



The Littler Report

Labor and employment issues facing the healthcare industry

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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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.

This publication is 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 and Hour Concerns for Healthcare Employers

Healthcare industry employers face a wide range of wage and hour compliance challenges that continually evolve based on litigation, federal, state and local laws, regulations, public relations, and healthcare demands. This section highlights the most significant issues facing healthcare industry employers with respect to wage and hour compliance and presents several approaches that employers may consider pursuing to potentially reduce their risk of litigation and liability.

A. Factors Employers Should Consider for Overtime Exemption Purposes

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 historically have been “narrowly construed against the employers seeking to assert them.”³ The U.S. Supreme Court partially rejected this longstanding principle in a 5-4 ruling in April 2018.⁴ Employers should not lower their guard with exemptions, however, as the practical effect of this ruling remains to be seen, and many courts continue to view the use of questionable exemptions with a jaundiced eye. Accordingly, employees in the healthcare industry who traditionally may be considered exempt from overtime, such as registered nurses and pharmacists, should 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.⁵

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 should not automatically assume that employees will qualify 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,⁶ certified registered nurse anesthetists,⁷ nurse practitioners,⁸ certain

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 *Encino Motorcars, L.L.C. v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

5 99 C.F.R. § 541.2.

6 29 C.F.R. § 541.301(e)(2) (addressing registered nurses); see *Fazekas v. 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).

7 U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter, 1999 DOLWH LEXIS 127, at *4 (Dec. 29, 1999).

8 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 DOL 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.

pharmacists,⁹ and certain physician assistants,¹⁰ but specifically excludes licensed practical nurses and employees with similar duties.¹¹

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; and (3) that must be acquired customarily by a prolonged course of specialized intellectual instruction.¹² Having the requisite degree or license alone is often not enough to satisfy this exemption.¹³ The employee's primary duty must involve work that requires his or her advanced knowledge.¹⁴ For example, nurses who frequently perform nontraditional nursing duties, such as case-management functions, have challenged their exempt classification.¹⁵ Healthcare employers should consider reviewing whether possibly exempt employees primarily engage in duties related to their professional 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.¹⁶ The administrative exemption applies to employees whose primary duties are: (1) the performance of office or nonmanual 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.¹⁷

Even if the above exemptions seem applicable to all employees with certain job titles, employers should not 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.¹⁸ 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.

9 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).

10 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).

11 29 C.F.R. § 541.301(e)(2).

12 29 C.F.R. § 541.301(a)(1)-(3).

13 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).

14 *Rieve*, 870 F. Supp. 2d at 862-63.

15 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).

16 29 C.F.R. § 541.100.

17 29 C.F.R. § 541.200.

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

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.¹⁹ Generally, under the FLSA, an exempt employee must currently 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,²⁰ 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.²¹ 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.²² (See section I. (B) below for discussion of proposed changes to the white collar exemptions under the FLSA.)

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 issue often arises in the healthcare industry where employees are frequently incentivized to take less desirable shifts through 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, employers should strive to review their pay practices and compensation policies for clarity—not only legality. 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 potentially 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.

3. Classifying Healthcare Workers as Independent Contractors

Many home care companies – such as caregiver registries – can take comfort in the DOL's decision to withdraw an Obama-era administrative interpretation that had made it extraordinarily difficult to satisfy the independent contractor test under the FLSA. Returning to its former approach, the DOL issued a new field assistance bulletin stating that it will consider the "totality of the circumstances to evaluate whether an employment relationship exists" and "will evaluate all factors . . . to reach appropriate conclusions in each case."²³ The criteria the DOL will consider in the caregiver registry industry indicate a return to the focus on historically important factors, including control of the work performed by the independent contractor. Nevertheless, caregiver registries and other healthcare companies utilizing independent contractors should remain vigilant by implementing practices that militate against employment status. Such companies, for example, should be wary of monitoring the care that caregivers provide, training them or providing them with the tools to do their job.

B. Proposed Changes to the White Collar Exemption

On March 22, 2019, the DOL issued a proposed rule that would change the "white collar" exemption under the FLSA, which applies to executive, administrative and professional employees.²⁴ The 60-day comment period

19 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).

20 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).

21 29 C.F.R. § 541.605.

22 *Id.*

23 U.S. Dep't of Labor, Wage & Hour Div., Filed Assistance Bulletin No. 2018-4, Determining Whether Nurse or Caregiver Registries are Employers of the Caregivers (July 13, 2018), available at https://www.dol.gov/whd/FieldBulletins/fab2018_4.htm.

24 Proposed Rule Defining and Delimiting the Exemptions for Executive, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 10, 900 (Mar. 22, 2019).

ended May 21, 2019. 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 last attempted to modify these exemptions in 2016 under the Obama administration, but the final rule was enjoined by the Eastern District of Texas just weeks before its December 1, 2016 effective date. If adopted, the proposed rule would replace the final rule issued by the DOL in 2016, which would have increased the salary requirement to \$921 per week or \$47,892 annually. Under the new proposed rule, there are no changes to the job duties test. Further, there are no changes to exemptions for certain workers, including nurses and paramedics.

The proposed rule would increase the \$455 minimum salary requirement to \$679 per week or \$35,308. The DOL's new proposal would allow employers to satisfy up to 10% of the \$35,308 minimum salary requirement by the payment of nondiscretionary bonuses and incentives payments (including commissions), which could be paid annually or more frequently. Additionally, the proposed rule also seeks to raise the compensation requirement for the highly compensated employee exemption to \$147,414 annually. Unlike the 2016 final rule, the DOL's new proposal does not include automatic increases to the minimum salary level or the highly compensated test. Instead, every four years, the DOL plans to publish a notice of proposed rule-making setting forth the minimum salary levels, which would be followed by a public comment period.

In anticipation of the final rule, employers may wish to evaluate the cost of estimated overtime for formerly exempt employees versus increasing the weekly earnings for such employees so that they still qualify. Employers should consult with an attorney if they prefer for any such review to be protected from disclosure, to the extent possible, by the attorney-client privilege.²⁵ The review can 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 could consider modifying the job duties of borderline positions to bolster the exemption requirements.

C. Litigation and Investigations Targeting Home Healthcare

Since the Home Care Rule went into effect in 2015, thereby extending minimum wage and overtime requirements to the vast majority of home care workers, home healthcare employers have been inundated by lawsuits and government investigations. While employers might think such scrutiny has subsided, nothing could be farther from the truth. Private lawsuit filings continue unabated, and wage and hour lawsuits filed by the DOL's Wage and Hour Division have skyrocketed over the past year.²⁶ In this context, home healthcare employers should take note of certain pay-related practices that have been repeatedly targeted in lawsuits and investigations in the home care space.

1. Live-In and 24-Hour Shifts

Compensation of caregivers working live-in shifts and/or extended shifts has become a lightning rod for litigation, government investigations, and state and local activity. While legal treatment of true "live-in" shifts differs from treatment of 24-hour shifts, the dividing line for both shifts occurs at the 24-hour mark.²⁷ For shifts lasting less than 24 hours, all time spent on duty must be paid even if the caregiver sleeps or engages in personal activities.²⁸ For shifts lasting 24 hours or more, employers and caregivers may agree in advance to exclude from

25 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, at **2-3 (D. Del. Oct. 15, 2014).

26 For instance, only two wage and hour lawsuits were filed by the DOL against home care companies for the first two years after the Home Care Rule started being enforced by the DOL, i.e., from November 2015 through the end of 2017. From March 2018 through March 2019, 19 such lawsuits were filed, ranging across nine states. See, e.g., *Acosta v. Blessed Health and Home Care, L.L.C.*, No. 4:19-cv-00238 (W.D. Mo. Mar. 27, 2019).

27 A "live-in" shift occurs when a caregiver: (1) permanently resides on the premises; (2) lives, works and sleeps on the premises five days per week and 120 hours or more; or (3) spends five consecutive days or nights residing on the premises. See 29 C.F.R. § 785.23; U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet No. 79B, Live-in Domestic Service Workers Under the Fair Labor Standards Act (FLSA) (2013).

28 29 C.F.R. § 785.21.

hours worked meal periods and bona fide sleep periods of not more than eight hours, provided adequate sleeping facilities are furnished and caregivers may usually enjoy an uninterrupted night's sleep.²⁹

However, without an express or implied agreement to this effect, the meal periods and sleep time constitute hours worked.³⁰ With so many hours at stake (at least eight hours per day), employers should pay particular attention to policies and compensation for caregivers who perform live-in and 24-hour shifts. Having a defensible agreement excluding sleep time and meal periods as noncompensable is critical.³¹ While the regulations allow an "implied" agreement, the reasonable agreement typically should be in writing to avoid misunderstandings and or claimed misunderstandings. The agreement may specify the anticipated schedule, e.g., 13 working hours, three hours of sleep time, and three hours of meal periods, which should reflect the reality of hours worked by the caregiver as much as possible.

Even after employers have a reasonable agreement in place, certain compliance challenges often arise with live-in and 24-hour shifts. For instance, federal regulations on live-in shifts specifically impose a recordkeeping obligation; employers cannot rely upon the reasonable agreement as a substitute for a record of hours worked.³² As such, employers should carefully evaluate their timekeeping and recordkeeping procedures with respect to live-in and 24-hour shifts. In addition, the need for caregivers to receive compensation for interruptions to sleep and meal periods makes live-in and 24-hour shifts especially vulnerable to off-the-clock work claims. The nature of home care work—taking place in a client's home and not in an office or traditional clinical setting—requires that employers depend on caregivers to accurately report their hours of work. If caregivers claim their sleep or meal periods were interrupted and they did not receive compensation, employers need strong policies and documentation to defend against such claims.³³

Moreover, employers should familiarize themselves with the laws relevant to live-in and 24-hour shifts of the states and localities in which they operate. Some states and localities have taken actions that dramatically affect the viability and risks associated with live-in and 24-hour shifts (e.g., excluding sleep time as noncompensable is problematic in California,³⁴ and was litigated hotly in New York until March 26, 2019³⁵), while other states impose lesser restrictions that require additional administrative steps (e.g., live-in workers in Massachusetts have special protections upon termination that can involve severance pay or housing³⁶). With state and local laws subject to change, and case authority constantly evolving, home healthcare employers should consult with legal counsel on treatment of live-in and 24-hour shifts as a prime source of potential liability.

2. Travel Time

Compensation of travel time remains a common source of liability for home healthcare employers. Caregivers who do not qualify for an FLSA exemption (see discussion in section I. (A) above) must be paid for all hours

29 See 29 C.F.R. §§ 785.22, 785.23. Interruptions to sleep must be counted as hours worked, and if the caregiver cannot get at least five hours of sleep during the scheduled period, the full period must be counted as hours worked. *Id.*

30 *Id.*

31 See, e.g., *Bouchard v. Regional Governing Bd. of Region V Mental Retardation Servs.*, 939 F.2d 1323 (8th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) (employer prevailed against residential workers' general testimony about sleep time interruptions because of a reasonable agreement between the employer and the workers consistent with 29 C.F.R. § 785.22 and a requirement that the workers record all working time, although they chose not to do so).

32 See 29 C.F.R. § 552.110(b); Application of the Fair Labor Standards Act to Domestic Workers, 78 Fed. Reg. 60,454, 60, 474-75 (Oct. 1, 2013).

33 See, e.g., *Bouchard v. Regional Governing Bd. of Region V Mental Retardation Servs.*, 939 F.2d 1323 (8th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) (employer prevailed against residential workers' general testimony about sleep time interruptions due to a reasonable agreement consistent with 29 C.F.R. § 785.22 and a requirement that employees record all working time, although they chose not to do so).

34 See Michael Warren & Benjamin Emmert, *No Lullaby for Employers: California Supreme Court Finds Sleep Periods Considered 'Hours Worked'*, LITTLER INSIGHT (Jan. 13, 2015), available at <https://www.littler.com/no-lullaby-employers-california-supreme-court-finds-sleep-periods-considered-hours-worked>.

35 See Lisa M. Griffith, Ira Wincott, & Angelo Spinola, *NY Court of Appeals Decision Saves the NY Home Care Industry – What's Next for Home Care Providers?*, LITTLER INSIGHT (Mar. 27, 2019), available at <https://www.littler.com/publication-press/publication/ny-court-appeals-decision-saves-ny-home-care-industry-whats-next-home>; Ira Wincott, Lisa M. Griffith, & Daniel Gomez-Sanchez, *Certainty is (Even Closer) on the Horizon for the New York Home Care Industry*, LITTLER ASAP (Feb. 13, 2019), available at <https://www.littler.com/publication-press/publication/certainty-even-closer-horizon-new-york-home-care-industry>.

36 See MASS. GEN. LAWS ch. 149, § 190(k).

worked, *i.e.*, time spent on activities predominantly for the company's benefit.³⁷ As a general rule, home healthcare companies must pay caregivers for all time spent traveling within the day as part of their normal duties, aside from the typical commute between home and the first and last work site of the day. In other words, a caregiver typically must be paid for travel within a day from one client to another client or from a client's home to the office. A commonly targeted practice with the treatment of travel time is substituting mileage reimbursement for tracking and paying for actual compensable travel time.³⁸ Payment for travel time is separate from reimbursement for mileage. Reimbursement for mileage may be required in certain states but is not required under federal law unless the failure to reimburse mileage would cause the caregiver to fall under the minimum wage. As a variation on the general rule for travel time, a common argument by caregivers in litigation relates to the application of the continuous workday rule to travel time. This theory is that a nonexempt caregiver's performance of work at home immediately before traveling to the client's home makes the home-to-work travel time compensable as part of the "continuous workday."³⁹ The type of work the caregiver alleges to perform from home is typically scheduling visits or otherwise preparing for the workday. Similarly, these caregivers argue that any work performed at home immediately after the work-to-home commute, such as completion or releasing of care logs, also converts that end of day travel into compensable time. To help defend against these claims, perhaps consider having a remote work policy and a travel policy that expressly reference when work is to be completed to make expectations clear.⁴⁰

Travel time becomes more complicated for home healthcare employers when caregivers have "split shifts," a significant break between two visits that take place within the same workday. The DOL has advised for such situations that, if the worker is relieved from duty for a period sufficient to engage in purely personal pursuits, only the time that would have been necessary to travel directly from the first job site to the second job site is considered compensable work time.⁴¹ There is no bright-line rule for how long the personal time—*i.e.*, the total interval minus the estimated travel time—should last to enable employees to use the time for personal pursuits. Cases suggest that personal time less than 30 minutes is insufficient, and personal time of an hour or more likely is sufficient.⁴² Moreover, employers should try to give employees an opportunity to correct the travel time estimated for getting from the first client to the second client, to account for longer travel times due to traffic or weather, etc. As travel time for split shifts are a frequent source of confusion for caregivers, home healthcare employers should consider having a travel time policy that squarely addresses the issue.

37 See 29 C.F.R. §§ 785.7, 785.9; see generally 29 C.F.R. § 785.33–785.41.

38 There is no general rule under federal law requiring employers to reimburse employees for business-related expenses, such as the cost of mileage. Under the FLSA, reimbursement for expenses generally is a matter of private agreement between the employer and the employee, so long as at least the full minimum wage is paid in full and clear of any expenses. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1998 DOLWH LEXIS 78 (Sept. 10, 1998). When employees are paid at or near the minimum wage, there is a risk that not paying separately for mileage may cause employee pay to drop below minimum wage when mileage costs are considered, which the DOL has found violates the FLSA. See 29 C.F.R. § 531.35; U.S. Dep't of Labor, Opinion Letter No. FLSA2001-7 (Feb. 16, 2001); U.S. Dep't of Labor, Field Operations Handbook (FOH), § 30c15 (June 30, 2000).

39 While home-to-work or work-to-home travel is ordinarily not compensable (29 C.F.R. § 785.35), work performed at home can start or end the workday if that work is part of the employee's "principal activity," even if completed before or after the employee's normal shift. See 29 C.F.R. § 790.6(a); *IBP v. Alvarez*, 546 U.S. 21, 37 (2005); see also *Lacy v. Reddy Elec. Co.*, 2013 U.S. Dist. LEXIS 97718, at *19 (S.D. Ohio July 11, 2013).

40 See *Chambers v. Sears Roebuck & Co.*, 2011 U.S. App. LEXIS 12150 (5th Cir. June 15, 2011) (instructions and policies in technician program manual supported the employer's defense that normal commute time was not compensable); *Kuebel v. Black & Decker Inc.*, 643 F.3d 352 (2d Cir. 2011) (voluntary completion of administrative tasks from home at the beginning and end of the workday did not make commute time compensable, in part due to the employee's flexibility in deciding when to complete these tasks); *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1060 (9th Cir. 2010) (technician's evening commute in company-owned vehicle was not rendered compensable merely because he uploaded data to his employer after returning home when he could upload the data anytime between 7:00 P.M. and 7:00 A.M.).

41 See U.S. Dep't of Labor, Wage & Hour Div., Domestic Service Final Rule Frequently Asked Questions (FAQ), available at <http://www.dol.gov/whd/homecare/faq.htm>.

42 See, e.g., *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1117-18 (10th Cir. 1999) (holding split-shift periods in excess of one hour were not hours worked under the FLSA where drivers were "free to do anything they chose except drink alcohol"); *Hiner v. Penn-Harris-Madison Sch. Corp.*, 256 F. Supp. 2d 854, 864 (N.D. Ind. 2003) (finding that down-time exceeding 20 minutes is not working time where the employee is not required to perform services for the employer and is free to use such time for personal pursuits).

3. Orientation and Training Time

Some home healthcare companies treat orientation periods for new caregivers as noncompensable or defer compensation until the caregiver accepts a billable assignment based on the position that this is a “pre-hire” period. The business concern stems from the unfortunately common occurrence of caregivers undergoing orientation or training but leaving before they perform any billable work. While this concern is understandable, the law is quite clear that orientation and training time is generally compensable when it involves instructing the caregiver about the company’s policies and procedures, shadowing other caregivers, or performing any work.⁴³ The FLSA has very narrow parameters for legitimate unpaid orientation periods, and they more closely resemble vocational programs that benefit the caregiver population at large than traditional, company-specific orientation.⁴⁴ Some states also have very specific laws about what type of programs can be treated as noncompensable, so employers may wish to seek guidance before treating any orientation or training time as noncompensable. If home healthcare employers wish to adjust the pay rate for lesser productivity, they might consider paying caregivers for orientation and training time at minimum wage, or hold orientation until a billable client engagement is available for the new employee.

D. Pay-Per-Visit Compensation Under the FLSA

A recurring target of litigation against healthcare providers is the practice of paying health clinicians on a “per-visit” basis, in which a flat fee is paid for work related to a particular visit.⁴⁵ 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.”⁴⁶ 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.”⁴⁷ Whether the compensation is paid for a “unique” job in the home healthcare industry has been the subject of litigation.⁴⁸

If healthcare employers wish to compensate employees on a fee basis, they should make such compensation independent of the time required for the task’s completion.⁴⁹ Combining per-visit and hourly compensation or varying visit fees based on the time required for certain tasks puts employees’ exempt status at risk.⁵⁰ One court even found that paying employees on an hourly basis for vacation time and sick time, though not for actual work performed, raised concerns about the professional exemption for registered nurses.⁵¹ Similarly, per-visit compensation that takes duration into account, even if not entirely based on duration, increases an employer’s risk of litigation.⁵² If done properly, paying employees per-visit can qualify as “fee” compensation for purposes of claiming an exemption to the FLSA’s overtime requirements (see section I. (A)(2) above). However, if the per-visit payments do not adhere to the “fee” compensation requirements—meaning the employer generally cannot utilize an overtime exemption—this model often falls prey to off-the-clock work claims. As a preventative measure, healthcare employers that pay employees per-visit should carefully review their policies and procedures,

43 On January 5, 2018, the DOL published a new version of Fact Sheet No. 71, applying a nonexhaustive seven-factor “primary beneficiary” test for determining whether training time is compensable. The seven-factor test displaces the six criteria specified in the older, 2010 version of Fact Sheet No. 71.

44 See *Nance v. May Trucking Co.*, 685 F. App’x 602, 604-05 (9th Cir. 2017) (affirming orientation attendees were not employees, and thus not entitled to payment for attending orientation, where the orientation’s purpose was to ascertain truck drivers’ training and abilities and not all participants were hired upon completion).

45 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).

46 29 C.F.R. § 541.605(a).

47 *Id.*

48 See, e.g., *Fazekas v. Cleveland Found. 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.

49 *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 838 (6th Cir. 2002).

50 *See id.*

51 See *Dillon v. Jackson Home Care Services, L.L.C.*, 2017 WL 3446293 (W.D. Tenn. Aug. 10, 2017) (granting the plaintiffs’ motion for conditional certification of their collective action alleging their employer’s failure to pay overtime wages by paying RNs on a per-visit basis).

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

particularly those relating to pay-per-visit compensation, time recording, off-the-clock work, and remote work. A clear and full description of work activities covered by the visit fee can be helpful.⁵³

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.⁵⁴ Potential benefits of salary-plus compensation include more cost predictability (with no availability of overtime provided the other FLSA exemption requirements are met) and increased protection against off-the-clock work claims. While implementing a new compensation system imposes costs on the front end, a salary-plus system may prove less burdensome going forward given the litigation risks associated with pay-per-visit systems and overtime calculation and tracking.⁵⁵

A case in Massachusetts addressing a salary-plus system is instructive on such a system’s potential benefits. In *Guardia v. Clinical & Support Options, Inc.*,⁵⁶ 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.”⁵⁷ 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.”⁵⁸

Another alternative to treating healthcare employees paid per visit as FLSA-exempt is simply to treat employees as nonexempt, *i.e.*, paid hourly or per-visit but entitled to overtime. Employers still must guard against litigation involving off-the-clock work, overtime calculation,⁵⁹ compliance with minimum wage laws and state-mandated breaks, etc., but such a system can be easy to implement administratively and would have more established treatment by the law.

Lastly, another tool for healthcare industry employers to help minimize risk of exemption-related litigation is an arbitration agreement with a class waiver. As discussed further below in section I. (I), the principal advantage of 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 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 strategies described above has detailed requirements that are beyond the scope of this summary. Before assessing an existing system or implementing a new system, employers should consult with legal counsel.

53 See, e.g., *Sarantopoulos v. Shepard Home Health Care, Inc.*, 2017 WL 3124059 (Cal. Ct. App. 2017) (compensation for travel time, unpaid breaks, administrative time, and overtime found to not be included in the piece rate amount).

54 See 29 C.F.R. § 541.604.

55 One potential “con” of a salary-plus system arises from its newness as a pay practice. See, e.g., *Rindfleisch v. Gentiva Health Servs., Inc.*, 1:10-cv-03288-SCJ (N.D. Ga. Feb. 23, 2016) (granting summary judgment to company as to three plaintiffs’ claims when company paid them guaranteed base salaries and they received additional compensation based on the number of visits conducted); *Guardia v. Clinical & Support Options, Inc.*, 2014 U.S. Dist. LEXIS 79219 (D. Mass. June 3, 2014).

56 25 F. Supp. 3d 152 (D. Mass. 2014).

57 *Id.* at 159-60 (agreeing with the employer’s characterization).

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

59 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 nonexempt 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 § 3.

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, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia. Most recently, in February and March 2019, respectively, the Michigan and Ohio legislatures each introduced a bill that would prohibit hospitals from requiring registered nurses and licensed practical nurses to work overtime as a condition of continued employment. 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 providers.

Generally, 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.⁶⁰ 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 eight consecutive hours off duty. Similarly, Illinois prohibits any nurse from working more than 16 hours and requires eight consecutive hours off duty following any 12-hour shift.⁶¹ Maine has legislation prohibiting employers from disciplining nurses who refuse to work more than 12 hours, unless there is an emergency affecting patient care.⁶² 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.⁶³ New Jersey caps the number of hours for a nurse to 40 hours in a workweek.⁶⁴

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 Michigan Nurses Association has a webpage detailing its 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.

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 somewhat unclear. Statutory violations can also lead to investigations by the state's Department of Labor, though state agencies can be slow in working through the complaints. For example, an April 2018 audit revealed that from January 2015 through June 2017, the New York State Department of Labor closed just 186 investigations out of 540 complaints regarding

60 MASS. GEN. LAWS, ch. 111, § 226.

61 210 ILL. COMP. STAT. 85/10.9; 250 ILL. ADM. CODE pt. 1110.

62 ME. REV. STAT. ANN. tit. 26, § 603.

63 OR. REV. STAT. § 441.166.

64 N.J. STAT. ANN. § 34:11-56a33.

potential overtime violations.⁶⁵ The audit report recommended, in part, that the New York agency establish policies and procedures to ensure nurse overtime complaints are investigated timely, develop and maintain a list of all employers covered by the law, and explore feasible actions to strengthen enforcement options.

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 or lawsuits filed by state Attorneys General. However, as demonstrated by the 2018 New York audit, this status may change in the future. Accordingly, any hospital requiring its nurses to work overtime due to emergency circumstances should take steps to comply with respective state law by filing any required reports with the appropriate state regularly agency/department defending the decision. Hospitals might also consider providing 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.

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.⁶⁶ "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, 10 minutes, or quarter hour. For example, if a nonexempt 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 DOL'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.⁶⁷ Despite these regulations, plaintiffs' attorneys are testing rounding practices.⁶⁸

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.⁶⁹

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.⁷⁰ 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 similarly should consider the appropriateness

⁶⁵ See <https://osc.state.ny.us/audits/allaudits/093018/sga-2018-17s14.pdf>.

⁶⁶ 29 C.F.R. § 785.48(b); see also U.S. DOL, Opinion Letter No. FLSA2008-7NA (May 15, 2008) (payment of wages based on recording or computing time to the nearest five minutes, or the nearest one quarter or one tenth of an hour is acceptable and that insubstantial or insignificant amounts of time that cannot practically be precisely recorded may be disregarded, but that an employer may not fail to pay an employee for any part of the employee's fixed or regular working time).

⁶⁷ See 29 C.F.R. § 785.48.

⁶⁸ See, e.g., *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003) (rounding to the nearest quarter of an hour failed to properly compensate employees for all time worked). Especially when a company uses electronic time systems, courts have shown skepticism about rounding when to-the-minute payment is readily accessible. See, e.g., *Eddings v. Health Net, Inc.*, 2012 U.S. Dist. LEXIS 51158 (C.D. Cal. Mar. 23, 2012) (where time is kept to the minute through an electronic timekeeping system, there is no justification for rounding, as there are no "free minutes" of labor in the day).

⁶⁹ See *Austin v. Amazon.com, Inc.*, 2010 WL 1875811, at *3 (W.D. Wash. May 10, 2010) (rounding practice neutral on face, but unequal in practice because employees were disciplined for arriving late).

⁷⁰ 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.

of implementing a contemporaneous timekeeping system for their workforces. Although such a system poses challenges for home healthcare services, online system access makes such systems feasible regardless of the location. Contemporaneous timekeeping systems can reduce an employer's risk of litigation by employees claiming they were not paid for time actually worked. In addition, employers also should consider arbitration agreements with class action waivers, discussed further below, 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 nonexempt 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 has been disputed in class litigation under federal and state law. Indeed, because many healthcare employers use the same auto-deduct mechanism for large numbers of nonexempt employees, they have been targeted in system-wide auto-deduct "pattern and practice" claims involving large "classes" of allegedly underpaid employees. Moreover, these claims are often not susceptible to summary judgment because courts find that 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 potentially large settlements.

Notably, 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*,⁷¹ 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 a supervisor if he/she 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."⁷² This case was later settled for an undisclosed amount. Similarly, in *Magpayo v. Advocate Health and Hospitals Corp.*, the court denied summary judgment, opining that the defendant could "not hide behind a policy of having employees keep their own time to avoid compensating employees for all overtime hours worked, including unrecorded hours."⁷³ In yet another case, *Potoski v. Wyoming Valley Health Care System*, the court denied summary judgment in a collective action where the defendant claimed the failure to pay overtime was not a willful violation of the FLSA. In doing so, the court relied on some plaintiffs' testimony that they reported their concerns about missing meal breaks to their supervisors and management, and other plaintiffs' testimony that their supervisors saw them eating while watching patients' monitors or eating at the nurses' station while charting and they felt discouraged by supervisors for reporting missed or interrupted meal periods.⁷⁴

71 2013 WL 1668998, at *6 (E.D. Ark. Apr. 17, 2013).

72 *Id.*

73 2018 WL 950093 (N.D. Ill. Feb. 20, 2018).

74 2019 WL 1227196 (M.D. Pa. Mar. 15, 2019).

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*,⁷⁵ 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.*,⁷⁶ 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. After two years of litigation in this collective action, the case settled for \$3.5 million dollars, \$1,166,666.66 of which was allocated toward attorneys' fees.⁷⁷

For these reasons, employers are exploring whether to eliminate or modify auto-deduct meal break practices to better insulate themselves from litigation. One way to attempt to minimize exposure is to utilize an "Attestation Model," which requires each employee to affirmatively certify that he/she 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 he/she took a meal break, the employer may be in a better position to defend any future meal deduction claim by that employee. Employers might 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 demonstrate their intention of enforcing the "Attestation Model" in good faith.

H. State-Specific Wage and 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 nonexempt employees.⁷⁸ California laws give broader protections to employees in a number of areas,⁷⁹ and other state laws vary significantly from federal law as well.⁸⁰ State-specific statutes and case law can change the landscape of employers' wage and hour compliance.

75 658 F. Supp. 2d 802, 812-13 (N.D. Tex. 2009).

76 2013 WL 3287600, at *1 (W.D. Wis. Apr. 4, 2013).

77 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.

78 CAL. LAB. CODE § 510; California Dept. of Indus. Relations, IWC Order 4-2001 sec. 3

79 See, e.g., CAL. LAB. CODE § 1194 (overtime), §§ 202-203 (final pay and waiting time penalties), § 226(a) (pay stub requirements).

80 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 nonwillful 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. LAW § 198).

The three states with the most lawsuits filed against healthcare companies from 2010 to 2014 are California, New York, and Florida.⁸¹ Healthcare industry employers with employees working in these states should pay special attention to state law and how it diverges from the FLSA.

A 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 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.⁸² Instead, the New York state court found that sleep and meal periods must not be excluded from the hourly wages of certain home care attendants, and certified a class action of over 1,000 home care attendants who worked 24-hour shifts.⁸³ In 2019, the New York Court of Appeals reversed the state court's ruling, again allowing providers to continue to pay home care attendants 13 hours of a 24-hour shift as long as the attendant does not experience interruptions during the nonwork hours and certain other requirements are met.⁸⁴ Nonetheless, this clear departure from federal case law underscores the importance of monitoring state court cases.

Similarly, in *Mendiola v. CPS Security Solutions, Inc.*,⁸⁵ the California Supreme Court 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.⁸⁶ 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.'"⁸⁷ 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.

1. Domestic Workers Bill of Rights

Domestic workers are estimated to make up approximately two million workers in the United States. In July 2018, Seattle became the first city to pass an ordinance extending various protections (minimum wage, rest breaks) to domestic workers.⁸⁸ In doing so, Seattle joined eight states in passing legislation to guarantee certain rights and protections to domestic workers. In 2010, New York became the first state to pass a domestic workers' bill of rights, requiring overtime pay and a day of rest per week or overtime pay on the day of rest, expanding the protections of the New York Human Rights Law, and creating a special cause of action for domestic workers who experience sexual or racial harassment.⁸⁹

Subsequently, California, Connecticut, Hawaii, Illinois, Massachusetts, Nevada, and Oregon followed, enacting legislation similar to New York with respect to overtime pay, and except for California and Nevada, with respect to discrimination and harassment protections. The laws vary somewhat with regards to who is covered as a

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

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

83 *Andryeyeva v. New York Health Care, Inc.*, 45 Misc. 3d 820 (Sup. Ct. Kings Cnty. Sept. 16, 2014) (Demarest, J.), *rev'd*, 2019 NY Slip Op 02258 (Mar. 26, 2019).

84 2019 NY Slip Op 02258 (Mar. 26, 2019).

85 60 Cal. 4th 833, 843 (Cal. 2015).

86 *Id.*

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

88 SEATTLE, WASH., CODE §§ 14.19, 14.23 (2018).

89 N.Y. EXEC. LAW § 296-b; N.Y. LAB. LAW §§ 161, 170.

“domestic worker” (e.g., Oregon’s law excludes home care workers who provide services to senior and persons with disabilities and independent contractors). In addition, some states impose higher requirements than others do. For example, in Massachusetts, domestic workers can request written evaluations after three months of employment and employers are required to keep a record of wages and hours for two years. Importantly, domestic workers in Massachusetts also have an affirmative right to privacy, prohibiting employers from monitoring, restricting or interfering with their private communications.⁹⁰

As the number of domestic workers grows, the trend to extend employment rights to domestic workers will likely continue at both the state and federal level. In 2018, the California legislature passed a bill to establish the Domestic Work Enforcement Pilot Program to increase awareness and enforcement of existing laws, but the bill did not become law because of a governor veto.⁹¹ On the federal level, there has been talk of a bill being introduced in Congress in 2019, but as of the date of this publication, nothing has yet come to fruition. The federal bill is expected to include: overtime pay requirements; protections of the Occupational Safety and Health Administration; the right to unionize; recourse against harassment and discrimination (from clients and employers); meal and rest breaks; paid sick days; advanced notice of scheduling; written agreements; and privacy and other protections for live-in workers. The federal bill may also create a retirement-savings plan funded by employees, offer workers affordable health insurance, and create training and development programs. Finally, the bill may seek to establish a new Interagency Task Force on Protecting Domestic Workers’ Workplace Rights to police the industry and ensure employers are complying with the rules (with the task force involving the Department of Labor, Equal Employment Opportunity Commission, and Department of Health and Human Services).⁹²

2. Predictive and Fair Scheduling Laws

Healthcare industry employers—like other employers—should pay close attention to efforts by state and local governments to enact predictive scheduling rules, which generally place a requirement on employers to provide advanced notice to employees of their work schedules. The employer must then pay a premium in addition to the employee’s wages to the extent the employee’s schedule changes for any reason. Some of these laws require the work schedule to be provided several weeks in advance. These laws initially targeted only certain industries, such as retail and fast food. However, recent proposals are much broader and would apply to the home care industry if passed as drafted. For example, the New York State Department of Labor proposed a new set of regulations in 2018 that would have required employers in general to pay at least four hours of “call-in pay” to a covered employee who reports to work by request or permission of the employer, two additional hours of call-in pay to an employee who reports to work for a shift scheduled with less than 2-weeks’ notice, two hours of call-in pay to an employee whose shift is canceled within 14 days in advance of the scheduled start of the shift, and four hours of call-in pay when the shift is canceled within 72 hours in advance of the scheduled start of the shift (among other requirements).⁹³

In the home care industry, where caregivers frequently call out from work, employers and providers may be forced to pay this premium every time a replacement caregiver elected to cover one of these shifts. Likewise, client schedules are dynamic and change from day to day in the home care industry depending on the needs of the client. Many seniors need services immediately upon discharge from the hospital or as a result of a change in condition. It is not realistic to expect these seniors to wait 14 days to receive care to avoid payment of these

⁹⁰ MASS. GEN. LAWS ch. 149, § 190; 940 MASS. CODE REGS. § 32.00 *et seq.*

⁹¹ Assem. Bill 2314, 2017-2018 Reg. Sess. (Cal. 2018)

⁹² National Domestic Workers Alliance, A National Bill of Rights for Domestic Workers, *available at* <https://www.domesticworkers.org/national-bill-rights-domestic-workers>.

⁹³ See <https://www.labor.ny.gov/workerprotection/laborstandards/pdfs/employee-scheduling-proposed-rule.pdf>.

penalties. Fortunately, the New York DOL withdrew these regulations in early 2019. However, it is possible they may re-emerge in some form, either in New York or elsewhere.

3. Wage Theft Notices

A number of states require employers to provide their employees with written notice of wage rates. For example, in New York, the Wage Theft Prevention Act (WTPA) requires that each new hire receive notice of: rate or rates of pay, including overtime rate of pay (if it applies); how the employee is paid: by the hour, shift, day, week, etc.; the regular payday; the official name of the employer and any other names used for business; the address and phone number of the employer's main office or principal location; and allowances taken as part of the minimum wage (tips, meal and lodging deduction).⁹⁴ Employers of New York employees must obtain signed acknowledgments from new employees that they have received wage notices in English and in the employee's primary language if the New York State Department of Labor offers a translation, and employers must retain copies of this acknowledgment for six years. Further, if any data in the notice changes, the employer must tell employees at least a week before it takes effect unless they issue a new paystub that carries the notice. The employer must also notify an employee in writing before they reduce the employee's wage rate. In addition, the WTPA mandates that employers furnish each employee with a statement with every payment of wages, listing required information, such as the rate or rates of pay and basis thereof, whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other arrangement, and any deductions. For employees paid by piece rate (e.g., pay per visit pay models), the earnings statement must also include the applicable piece rate or rates of pay and the number of pieces completed at such piece rate.

Other jurisdictions with similar wage notice obligations include: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas (upon employee request), Louisiana, Maryland, Minnesota, Montana (if written demand is made), New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Seattle, Washington.

California's Labor Code also contains wage notice requirements, which have resulted in a significant amount of actions over the years under the state Private Attorneys General Act (PAGA).⁹⁵ PAGA allows employees to bring actions against their employers on behalf of themselves and other current or former employees seeking civil penalties for violation of the Labor Code, in addition to any other remedies available under state or federal law. California employees are deemed to suffer an injury if an employer fails to provide a wage statement or provides an inaccurate or incomplete wage statement and the employee cannot "promptly and easily determine" the following from the wage statement alone: amount of gross or net wages paid to the employee during the pay period or other specified required information, deductions the employer made from the gross wages to determine the net wages paid to the employee during the pay period, employer's name and address; and/or employee's name and only the last 4 digits of the employee's Social Security number or an employee identification number.⁹⁶ Importantly, in order to state a claim for civil penalties under PAGA for violation of the California wage notice requirements, an employee does not have to establish that he/she suffered an injury or that the employer's omission was knowing or intentional.⁹⁷

4. Business and Travel Expenses

Currently, there are nine jurisdictions that require employers to reimburse employees for business-related expenses. The most recent state to impose such requirements, Illinois, amended its Wage Payment and Collection Act (IWPCA) to require employers to reimburse all reasonable "necessary expenditures or losses" that are "directly

⁹⁴ See, e.g., N.Y. LAB. LAW §§195(3).

⁹⁵ CAL. LAB. CODE § 226 (a).

⁹⁶ CAL. LAB. CODE §§ 226, 246; *Maldonado v. Epsilon Plastics, Inc.*, 2018 WL 2123889 (Cal. Ct. App. Apr. 4, 2018).

⁹⁷ See *Lopez v. Friant Assocs., L.L.C.*, 15 Cal. App. 5th 773 (2017).

related to services performed for the employer” and incurred primarily for the benefit of the employer.⁹⁸ For an employee to receive reimbursement, however, the employer must have: (1) “authorized or required” the expenditure; and (2) the employee must submit a reimbursement request “within 30 calendar days” of the date the expenditure was incurred, including the “appropriate supporting documentation” (*i.e.*, receipts). In lieu of a receipt, where the receipt was lost, stolen, or does not exist, an employee must submit a signed statement regarding the expense.

The Illinois expense reimbursement legislation tracks California’s reimbursement requirement almost identically.⁹⁹ Thus California court interpretations, given the closely analogous law, could prove instructive on how the Illinois law will be interpreted. California considers the following expenses to be reimbursable: transportation and travel, business meals, entertainment expenses, and such expenses related to the use of an employee’s personal cell phone or other similar device. Similarly, it is worth noting that Massachusetts has a regulation that requires payment to an employee for “all travel time” and reimbursement for “all transportation expenses” so long as the employee is “required or directed to travel from one place to another” between the beginning and end of the workday.¹⁰⁰ While this regulation does not require payment for time spent commuting to and from work, it generally requires an employer to pay for travel (both time and expenses) *between* appointments. Employers are not required to pay for travel time and expenses when there is a sufficiently long break between appointments (probably an hour or more, not including actual time spent in transit). However, legal risk increases when the employer does not pay for time spent on breaks that are short or nonexistent, especially in light of the state’s imposition of automatic treble damages. Notably, employers that do not adequately account for travel time risk liability on two fronts: once for the travel time that should have been paid at the regular hourly rate, and again if the additional time creates overtime exposure. The last several years have seen an uptick in claims asserted against Massachusetts employers based on this regulation, and home care companies should expect that trend to continue.

In addition to Illinois, California, and Massachusetts, the following jurisdictions also have some form of expense reimbursement legislation: the District of Columbia, Iowa, Montana, New Hampshire, North Dakota, and South Dakota.

5. California and Potentially Beyond

Recent California case law concerning reporting time pay, flat sum bonuses, and the FLSA’s *de minimis* doctrine may indicate forthcoming legal trends for other states.

For example, *Alvarado v. Dart Container Corp. of California*, while limited to California, addressed the question of how to calculate an employee’s overtime pay rate where the employee earned a flat sum bonus during the pay period. The California Supreme Court held that the flat sum bonus is “factored into an employee’s regular rate of pay by dividing the amount of the bonus by the total number of nonovertime hours actually worked during the relevant pay period and using 1.5, not 0.5,¹⁰¹ as the multiplier for determining the employee’s overtime pay rate.”¹⁰²

I. What Can 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

98 See 820 ILL. COMP. STAT. 115/9.5.

99 Illinois, however, allows an employer to establish a written expense reimbursement policy (or policies) specifying the allowable expenditure amounts in addition to other reimbursement requirements. So long as the employer maintains a “written expense reimbursement policy” that “establishes specifications or guidelines for necessary expenditures,” the employer is not liable for reimbursement of such expenditures that violate the policy or exceed the policy’s specified expenditure amount provided that the employer does not instate a policy for “no reimbursement or a *de minimis* reimbursement.”

100 454 MASS. CODE REGS. § 27.04(4)(d).

101 As permitted by the FLSA.

102 See *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (2018).

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. With that in mind, healthcare companies may wish to explore proactive steps to help limit their exposure, 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 to pay-per-visit compensation 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 nonexempt.
- Ensure there is a reliable system in place to track and verify all hours worked.
- Consider the continued appropriateness of rounding practices.
- Consider potential implementation of an "Attestation Model" for tracking meal breaks and capturing all time worked.
- Be aware of state wage hour and laws, including mandatory overtime statutes or regulations.

In addition, healthcare employers should consider implementing a mandatory or opt-out arbitration program. The U.S. Supreme Court ruled in May 2018 that mandatory arbitration agreements with class action waivers are lawful and enforceable.¹⁰³ Arbitration agreements can be utilized to limit or eliminate class actions, including costly wage and hour disputes. Under a carefully drafted arbitration agreement, many employment disputes would be decided by an arbitrator, not a court or jury, and on an individual basis instead of as a class action. Some state courts remain hostile to arbitration agreements and scrutinize them seeking to invalidate the agreements based on unconscionability and consideration issues. Other issues also may complicate arbitration rollout, such as union involvement or state claims that cannot be arbitrated. As such, and given how dramatically arbitration can reduce wage and hour risk exposure, healthcare employers might consider working with legal counsel to determine the most appropriate arbitration program for their business needs and states of operation.

II. Labor Relations

A. Union Access to Employees

1. Access to Hospitals and Healthcare Facilities

Unions have restricted access to the employees of 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."¹⁰⁴ 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.¹⁰⁵

However, the employer's right to deny union organizers access to its property is not absolute. In *Lechmere, Inc. v. NLRB*, 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

¹⁰³ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

¹⁰⁴ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

¹⁰⁵ 351 U.S. at 112-14.

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.¹⁰⁶

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*.¹⁰⁷ 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."¹⁰⁸ 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.¹⁰⁹ The court also noted that such union activity "could be particularly disturbing in a hospital setting."¹¹⁰

The Fourth Circuit in *NLRB v. Southern Maryland Hospital Center*¹¹¹ 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.¹¹²

In *Oakwood Hospital v. NLRB*,¹¹³ 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."¹¹⁴ The Sixth Circuit cited *Lechmere* in asserting there was "no room for doubt" under the National Labor Relations Act (NLRA) that a hospital could prohibit a union organizer from using the cafeteria for organizing activities.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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.¹¹⁸ In contrast, where the permitted solicitations occurred on a regular basis

106 502 U.S. 527, 536 (1992).

107 876 F.2d 661 (8th Cir. 1989).

108 *Id.* at 664.

109 *Id.*

110 *Id.*

111 916 F.2d 932 (4th Cir. 1990).

112 *Id.* at 937.

113 983 F.2d 698 (6th Cir. 1993).

114 *Id.* at 701.

115 *Id.* at 701-703.

116 *Oakwood Hosp.*, 983 F.2d at 702.

117 *Lucile Salter Packard Children's Hosp. at Stanford v. NLRB*, 97 F.3d 583, 586-87 (D.C. Cir. 1996), enforcing 318 NLRB 433 (1985).

118 *Id.*

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.¹¹⁹

Second, it is permissible to allow solicitations that relate to the employer's business functions and purposes without violating the nondiscrimination rule.¹²⁰ Blood drives, pharmaceutical and medical textbook displays, and fundraising sales are all integral parts of a hospital's necessary functions.¹²¹ 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.¹²² These solicitations were considered to be integrally related to the hospital's necessary business functions.¹²³

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.¹²⁴

In summary, employers typically 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 National Labor Relations Board (NLRB or "Board") order that the employer allow the union (nonemployees) access to the employer's premises.

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*.¹²⁵ 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 nonworking time, including for purposes of union organizing. Under the prior rule as set forth in *Register Guard*,¹²⁶ which was overruled by *Purple Communications*, an employer could limit the use of its internal, corporate email system by banning all nonbusiness 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 nonbusiness purposes—such as communications about union organizing, wages, and working conditions—during "non-working time."¹²⁷ 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."¹²⁸

119 *Id.* at 589.

120 *Id.* at 586-87.

121 *Id.* at 588.

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

123 *Id.* at 589.

124 *Id.* at 588-91.

125 361 NLRB No. 126 (Dec. 11, 2014).

126 351 NLRB 1110 (2007).

127 *Purple Commc'ns*, 361 NLRB No. 126, at 2.

128 *Id.* at 18.

In *Purple Communications*, the company's electronic communications policy stated that its systems and equipment "should be used for business purposes only."¹²⁹ 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."¹³⁰ 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 nonwork use less costly and disruptive than the nonwork use of the other property.¹³¹ 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.¹³² 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).¹³³ The Board also declined to characterize email systems as work or nonwork areas for purposes of such distribution.¹³⁴ 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 use 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."¹³⁵ The Board opined that it would be a "rare case where special circumstances justify a total ban on nonwork email use by employees."¹³⁶ 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."¹³⁷

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*.

Such was the outcome in an NLRB decision in which a three-member panel determined that a group of Pennsylvania hospitals maintained a nonsolicitation policy that violated Section 8(a)(1) of the NLRA.¹³⁸ Applying the principles in *Purple Communications*, the three-judge Board panel reversed an administrative law judge's (ALJ) finding that the hospitals' nonsolicitation 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 non-working time."¹³⁹

129 *Id.* at 9.

130 *Id.*

131 *Id.* at 37.

132 *Id.* at 31-33.

133 *Id.* at 54-55.

134 *Id.* at 55.

135 *Id.* at 4.

136 *Id.* at 61.

137 *Id.* at 63.

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

139 362 NLRB No. 191, slip op. at 3.

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.¹⁴⁰

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.”¹⁴¹ Therefore, the rule “reasonably tends to chill employees in the exercise of their Section 7 rights.”¹⁴²

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.¹⁴³

However, even after *Purple Communications*, employers have certain rights and protections. Employers are not required to open their corporate email system to unions or nonemployees for Section 7 activities—the decision only provides access to employees.¹⁴⁴ 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*.¹⁴⁵ 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.¹⁴⁶ For example, if the employer’s customary monitoring uncovers Section 7 activity, then there is no violation of the NLRA. 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 arguably would be unlawful. An employer can also continue to inform

140 *Id.*, slip op. at 2.

141 *Id.*, slip op. at 5.

142 *Id.*

143 *Id.*, slip op. at 4.

144 *Id.* slip op. at 64.

145 *Id.*

146 *Id.* slip op. at 67-68.

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.”¹⁴⁷

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.”¹⁴⁸ 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 “non-working time.”¹⁴⁹

Although not explicit in *Purple Communications*, unless changed as discussed below, the holding would likely extend to other electronic communications, such as text messages, internal/corporate social media, and messenger chats.

Looking forward, the NLRB issued a notice on August 1, 2018, inviting the filing of briefs on whether the Board should uphold, modify, or overrule *Purple Communications*.¹⁵⁰ Perhaps recognizing that technology in the workplace has expanded beyond email, the Board also welcomed briefing on what standard it should apply to other methods of employee communication. The briefing period closed on October 5, 2018, but as of the date of this publication, the Board has not yet reached a decision. Ahead of any decision, healthcare employers should consider: notifying employees of any monitoring of the employer email system; reviewing protocols to confirm that monitoring is focused on legitimate managerial reasons (e.g., ensuring productivity and work quality, preventing harassment, reducing employer liability); assuring that employees understand they do not have a right to privacy in messages sent through the employer’s email system; and reminding management to think twice about what is said in emails.

B. “Quickie” Elections

The “quickie election” rule makes unionizing easier and quicker. 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, 2015.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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

147 *Id.* slip op. at 68.

148 *Id.* slip op. at 64.

149 *Id.* slip op. at 67.

150 NLRB, News Release, Board Invited Briefs Regarding Employee Use of Employer Email (Aug. 1, 2018).

151 79 Fed. Reg. 74,307-74,490 (Dec. 15, 2014).

152 29 C.F.R. § 102.64.

153 29 C.F.R. § 102.66.

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.¹⁵⁴

Looking ahead, as with the *Purple Communications* decision, the NLRB has requested the public's input on the "quickie election" rules specifically asking whether the rule: should be kept as is; should be kept with modifications; or should be rescinded and, if so, what should take its place. The Board's comment period closed on February 12, 2019, but as of the date of this publication, it has not released a decision yet.

Bargaining unit appropriateness has long been an issue in healthcare settings. In its 2017 decision in *PCC Structurals*,¹⁵⁵ the Board reversed its seminal decision in *Specialty Healthcare*,¹⁵⁶ where the NLRB adopted a 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 *PCC Structurals*, the Board held that *Specialty Healthcare* was "fundamentally flawed" and that the "overwhelming community of interest" standard was "an unwarranted departure" from the traditional test. The *PCC Structurals* decision returned to the community of interest test where the NLRB weighs eight factors to determine whether a petitioned for bargaining unit is appropriate. Specifically, the Board will consider whether or not the employees:

- are organized into a separate department;
- have distinct skills and training;
- have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
- are functionally integrated with the employer's other employees;
- have frequent contact with other employees;
- interchange with other employees;
- have distinct terms and conditions of employment; and
- are separately supervised.

In light of the Board overturning *Specialty Healthcare*, employers face a substantially lesser burden when challenging the scope of a union's petitioned-for unit, and the risk of "micro-units" forming in the workforce may be reduced. Nonetheless, it remains to be seen how the Circuit Courts of Appeal will respond.

Related to this issue is the Board's long-standing Health Care Rule,¹⁵⁷ 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:¹⁵⁸ (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

154 29 C.F.R. § 102.66(d).

155 365 NLRB No. 160 (2017).

156 357 NLRB No. 83 (2011).

157 29 C.F.R. § 130.30.

158 *Acute care hospital* is defined as: either a short term care hospital in which the average length of patient stay is less than 30 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 30 days. Average length of stay shall be determined by reference to the most recent 12-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).

technical employees, skilled maintenance employees, business office clerical employees, and guards.¹⁵⁹ 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.”¹⁶⁰

Healthcare entities have often tried to challenge the appropriateness of a bargaining unit as running contrary to the Health Care Rule.¹⁶¹ 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 2018, approximately 1.1 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 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.¹⁶² Membership for most of the above healthcare industry categories remained constant from 2017.

As long as the current accelerated election procedure remains in place, employers must be especially well prepared in advance for any possibility of union organizing. There is little time after a union files a petition to prepare a union avoidance campaign under the existing 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 NLRA 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 can 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 would be excluded from organizing under Section 2(11) of the NLRA. 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 any organizing efforts. Early identification also allows the employer to begin training supervisors regarding their roles in responding to organizing campaigns.

159 29 C.F.R. § 130.30(a)(1)-(8).

160 29 C.F.R. § 130.30(b), (c).

161 See, e.g., *San Miguel Hosp. Corp. v. National Labor Relations Board*, 697 F.3d 1181 (D.C. Cir. 2012) (rejecting a New Mexico hospital’s contention that a “wall-to-wall” bargaining unit comprised of both professional and nonprofessional employees was an inappropriate unit for collective bargaining and in violation of the Health Care Rule); *Rush Univ. Med. Ctr. and Local 743 Int’l Bhd. 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.).

162 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.

In addition to identifying supervisors, employers might also consider analyzing potential bargaining units among the workforce. The employer may focus on the scope (*i.e.*, locations) and composition (*i.e.*, job classifications) of potential bargaining units.

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*¹⁶³ list.

Finally, employers can also prepare a campaign calendar to expedite decision-making if a petition is filed.

C. Calling off the NLRB Attacks on Work Rules and Policies Under Section 7 of the NLRA

In recent past, the NLRB scrutinized employer handbooks, policies and rules to restrict perceived employer infringements on employees' Section 7 rights—searching for any possible ambiguities that had the potential to chill those rights. As a result, those Board decisions and NLRB General Counsel reports have shaped an expansive framework significantly restricting an employer's ability to regulate employee conduct in the workplace. Generally, the NLRB welcomes detailed policies that clearly identify what the policy allows and/or prohibits while the Board strikes down general and vague policies that can be reasonably interpreted to restrict some form of protected Section 7 communication or activity.

In a December 2017 decision, *The Boeing Co.*, the Board reassessed its standard for when the mere maintenance of a work rule violates Section 8(a)(1) of the Act.¹⁶⁴ The Board overturned the first prong of the test announced in *Lutheran Heritage Village-Livonia*,¹⁶⁵ and established a new standard focusing on the balance between the rule's negative effect on employees' ability to exercise their Section 7 rights and the rule's connection to employers' rights to maintain discipline and productivity in their workplace. Not only did *The Boeing Co.* decision add the balancing test, but it significantly changed Board jurisprudence on the reasonable interpretation of the handbook rules. The Board criticized *Lutheran Heritage* and its progeny for prohibiting work rules that could be interpreted as covering Section 7 activity, as opposed to prohibiting rules that *would* be interpreted that way. *The Boeing Co.* decision applies only to mere maintenance of facially neutral rules and not rules that specifically ban protected concerted activity or that are promulgated directly in response to organizing (which remain unlawful). *The Boeing Co.* decision established three categories of rules:

- lawful (*e.g.*, no-camera rules; rules promoting "harmonious interactions and relationships" in the workplace);
- subject to scrutiny; and
- unlawful (rules prohibiting employees from discussing their wages and benefits).

1. Confidentiality

One type of policy the Board has examined involves confidentiality rules. Employers may prohibit disclosing "confidential" information because they have a legitimate interest in maintaining the privacy of certain business information, so long as the prohibition does not refer to information about employees or anything that would reasonably be considered a term or condition of employment.¹⁶⁶ 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.

¹⁶³ An "Excelsior list" is a list filed by the employer within seven days after a union election has been directed by the Board, stating the names and addresses of all eligible bargaining unit members.

¹⁶⁴ 365NLRBNo.154(Dec.14,2017).

¹⁶⁵ 343NLRB646(2004).

¹⁶⁶ *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

Following these general guidelines, the NLRB General Counsel issued a guidance Memorandum on June 6, 2018, that identified examples of unlawful and lawful confidentiality policies.¹⁶⁷ The General Counsel's Memorandum concludes that many confidentiality rules that do not restrict employee rights will be treated categorically as lawful.

The Board now will begin its analysis by asking whether a rule reasonably interferes with protected employee rights. This approach marks a return to the original *Lutheran Heritage* standard where the Board held that in determining whether employees would reasonably construe work rules to prohibit Section 7 activity, it will give the rules a "reasonable reading," refrain from "reading particular phrases in isolation," and "must not presume improper interference with employee rights." *The Boeing Co.* necessarily overrules prior cases finding confidentiality rules unlawful simply because they are broad.

At minimum, the *The Boeing Co.* standard appears to render unlawful rules that mention wages, benefits, or employment conditions within the definition of restricted information. The Board cited, as the prototypical example of a categorically unlawful rule, a restriction that "prohibits employees from discussing wages or benefits with one another."¹⁶⁸ The same result would apply to a rule prohibiting disclosure of "wage and salary information,"¹⁶⁹ and a rule prohibiting employees from disclosing their "salaries, contents of employment contracts," or "staff addresses and phone numbers."¹⁷⁰

Employers should expect to be found lawful under *The Boeing Co.* confidentiality provisions that do not refer to employee information or working conditions and do not restrict employees from engaging in concerted activities. To illustrate, Member Miscimarra concluded in his dissent in *Schwan's Home Service, Inc.*,¹⁷¹ that a rule prohibiting disclosure of "information concerning customers" is lawful because customers are not involved in activities such as the collective bargaining process. He reasoned that "[a]lthough two or more employees may sometimes concertedly engage in NLRA-protected conduct that implicates customer information, I believe this is likely to occur in limited circumstances, and in such cases, I believe the Board can independently address whether *applying* [the rule] against such conduct violates" the NLRA. Because employers have a compelling interest in prohibiting the disclosure of customer information, such rules should be considered broadly lawful under the new standard.

The General Counsel takes this interpretation a step further in his 2018 guidance Memorandum and defines rules generally protecting confidential, proprietary, and customer information as categorically lawful under *The Boeing Co.* As the General Counsel points out, a ban on discussing confidential information should not be assumed to affect employees' rights unless employment terms at least are mentioned.¹⁷² Given the substantial legitimate interests behind such rules, and the minor impact they have on protected activity, the Board's Regional offices have been instructed to consider them lawful when reviewing unfair labor practice cases.

Examples of the types of rules the General Counsel will treat as categorically lawful under the Board's new standard include the following:

- "[I]nformation concerning customers . . . shall not be disclosed, directly or indirectly" or "used in any way."
- Do not disclose confidential financial data, or other nonpublic proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.
- "Divulging Hotel-private information to employees or other individuals" is prohibited.

¹⁶⁷ NLRB, General Counsel Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing* (June 6, 2018).

¹⁶⁸ 365NLRBNo.154, slip op. at 15 (Dec.14,2017).

¹⁶⁹ *G4S Secure Solutions*, 364 NLRB No. 92 (2016) (Miscimarra, concurring in part).

¹⁷⁰ *Long Island Assoc. for AIDS Care, Inc.*, 364 NLRB No. 28 (2016) (Miscimarra, concurring in part).

¹⁷¹ 364NLRBNo.20(2016).

¹⁷² NLRB, General Counsel Memorandum GC 18-04, at 10 (June 6, 2018).

- No unauthorized disclosure of business secrets or other confidential information.¹⁷³
- Employers retain substantial information in their records about employees, which is often highly sensitive. Employee Social Security numbers, identification or account numbers, and protected medical information that may be housed in the employer's files typically would not be needed for employees to engage in concerted activities. However, it is critical to protect such information from disclosure to prevent identity theft, privacy intrusions, and to avoid liability. Rules protecting this type of highly sensitive employee information very likely will be found lawful under the Board's new balancing test.¹⁷⁴
- More broadly, an employer's files should be subject to the employer's control like any of its other assets. The Board's traditional rule has been that "employees may use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association, but are not entitled to their Employer's private or confidential records."¹⁷⁵ For instance, an employee was not entitled to a list of his coworkers. But, he was engaged in protected activity when he memorized the names of his co-workers from their timecards for the purpose of contacting them about joining a union. Thus, employees may use information that is openly available to them, but may not disclose the employer's internal confidential information without authorization.¹⁷⁶
- In *Macy's, Inc.*, a 2017 decision, the Board found a confidentiality policy limiting the use or disclosure of customer names and contact information lawful, even though that information could have been used to communicate about labor disputes.¹⁷⁷ The policy by its terms applied only to customer information obtained from the employer's own confidential records. The majority found that "[t]he Act does not protect employees who divulge information that their employer lawfully may conceal."¹⁷⁸ Because the policy at issue restricted only the use or disclosure of confidential customer information that the employer "has" or "maintains," it was lawful.¹⁷⁹
- *The Boeing Co.* decision does not undermine the rule in *Macy's, Inc.* To the contrary, the same rationale applies to rules protecting information in the employer's files even when it includes employee information that otherwise is protected. In *Cellco Partnership d/b/a Verizon Wireless*,¹⁸⁰ then-Chairman Miscimarra dissented, arguing that a rule restricting disclosure of employees' home addresses and phone numbers in its files was lawful arguing "disclosing information contained in the [employer's] confidential files would not typically be protected by the Act."
- As the General Counsel pointed out in his 2018 guidance Memorandum, restricting disclosure of information from the employer's files is different from restricting discussions about or use of the information generally. While employees must remain free to share coworkers' contact information, or other information about the workplace, employers do not need to permit employees to violate internal information protection policies. "Given the substantial legitimate interests behind such rules, and the little, if any, adverse impact on NLRA-protected activity," such rules should be considered categorically lawful.¹⁸¹

173 *Id.* at 9-10 (internal citations omitted).

174 See *Cellco P'ship d/b/a Verizon Wireless*, 365 NLRB No. 38 (Feb. 24, 2017) (Miscimarra, dissenting in part) ("Nobody can reasonably question the importance of maintaining the confidentiality of information such as social security numbers, identification numbers, passwords, and financial information.").

175 *Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1973).

176 See *International Bus. Machines Corp.*, 265 NLRB 638 (1982).

177 365NLRBNo.116(Aug. 14, 2017).

178 *Id.*

179 *Id.*

180 365NLRBNo.38(Feb. 24, 2017).

181 NLRB, General Counsel Memorandum GC 18-04, at 11 (June 6, 2018).

- *The Boeing Co.*'s announcement of lawful and unlawful rule categories promises to significantly increase certainty in the Board's rules cases. Of course, how the Board defines the types of rules that will be placed in these categories will go a long way toward determining how useful they will be.
- It is difficult to predict how the Board will categorize some common confidentiality provisions in future cases. For instance, when an arbitration agreement covering employment claims contains a confidentiality restriction, there is a real risk that the Board will treat it as unlawful under *The Boeing Co.* In *Dish Network, L.L.C.*, then-Member Miscimarra concurred with the Board majority that a provision treating all arbitration proceedings as confidential was unlawful, noting that "there may be circumstances where an arbitration agreement's confidentiality provision may be lawful based on justifications unrelated to the NLRA," but finding this was not such a case.¹⁸² He reached the same conclusion in *Jack in the Box, Inc.*,¹⁸³ concurring with the majority that a more limited provision treating an arbitration award as confidential was overly broad because it "would preclude all public discussion (with narrow exceptions) of employment-related matters addressed in arbitral decisions, including discussions that constitute concerted activity" while offering no supporting justifications.
- Confidentiality directives during workplace investigations are also important. In *Banner Estrella Medical Center*,¹⁸⁴ the Board ruled that to justify a prohibition on employee discussions during ongoing investigations, an employer must demonstrate the need for confidentiality, such as protecting witnesses and evidence, preventing testimony from being altered or fabricated, or preventing a cover up. Essentially, the Board prohibited blanket rules and required a balance of employer justifications for requiring confidentiality on a case-by-case basis. Then-Member Miscimarra dissented in that case, and more recently in *Dish Network, L.L.C.*,¹⁸⁵ argued that a narrowly tailored nondisclosure request, even if made routinely, always should be considered lawful. It is unclear whether that view will result in investigation confidentiality directives being treated as categorically lawful in the future, or subject to a case-by-case assessment based on the needs of a given investigation, as under *Banner Estrella Medical Center*.

2. Workplace Civility

*The Boeing Co.*¹⁸⁶ Board approved the maintenance of rules promoting "harmonious interactions and relationships," and requiring civility in the workplace, as categorically lawful. "To the extent the Board in past cases has held that it violates the Act to maintain rules requiring employees to foster 'harmonious interactions and relationships' or to maintain basic standards of civility in the workplace, those cases are hereby overruled."¹⁸⁷

The Board's decision provides "common-sense" standards of conduct as appropriate civility rules. *The Boeing Co.* does not merely approve rules prohibiting workplace rudeness or requiring courtesy as a general matter; it also reflects a new perspective on rules such as those regulating coworker harassment, disparagement, and cooperation.

Previously, the Board's focus on the restrictive implications in common handbook provisions under *Lutheran Heritage Village-Livonia*,¹⁸⁸ produced a number of surprising results. Because protected speech may include "intemperate, abusive and inaccurate statements,"¹⁸⁹ the Board found restrictive and unlawful rules prohibiting *inappropriate, offensive, disrespectful, loud, disruptive, discourteous, disparaging or negative* workplace conduct,

¹⁸² *Dish Network, L.L.C.*, 365 NLRB 1108 (2017).

¹⁸³ 364NLRBNo.12(2016).

¹⁸⁴ 362NLRB1108 (2015).

¹⁸⁵ 365NLRBNo.47(2017).

¹⁸⁶ 365NLRBNo.154(Dec.14,2017).

¹⁸⁷ *Id.* slip op. at 4, n.15.

¹⁸⁸ 343NLRB646(2004).

¹⁸⁹ *Linn v. United Plant Guards*, 383 U.S. 53 (1966).

to name just a few. *The Boeing Co.* decision criticized those prior decisions saying: “We do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to ‘work harmoniously’ or conduct themselves in a ‘positive and professional manner.’”¹⁹⁰

Because Section 7 activities are broadly consistent with “basic standards of harmony and civility,” the Board explained that civility rules “would have little if any adverse impact on these types of protected activities.”¹⁹¹ As against their limited impact on core rights protected by the Act, such rules meet both employer and employee interests in the workplace (“nearly every employee would desire and expect his/her employer to foster harmony and civility in the workplace”).¹⁹² Maintaining civility rules is also strongly justified by “the employer’s legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics, its substantial interest in preventing workplace violence, and its interest in avoiding unnecessary conflict that interferes with patient care (in a hospital), productivity and other legitimate business goals.”¹⁹³

As commonly understood, the “civility rules” the Board has found overly broad in the past required politeness, courtesy, and respectful workplace interactions. They also would include rules prohibiting rudeness and unprofessionalism. Certainly, employees would expect to find such rules in their own workplaces—they serve the interests of employers and employees; they are justified by antiharassment concerns; and they promote employers’ goals of maintaining safe, productive workplaces.

While it is important to note that the Board limited the reach of its holding in *The Boeing Co.*, by saying that “other than cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past Board decisions,”¹⁹⁴ the decision covers a lot of ground. The Board cites at least 35 decisions applying *Lutheran Heritage* to facially neutral rules including those pertaining to civility in the workplace. These include cases addressing rules requiring harmony or prohibiting negativity; rules prohibiting rude, condescending, or socially unacceptable conduct; rules regarding abusive, threatening language and harassment; rules restricting disparagement; and rules requiring employees to work cooperatively. The Board found all of these encompassed by its approval of civility requirements generally.

In particular, the Board included the following examples of civility rules that are now categorically lawful under *The Boeing Co.*’s new standard:

Examples of lawful rules requiring harmony or prohibiting negativity:

- a rule prohibiting “conduct . . . that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships;”
- a rule subjecting employees to discipline for “inability or unwillingness to work harmoniously with other employees;” and
- a rule prohibiting “any type of negative energy or attitudes.”

Example of lawful rules prohibiting rude or unacceptable conduct:

- a rule prohibiting “behavior that is rude, condescending or otherwise socially unacceptable.”

Examples of lawful rules prohibiting abusive, threatening language or harassment:

- a rule prohibiting “abusive or threatening language to anyone on company premises;”
- a rule prohibiting “verbal abuse,” “abusive or profane language,” and “harassment;”

¹⁹⁰ 365NLRBNo.154, slip op. at 3 (Dec. 14, 2017).

¹⁹¹ *Id.* slip op. at 4, n.15.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* slip op. at 12, n. 51.

- a rule prohibiting “conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with” other employees; and
- a rule prohibiting “loud, abusive or foul language.”

Examples of lawful rules prohibiting disparagement:

- a rule prohibiting “negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients or visitors;”
- a rule prohibiting “false, vicious, profane or malicious statements concerning the . . . employer or any of its employees;” and
- a rule prohibiting “negative conversations about associates and/or managers.”

Example of lawful rules prohibiting uncooperativeness:

- a rule prohibiting being uncooperative, or engaging in other “conduct that does not support the hotel’s goals and objectives.”

The Board’s cited illustrations show that the concept of civility extends to many different types of workplace rules that the Board has treated as unlawful in the past.

For instance, previously the Board ruled that policies prohibiting “harassment” were overly broad under the Act when they exceeded equal employment opportunity goals,¹⁹⁵ reasoning that the NLRA protects employees’ right to argue and debate with one another about unions, management and workplace conditions, even when the debate turns heated and tempers flared. As the Fourth Circuit stated in enforcing the Board’s decision in *Consolidated Diesel Co.*, “there would be nothing left of Section 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion.”¹⁹⁶

But, *The Boeing Co.* takes the opposite view and focuses on protecting core Section 7 rights like the right to argue and debate with coworkers, rather than more peripheral rights, such as the right to do so in a manner that is harassing. Section 7 activities are not inconsistent with restrictions on offensive or harassing conduct and core Section 7 rights arguably are not chilled by a civility requirement. Going forward, it appears the Board will allow restrictions of such peripheral rights to promote workplaces that are safe, productive, and civil, for the benefit of employers and employees.

The Boeing Co. is also a clear departure from prior case law about rules prohibiting disparagement. Employees have a broad right under the NLRA to communicate publicly about the workplace.¹⁹⁷ Public statements have been found to be unprotected when they constitute “a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”¹⁹⁸ To lose the Act’s protection, an employee’s workplace criticism must evidence “a malicious motive.”¹⁹⁹ Applying that standard, the Board has ruled repeatedly under *Lutheran Heritage* that restrictions on critical, derogatory, negative, or disparaging statements about the employer, coworkers, or the workplace restrict Section 7 rights and are therefore unlawful.

The Boeing Co. recalibrates this standard by incorporating civility into the standard governing unprotected malicious employee speech. The General Counsel’s 2018 Guidance Memorandum notes that rules prohibiting disparagement are a form of lawful civility prescription under the Board’s new standard, citing as highly influential

195 See *2 Sisters Food Group*, 357 NLRB No. 168 (2011).

196 332NLRB1019,1020(2000),enforced, 263 F.3d 345, 354 (4th Cir. 2001).

197 See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

198 *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

199 See *Valley Hosp. Med. Ctr.*, 351 NLRB No. 88 (2007).

Chairman Miscimarra's dissent in *Cellco Partnership d/b/a Verizon Wireless*.²⁰⁰ There, Chairman Miscimarra disagreed with the majority's conclusion that a rule prohibiting disparagement was overbroad, explaining: "employees are capable of exercising their Section 7 rights without resorting to disparagement of their fellow employees."

As the General Counsel explained, *disparagement* "describes statements that attack" a person. *Disparagement* means "to describe someone as unimportant weak, bad, etc. . . . and its synonyms include 'badmouth,' 'belittle' and 'put down.'"²⁰¹ Thus, work rules prohibiting disparagement are considered lawful under *The Boeing Co.* because disparagement is uncivil in the sense that it is deliberately hurtful. A rule prohibiting disparagement therefore does not interfere with the core Section 7 right to criticize the employer particularly when the rule focuses on disparagement of individuals such as coworkers or supervisors. Thus, the General Counsel adds illustrative rules to those cited in *The Boeing Co.* as categorically lawful, including:

- a rule prohibiting "disparaging . . . the company's . . . employees;"
- a rule prohibiting disparaging or offensive language; and
- a rule prohibiting posting any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.²⁰²

The focus on disparagement as a form of uncivil conduct suggests that other restrictions on criticism more generally will not be encompassed by the endorsement of nondisparagement policies. While prohibiting derogatory, demeaning, or insulting statements likely may be included in a lawful policy prohibiting disparagement, policies prohibiting critical and even damaging statements likely will continue to be found unlawful. Moreover, given that the rationale of the decision focuses on civility, policies prohibiting disparagement may be viewed very differently when they apply to individual coworkers who are vulnerable to unfair criticism, and disparagement of the employer itself. Importantly, the General Counsel's Memorandum explains that he would not necessarily include a rule prohibiting disparagement of the employer as a categorically valid rule under *The Boeing Co.* but may include it in a separate category of rules that must be evaluated on a case-by-case basis, because of its tendency to restrict Section 7 rights. The General Counsel has instructed the Regional offices to submit similar cases to headquarters for advice.

In the future, rules requiring cooperation, and prohibiting disrespectful, uncooperative conduct, will be treated as lawful under *The Boeing Co.* This ruling does not modify the "core" rights of employees to disagree with their employer or even engage in forms of resistance. Rules restricting any form of opposition to, argument with or confrontation in the workplace, particularly with management, very likely will not be deemed lawful.

After *The Boeing Co.*, the distinction between maintenance of lawful rules and application of those rules is more important than ever. Rules that the Board would find valid may be only suggestive of interference of Section 7 rights, until they are applied in a manner that creates actual interference. Broad or ambiguous rules, such as a rule prohibiting disparagement generally, still must not be used to discipline an employee for voicing legitimate criticism of workplace policies. Employers should continue to consider the importance of drafting rules that are easy to administer while also preventing unlawful applications that can be anticipated.

3. 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.²⁰³ An employer's name and logo are usually protected by

200 365NLRBNo.38(Feb. 24, 2017).

201 NLRB, General Counsel Memorandum GC 18-04, at 4 (June 6, 2018).

202 *Id.* at 3-4.

203 See *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991), *enforced mem.*, 953 F.2d 638 (4th Cir. 1992).

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 noncommercial use of a name, logo, or other trademark to identify an employer in the course of Section 7 activity.

4. Photography and Recording

The Boeing Co. Board determined the company's no-recording rule was lawful because it did not implicate Section 7 rights. Notwithstanding, the Board indicated that if employers draft or apply no-recording rules too broadly to interfere with employees' Section 7 rights, then the Board would likely find those policies violate the Act. Employees have a right to photograph and make recordings to further protected concerted activity, and while employers may have legitimate justifications to prohibit certain types of photographs or recordings, complete bans on photography or recordings, or the use or possession of personal cameras or recording devices, may be unlawfully broad if they interfere with Section 7 rights.

Thus, risks remain even after *The Boeing Co.* decision and employers may afoul of the Section 7 rights of their employees in drafting, promulgating, and enforcing no-recording rules. The Board's new approach only applies to rules that are facially neutral, so a rule expressly restricting protected activities, such as workplace protests or complaints will likely be deemed unlawful. Likewise, if a company announces a no-recording rule close in time to labor organizing, for example, the Board may find the application of that rule unlawful. At a minimum, employers should draft their policies to prevent restricting employees' Section 7 rights and with sufficient guidance to be easily and lawfully administered by supervisors.

5. 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.²⁰⁴

6. 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,²⁰⁵ 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."

D. Tips for Employers

Employers may wish to consider the following steps if they intend to implement workplace policies:

- strive to establish policies with specific rules that are easily understood;
- understand what the employer is trying to restrict and draft the language accordingly;
- try to avoid subjective terms and standards that require employees to decipher what is prohibited;
- where appropriate, perhaps use examples and limiting language to provide context and help 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

²⁰⁴ See *Purple Commc'ns, Inc.*, 361 NLRB No. 43, slip op. at 2 (Sept. 24, 2014).

²⁰⁵ *Mercedes-Benz*, 361 NLRB No. 120 (2014).

- if a policy addresses matters that are described in more detail elsewhere, make a specific reference to the more detailed policy.²⁰⁶

Another possible way to support the enforceability of an 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."²⁰⁷ 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 typically should be located in close proximity to the rules it purports to inform.²⁰⁸ A general savings clause on page three of a 70-page handbook may not be read into each rule in the handbook, for example. However, inclusion of the savings clause at the end of a particular rule will reasonably be read with that rule.²⁰⁹ Similarly, an explicit reference to the savings clause will inform employees that the clause is part of the rule.²¹⁰

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.

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."²¹¹ Medical Group Management Association survey data suggests that hospital ownership of physician practices has increased from 24% in 2004 to 54% in 2012.²¹² 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.²¹³ This trend has continued since publication of our last healthcare industry report in 2016, and may even be accelerating.²¹⁴

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

206 As discussed above in II. (A)(2), a broader policy addressing social media activity may encompass numerous other policies.

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

208 *Id.*

209 *Id.*

210 *Id.*

211 David Cutler and Fiona Scott Morton, *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASSOC. 1964, 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).

212 Cutler and Morton, *supra* note 219; Lineen, *supra* note 219.

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

214 See, e.g., *Get Ready for a Future of Rampant Healthcare Consolidation*, *BECKER'S HEALTHCARE REVIEW* (Aug. 7, 2018), <https://www.beckershospitalreview.com/healthcare-information-technology/get-ready-for-a-future-of-rampant-healthcare-consolidation.html>.

the predecessor. In addition, even an acquisition that results in no measurable loss of employment may technically trigger lengthy advance notice obligations under federal and state WARN Acts.²¹⁵

A. WARN Act

The Worker Adjustment Retraining and Notification (WARN) 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. However, 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.²¹⁶

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 (which can be a department, a job function or distinct operation), and 50 or more full-time employees lose their jobs in a 30- (or 90-) day period as a consequence. 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. These definitions 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. However, 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 six of the 12 months preceding the WARN notice date.

WARN Act 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. Up to and including the date of sale, the seller is responsible for providing notice, and after the date of sale, the buyer is responsible for giving notice.²¹⁷ However, WARN creates a legal fiction that if a sale of all or part of a business occurs, unless they have been terminated by the seller, the employees of the seller automatically become employees of the buyer for WARN purposes and no notice is required. However, 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 hire them all) must ensure that the seller has given any required notice to employees. This is usually accomplished through the purchase agreement. Even when parties intend that all or nearly all employees will transfer from the seller to the buyer, the asset purchase (or stock purchase or merger) agreement should be carefully reviewed to be sure WARN is not inadvertently triggered. A common error is to require the seller to terminate all employees prior to the closing, which technically takes the employees outside the sale of assets exception and thus trigger a notice requirement.

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

215 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, see REED ELLIS, ROBERT C. LONG, *ET AL.*, LITTLER ON CORPORATE RESTRUCTURING; DANIEL L. THIEME & DEIDRA A. NGUYEN, LITTLER ON REDUCTIONS IN FORCE.

216 "[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 C.F.R. § 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.")

217 29 U.S.C. § 2101(b)(1).

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.²¹⁸ However, some courts have held that WARN was not triggered in such circumstances, either by analogy to WARN's sale of assets provision,²¹⁹ or by determining that there was no "employment loss" under WARN because of the continued employment.²²⁰ 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 17 states and the City of Philadelphia, with varying requirements that often differ from federal law. In some states, terminating as few as 25 employees may trigger mini-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. In addition, 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 transaction, in which ownership of the company changes, or an assets transaction, in which ownership of the property of the company changes. In a stock transaction, the preexisting company typically continues as an ongoing entity, the employees continue to be employed by the same entity, and any preexisting employment law liabilities continue. Asset deals offer more flexibility concerning employment and other contracts including union agreements and relationships. Moreover, 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. To the contrary, where there is "substantial continuity" between the predecessor and successor employers, the successor will likely be held responsible for the predecessor's employment law obligations and liabilities.

The U.S. Supreme Court first recognized successor liability in labor law in *John Wiley & Sons, Inc. v. Livingston*,²²¹ ruling that the defendant, formed as a result of a merger, was bound to arbitrate with a union under a collective bargaining agreement (CBA) with one of the premerger 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."²²²

Wiley was distinguished in two significant later cases. In *NLRB v. Burns International Security Services*,²²³ the Supreme 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. The Court expressed concern that a contrary result would "inhibit the free transfer of capital" and inhibit new employers from making

218 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. § 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).

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

220 See *SEIU v. Prime Healthcare Servs., Inc.*, 2010 U.S. Dist. LEXIS 72036 (E.D. Cal. 2010) (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 F. App'x 691 (9th Cir. 2011); *Baker v. Wash. Grp. Int'l, Inc.*, 2008 U.S. Dist. LEXIS 20343 (M.D. Pa. 2008) (finding no employment loss when employees of contractor providing services to third party, whose contract with third party was not renewed, were immediately rehired by new contractor that took over the contract work with that third party).

221 376 U.S. 543 (1964).

222 *Id.* at 551.

223 406 U.S. 272 (1972).

substantial changes in operations.²²⁴ In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,²²⁵ the Supreme Court held that an alleged successor was not bound to arbitrate under the CBA signed by its predecessors because there was no substantial continuity of identity in the workforce hired by the successor with that of the predecessors.²²⁶

*Golden State Bottling v. NLRB*²²⁷ involved an NLRB order reinstating with back pay a Golden State employee whose discharge was found to be an unfair labor practice. Finding that the purchaser, 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 Supreme Court affirmed the Ninth Circuit ruling enforcing the order against All American as a successor.²²⁸

These four labor cases set the stage for successor liability in other contexts. In the leading case of *Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*,²²⁹ 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 under the Age Discrimination in Employment Act (ADEA), Americans with Disability Act (ADA), and the Employee Retirement Income Security Act (ERISA). In *Steinbach v. Hubbard*,²³⁰ the Ninth Circuit adopted the same basic standard for overtime liability under the Fair Labor Standards Act. Notably, 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."²³¹

224 *Id.* at 288.

225 417 U.S. 249 (1974).

226 There are many other significant aspects to the bargaining obligations of an employer that may be restructuring. For example:

[A]s 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.

RoDavid Kadela & 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). In *Paragon Systems, Inc.*, 364 NLRB No. 75 (2016), the National Labor Relations Board declined the General Counsel's request to overturn *Spruce Up*. However, "recent Board's decisions have been so expansive that the narrow "perfectly clear" exception noted by the Supreme Court in *Burns* now threatens to swallow the fundamental principle established in *Burns* – that successors "ordinarily" are free to set their own initial terms and conditions of operation." Tom Dowd, *Spruce Up Survives, But a Successor's First Communication to a Predecessor's Employees is More Critical Than Ever*, Littler Insight (Sept. 9, 2016). On December 1, 2018, NLRB General Counsel Peter Robb issued a memo suggesting he was looking for an opportunity to reverse those recent developments (General Counsel Memo 18-02). And in April 2019, in *Ridgewood Health Care Center*, 367 NLRB No. 110, the NLRB issued a decision narrowing the "perfectly clear" exception, likely signaling a return to *Spruce Up*.

227 414 U.S. 168 (1973).

228 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").

229 503 F.2d 1086 (6th Cir. 1974).

230 51 F.3d 843 (9th Cir. 1995).

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

In *Teed v. Thomas & Betts Power Solutions, L.L.C.*,²³² 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 appellate 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.”²³³

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.”²³⁴ An FMLA successor has three major responsibilities of its own: to count periods of employment and hours worked for the predecessor in determining employee eligibility for FMLA leave; to 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.”²³⁵

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 withdrawing employer intended to make up that 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.²³⁶

According to the statute, 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.²³⁷

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*, notwithstanding the elaborate statutory scheme intended to impose the obligation on the seller and, in some limited circumstances, impose secondary liability on the buyer.²³⁸

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 transaction (or, in extreme cases, whether the transaction should even be consummated). Further, the surviving entity or entities may use the discovered information to fix legal and operational issues going forward, and thereby cap potential exposures. Often, a

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

²³³ *Id.* at 766.

²³⁴ 29 C.F.R. § 825.107.

²³⁵ *Id.*

²³⁶ ERISA also has rules under which a partial cessation of the employer’s obligation to contribute can trigger liability.

²³⁷ 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.

²³⁸ See *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89 (3d Cir. 2011).

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.

Since the advent of the “#MeToo” movement, even long-hidden or long-settled sexual harassment allegations and claims against senior executives have come under scrutiny, as they can lead to substantial financial and reputational injury. As *Bloomberg* reported in 2018, “#MeToo Is a Due Diligence Issue Now.”²³⁹ The internet abounds with articles providing advice on this particular issue, with many referring to the so-called “Weinstein clause,” a representation in the merger documents concerning the good behavior of senior executives over a period of years.

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. For these reasons, potential employment law liabilities often are reflected in the purchase price.

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 prohibited, 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, is it possible to 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?

239 See <https://www.bloomberg.com/opinion/articles/2018-08-02/-metoo-is-a-due-diligence-issue-now>.

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 you reconcile inconsistent pay scales? Are job descriptions the same? How do you handle the no-show relative on the medical practice payroll? Does the NLRB's approval of "mini bargaining units" in *Specialty Healthcare*²⁴⁰ 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: should they be merged, maintained as separate plans, spun 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. 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.

IV. Antitrust Employment Issues in the Healthcare Industry

Healthcare employers must give due consideration to the potential impact of antitrust law on their employment practices. 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 noncompetition 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.

While sensitive to the potential anticompetitive nature of business combinations, insurance and benefits relationships (issues that are outside the scope of this paper), healthcare employers should be aware that these same statutes may be implicated in certain employment relationships and practices, as discussed below.

A. Background

Three federal statutes primarily proscribe certain noncompetitive activities:²⁴¹

1. the Sherman Antitrust Act ("Sherman Act");²⁴²
2. the Clayton Antitrust Act ("Clayton Act");²⁴³ and
3. the Federal Trade Commission Act ("FTC Act").²⁴⁴

The Sherman Act generally prohibits 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.

²⁴⁰ 357 NLRB No. 83 (Aug. 26, 2011).

²⁴¹ 749 F.3d 559 (2014).

²⁴² 15U.S.C. §§1-7.

²⁴³ 15U.S.C. §§12-27.

²⁴⁴ 15U.S.C. §§41-58.

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 reduce competition.

The FTC Act prohibits unfair methods of competition in interstate commerce. This statute also created the Fair Trade Commission (FTC) to police such violations. The FTC continues to prioritize combatting anticompetitive conduct and mergers in the healthcare industry.

B. Antitrust Litigation Threats

A variety of potential antitrust issues arise in the healthcare employment context.²⁴⁵

Independent healthcare employers that share confidential compensation or employee benefit information (or otherwise confer or agree upon compensation or benefit levels in a market) risk antitrust exposure, as the noncompetitive result can lead to a suppression of wages to below market rates.

Independent hospital systems establishing nonsolicitation or “nonpoaching” 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 noncompetitive results as applicants or renegotiating employees lose bargaining power.

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.

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.

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

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

In the employment context, the most common antitrust risks 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 if they 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.²⁴⁶

²⁴⁵ U.S. Dep’t of Justice, Fed. Trade Comm’n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016), available at <https://www.justice.gov/atr/file/903511/download>.

²⁴⁶ *Expert Masonry, Inc. v. Boone Cnty, Ky.*, 440 F.3d 336, 342 (6th Cir. 2006).

The healthcare industry has faced numerous class action lawsuits over the past decade, most frequently dealing with allegations that various local hospitals in a market colluded to fix nurses' wages.²⁴⁷ Healthcare employers must take caution not to inadvertently increase litigation risk by improperly sharing or trading wage information with other competitors.

In addition to private claims, federal (and some state) agencies have made clear their intention to more aggressively scrutinize employment practices that may be anticompetitive. In July 2018, the FTC used the settlement of an administrative complaint against therapist staffing companies to announce its intention to increase scrutiny of employment practices. Competing therapist staffing companies and their owners had been accused of violating Section 5 of the Federal Trade Commission Act by fixing or decreasing therapist pay rates. In a statement reported by Bloomberg Law, Bruce Hoffman, director of the FTC's Bureau of Competition, said: "Just as it is illegal for competitors to agree to fix prices on the products they sell in order to drive prices up, it is illegal for competitors to agree to fix wages or fees paid to workers in order to drive wages down."²⁴⁸

Not all exchanges of information are prohibited. In October 2016, the U.S. Department of Justice (DOJ) and the FTC issued joint guidance permitting certain wage sharing antitrust "safety zones" for healthcare employers desiring to participate in wage surveys, so long as they are participating in the survey in conformity with the guidance.²⁴⁹ 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 nonpoaching or nonhire 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 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.²⁵⁰

Healthcare, similar to the technology industry, is filled with highly skilled employees with interchangeable skill sets and are vulnerable to nonpoaching agreements among competitors due to the increased likelihood of recruiting from competitors.

In 2015, a radiologist specializing in cardiothoracic imaging on faculty at Duke University was allegedly informed that Duke and the University of North Carolina (UNC) had agreed not to allow lateral faculty moves between the two institutions. She subsequently filed a class action lawsuit against Duke University, Duke University Health Systems, Dr. William Roper, the University of North Carolina at Chapel Hill, the University of North Carolina

247 See, e.g., *Cason-Merenda v. Detroit Med. Ctr.*, 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, claiming the hospitals exchanged wage information, which resulted in similar pay structures and thus a lack of competition. In January 2015, a Michigan federal court approved a \$14 million attorneys' fees award for attorneys representing the nurses. *Cason-Merenda v. VHS of Michigan, Inc., d/b/a Detroit Med. Ctr.*, 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). In August 2015, the plaintiffs and the last remaining hospital involved in the lawsuit agreed to settle 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).

248 A. Alexis, *Wage-Fixing Case Signals FTC Focus on Workers*, BLOOMBERG LAW NEWS (Aug. 1, 2018).

249 U.S. Dep't of Justice, Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016).

250 See *In re High-Tech Employee Antitrust Litig.*, 2014 U.S. Dist. LEXIS 110064 (N.D. Cal. Aug. 8, 2014).

School of Medicine, the University of North Carolina Health Care System (and Does 1-20), alleging that senior officials conspired “to eliminate or reduce competition among them for skilled medical labor, including medical facility faculty” by entering into nonhire agreements with each other.²⁵¹

The plaintiff sought to certify a class of all Duke and UNC faculty members, physicians, nurses, or other skilled medical employees. Although the court refused to certify such a broadly defined class, the court agreed to certify a class comprised of faculty members at either institution from 2012 to the present with respect to the Duke defendants (the UNC defendants settled with an agreed class). This case serves to highlight the risks involved when healthcare entities enter formal or informal agreements to protect each other from losing employees to each other.

In April 2018, the DOJ announced a settlement of a civil antitrust enforcement action against employers allegedly participating in agreements not to compete for each other’s employees. Announcing the settlement, Assistant Attorney General Makan Delrahim of the Antitrust Division stated: “The unlawful no-poach agreements challenged today restrained competition for employees and deprived . . . workers of important opportunities, information, and the ability to obtain better terms of employment.”²⁵² Although this settlement was not in the healthcare industry, the DOJ’s warning is clear: “Today’s complaint is part of a broader investigation by the Antitrust Division into naked agreements not to compete for employees—generally referred to as no-poach agreements.” Healthcare employers should be very careful in crafting any agreement with a competitor or vendor that could be interpreted as interfering with an employee’s ability to pursue employment or enjoy the benefits of employment that derive from competitive market forces.

E. Practical Tips

Employers in the healthcare industry should be aware of, and diligent in ensuring compliance with, applicable antitrust laws. Healthcare systems should be cognizant of the potential impact on affected labor market share in evaluating any proposed merger or acquisition.

Employers should consider reviewing 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, employers should strive to ensure the data methods are within the designated FTC “safety zones.”

Employers generally should rely upon carefully drafted noncompete agreements with employees, to the extent allowable under state law, rather than nonpoaching agreements with competitors.

Finally, employers should consider making an effort to train employees as well as executives on antitrust risks, 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.²⁵³ This increase has particular bearing on healthcare organizations for two reasons. First, the lion’s share of funds the federal government recoups under the federal False Claims Act (FCA)²⁵⁴ is recovered through reports of fraud against the U.S. Department of Health and Human Services. These whistleblower claims led to nearly \$39 billion

²⁵¹ *Seaman v. Duke Univ.*, Case No. 15-cv-462 (M.D.N.C. filed June 9, 2015).

²⁵² U.S. Dep’t of Justice, Press Release No. 18-398 (updated Apr. 4, 2018).

²⁵³ See LITTLER MENDELSON, *WHISTLEBLOWING & RETALIATION* (6th ed. 2018).

²⁵⁴ 31 U.S.C. §§ 3729-3733 (also called the “Lincoln Law”).

of the \$59 billion the government regained under the FCA over a 32-year period.²⁵⁵ Second, recent U.S. Supreme Court precedent establishes conclusively that contractors of publicly traded entities are covered by the Sarbanes-Oxley Act (SOX) nonretaliation provisions, thereby covering the great majority of privately held healthcare providers under SOX for the first time since the statute's inception.²⁵⁶

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

As will be explained more fully below, on May 20, 2009, President Barack Obama executed the Fraud Enforcement and Recovery Act of 2009 (FERA),²⁵⁷ which made the most sweeping pro-whistleblower revisions to the federal FCA since 1986.²⁵⁸ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank 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.²⁵⁹

The Patient Protection and Affordable Care Act (ACA or Affordable Care Act),²⁶⁰ 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 bar²⁶¹ 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*,²⁶² 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*²⁶³ 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.²⁶⁴

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*.²⁶⁵ 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), similar to that applied to Age Discrimination in Employment Act (ADEA) retaliation claims,²⁶⁶ 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

255 U.S. Dep't of Justice, *Fraud Statistics Overview, October 1, 1986 - September 30, 2018*, available at <https://www.justice.gov/civil/page/file/1080696/download>.

256 *Lawson v. FMR L.L.C.*, 571 U.S. 429 (2014).

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

258 Jacqueline Bell, *Changes To FCA Increase Contractor Liability*, LAW360 (May 21, 2009).

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

260 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.

261 As explained below in section V. (C)(3), 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.

262 548 U.S. 53 (2006).

263 555 U.S. 271 (2009).

264 *Thompson v. N. Am. Stainless, L.P.*, 562 U.S. 170 (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).

265 570 U.S. 338 (2013).

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

of the alleged wrongful action or actions of the employer.”²⁶⁷ 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.”²⁶⁸ 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.

However, federal circuit courts have subsequently limited the application of *Nassar*. The Third Circuit in *Carvalho-Grevious v. Delaware State University* held that while *Nassar* applied to the ultimate burden of persuasion in a retaliation case, the plaintiff at the prima facie stage must show only that her engagement in protected activity was the likely reason for the adverse employment action, not the “but-for” reason.²⁶⁹ The Fourth Circuit made a similar finding in *Foster v. University of Maryland-Eastern Shore*.²⁷⁰ In *Chaney v. Eberspaecher North America*,²⁷¹ defendants moved for dismissal of plaintiff’s Family and Medical Leave Act (FMLA) retaliation claim, in part, because the claim failed to establish the “but for” causation standard articulated in *Nassar*. The court summarily rejected this argument however, reasoning that “*Nassar* made clear that Title VII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This case was brought under the FMLA, not Title VII, and as such, the *Nassar* decision, while informative, did not change any applicable standards.”²⁷² Similarly, in *Ponce v. 480 East 21st Street, L.L.C.*,²⁷³ a New York federal court held that *Nassar*’s “but for” causation standard under Title VII did not apply to plaintiff’s retaliation claim under the Fair Housing Act.²⁷⁴ Likewise, the U.S. District Court of Oregon held that *Nassar*’s “but for” causation standard does not apply to claims under the ADA.²⁷⁵

The continued increase in whistleblowing claims has also been aided by decisions from the Administrative Review Board (ARB), the U.S. Department of Labor’s (DOL) tribunal for adjudicating most whistleblower disputes. In 2011, the ARB decided three cases that dramatically expanded whistleblower protections under SOX. In *Sylvester v. Parexel International, L.L.C.*,²⁷⁶ 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 ARB further held a complainant no longer needs to allege shareholder fraud to engage in protected activity. In a second case, *Vannoy v. Celanese Corp.*,²⁷⁷ the ARB 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.*,²⁷⁸ 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.

²⁶⁷ *Nassar*, 570 U.S. at 360.

²⁶⁸ *Id.* at 358-59.

²⁶⁹ 851 F.3d 249 (3d Cir. 2017).

²⁷⁰ 787 F.3d 243 (4th Cir. 2015).

²⁷¹ 2013 U.S. Dist. LEXIS 94534, at n.1 (E.D. Mich. July 8, 2013).

²⁷² *Id.*; see also *Crawford v. JP Morgan Chase*, 2013 U.S. Dist. LEXIS 124809, at *14 (W.D. Wash. Aug. 30, 2013) (“*Nassar* deals specifically with Title VII of the Civil Rights Act, not FMLA, and the Court hesitates to assume the analysis is interchangeable.”); *Clark v. Jackson Hosp. & Clinic, Inc.*, 2013 U.S. Dist. LEXIS 135461 (M.D. Ala. Sep. 23, 2013) (same); *Egan v. Delaware River Port Auth.*, 851 F.3d 263 (3d Cir. 2017) (mixed-motive jury instruction is available for FMLA retaliation claims); *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158 (2d Cir. 2017) (finding that the district court wrongly instructed the jury that “but for” causation applies to FMLA retaliation claims).

²⁷³ 2013 U.S. Dist. LEXIS 122769 (E.D.N.Y. Aug. 28, 2013).

²⁷⁴ *Id.* at n. 5 (“[b]ecause [*Nassar*] was based, in part, on Title VII’s statutory scheme and the specific text of its retaliation provision, this Court would be hesitant to apply that change in law to the FHA.”); see also *Mooney v. Lafayette Cnty. Sch. Dist.*, 2013 U.S. App. LEXIS 16471, at n.4 (5th Cir. Aug. 8, 2013) (“The holding in *Nassar*, however, does not apply to the First Amendment causation standard, which requires only that protected speech be a ‘substantial’ or ‘motivating’ factor in the adverse employment action suffered by the plaintiff”).

²⁷⁵ See *Siring v. Oregon State Bd. of Higher Ed.*, No. 3:11-cv-01407-SI (D. OR. Oct. 15, 2013).

²⁷⁶ ARB Case No. 07-123 (May 25, 2011).

²⁷⁷ ARB Case No. 09-118 (Sept. 28, 2011).

²⁷⁸ *Menendez v. Halliburton, Inc.*, ARB Case No. 09-002, 24 (Sept. 13, 2011).

More recently, the ARB has continued the trend of expanding the definition of protected activity in *Dietz v. Cypress Semiconductor Corp.*²⁷⁹ Although the ARB agreed that complaints regarding violations of state wage and hour laws were not protected activity under SOX, it found that the employee complained of wire and mail fraud because he reasonably believed that the employer was intentionally withholding information about the plan from its employees. The ARB reasoned that SOX was implicated because the employee raised the misrepresentation concern via email. After this decision, it seems logically possible that an employee could be protected by the antiretaliation portion of SOX by complaining about the possible violation of any law via email or mail.

However, these concerns may be assuaged after the Tenth Circuit held that SOX does not protect the employee's whistleblower complaint in *Dietz* because he did not reasonably believe that the company engaged in any of the enumerated offenses. Ultimately, the court found that "mail fraud and wire fraud require more than merely fraudulent inducement—there must be a scheme designed to deprive the victims of their property."²⁸⁰ Because the employee could not have reasonably believed that the company intended to deprive employees of the acquired entity of their property when it did not disclose the Bonus Plan in their offer letters, the employee's complaint was not covered by SOX.

In *Lawson v. FMR L.L.C.*,²⁸¹ the Supreme Court massively expanded the scope of the antiretaliation 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 (DOJ) 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.²⁸² 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 2012.²⁸³ Total recoveries hit a high in 2014 and have decreased somewhat in recent years, but the vast majority of recoveries continue to involve the healthcare industry.²⁸⁴

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.²⁸⁵ By

279 ARB No. 15-017, ALJ No. 2014-SOX-2 (ARB Mar. 30, 2016).

280 *Dietz v. Cypress Semiconductor Corp.*, 711 F. App'x 478, 484 (10th Cir. 2017).

281 571 U.S. 429 (2014).

282 U.S. Dep't of Justice, Press Release, *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 healthcare 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.*

283 *Id.*

284 Annual recovery of civil fraud claims by the Department of Justice increased to a record of over \$6 billion in civil settlements in 2014, but decreased to \$2.8 billion in 2018. Of the \$2.8 billion recovered, \$2.5 billion involved the healthcare industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians. See <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.

285 Mary L. Shapiro, U.S. Securities and Exchange Comm'n, 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>.

August 2011, the Office of the Whistleblower had launched a new website, making it easier than ever before for whistleblowers to submit tips.²⁸⁶

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.²⁸⁷

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.²⁸⁸ It also contains stringent whistleblower protections for employees who make such claims.²⁸⁹

In 2018, the federal government recovered nearly \$2.8 billion arising from FCA settlements and judgments.²⁹⁰ Approximately \$2.5 billion of that amount stemmed from claims involving the healthcare industry. Whistleblowers recovered more than \$300 million as their share of the proceeds.²⁹¹

In 2018, *qui tam* whistleblowers²⁹² filed 645 lawsuits, down slightly from a high of 757 lawsuits in 2013. The largest recoveries involving the healthcare industry came from the drug and medical device industry. In one matter, AmerisourceBergen Corporation and certain of its subsidiaries paid \$625 million to resolve allegations that they sought to circumvent important safeguards intended to preserve the integrity of the nation's drug supply and profit from the repackaging of certain drugs supplied to cancer-stricken patients.²⁹³

The healthcare industry remains at the center of FCA enforcement. In 2018, the number of *qui tam* lawsuits against healthcare providers increased as compared to the previous year. While there are some areas of uncertainty with respect to FCA actions in the healthcare industry, recent activity indicates that healthcare-related FCA investigations, actions, and recoveries will continue to comprise a large percentage of FCA actions in the coming years.

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.²⁹⁴ 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.

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

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

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

289 See 31 U.S.C. § 3730(h).

290 U.S. Dep't of Justice, available at <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.

291 *Id.*

292 See *discussion, infra*, section V. (C)(3).

293 U.S. Dep't of Justice, available at <https://www.justice.gov/opa/pr/amerisourcebergen-corporation-agrees-pay-625-million-resolve-allegations-it-illegally>.

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

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.²⁹⁵ 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*²⁹⁶ and replaced it with a less-demanding requirement that a false statement be “material” to a false claim.²⁹⁷

In *Allison*, the Court held that plaintiffs in a FCA case must show that the defendant company specifically intended to defraud the government.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

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 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).³⁰¹

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.³⁰² 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).³⁰³

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.³⁰⁴ 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

295 See National Whistleblower’s Center, Press Release, *President Signs Major Whistleblower Anti-Fraud Law* (May 20, 2009), available at <https://www.whistleblowers.org/news/president-signs-major-whistleblower-anti-fraud-law/>.

296 553 U.S. 662 (2008).

297 Pub. L. No. 111-2, § 4 (a), 123 Stat. 1617, 1621 (2009); Ryan G. Hassanein, *Revamping the False Claims Act*, LAW360 (Aug. 5, 2009).

298 *Allison*, 553 U.S. at 671-72.

299 *Id.*

300 *Id.*

301 *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409 (2005).

302 31 U.S.C. § 3729(a).

303 *Id.*

304 31 U.S.C. § 3730.

individual to proceed alone.³⁰⁵ 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.³⁰⁶

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.³⁰⁷

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/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.³⁰⁸

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.³⁰⁹ If the government does not intervene, the *qui tam* plaintiff may recover 25% to 30% of the action, plus reasonable expenses and attorneys’ fees.³¹⁰

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 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.
- 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, received 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.
- 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

305 *Id.* § 3730(b).

306 *Id.*

307 *Id.* § 3730(e)(4)(A).

308 *Id.*

309 *Id.* § 3730(d)(1).

310 31 U.S.C. § 3730(d)(2).

affiliated hospitals improperly billed the Medicare program for certain inpatient procedures and for services rendered to patients referred.

- 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.
- 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 nonindicated 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.
- \$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 \$7 billion under the FCA since its inception. Nearly \$5.3 billion of those recoveries involved matters in which the Department of Health and Human Services was the primary agency impacted.³¹¹

The largest recoveries involving the healthcare industry in 2018 came from the drug and medical device industry. In one matter, a drug wholesaler and certain of its subsidiaries paid \$625 million to resolve allegations that they sought to circumvent safeguards intended to preserve the integrity of the nation's drug supply and profit from the repackaging of certain drugs.³¹² In another matter, a medical device manufacturer paid \$33.2 million to resolve allegations that it sold a materially unreliable testing device that was intended to aid clinicians in the diagnosis of drug overdoses, acute coronary syndrome and other conditions.³¹³

Additionally, in 2017, a pharmaceutical company, which sold pulmonary arterial hypertension drugs, paid \$210 million to resolve allegations that it used a foundation as an illegal conduit to pay the copay obligations of Medicare patients.³¹⁴ In addition, another drug manufacturer paid approximately \$23.85 million to resolve claims that it used a foundation as a conduit to pay the copays of Medicare patients taking its drugs. The government alleged that the drug manufacturer raised the price of one of those drugs by 40% in three months.³¹⁵

5. Nonretaliation 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.³¹⁶ 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.³¹⁷

An employee who believes he/she has been retaliated against for engaging in conduct protected by the FCA may file an action in federal district court.³¹⁸ To state a claim of retaliation under the FCA, a relator must show that:

- the employee engaged in protected activity under the FCA; and
- the employer retaliated against the employee because of the protected activity.³¹⁹

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, nonretaliatory 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.³²⁰

311 U.S. Dep't of Justice, *Fraud Statistics Overview, October 1, 1986 - September 30, 2018*, available at <https://www.justice.gov/civil/page/file/1080696/download>.

312 U.S. Dep't of Justice, News Release, *AmerisourceBergen Corp. to Pay \$625 to Settle Civil Fraud Allegations* (Oct. 1, 2018), available at <https://www.justice.gov/usao-edny/pr/amerisourcebergen-corp-pay-625-million-settle-civil-fraud-allegations-resulting-its>.

313 U.S. Dep't of Justice, News Release, *Alere to Pay U.S. \$33.2 Million to Settle False Claims Act Allegations* (Mar. 23, 2018), available at <https://www.justice.gov/opa/pr/alere-pay-us-332-million-settle-false-claims-act-allegations-relating-unreliable-diagnostic>.

314 U.S. Dep't of Justice, News Release, *United Therapeutics Agrees to Pay \$210 Million to Resolve Allegations that it Paid Kickbacks Through a Co-Pay Assistance Foundation* (Dec. 20, 2017), available at https://www.justice.gov/usao-ma/pr/united-therapeutics-agrees-pay-210-million-resolve-allegations-it-paid-kickbacks-through?utm_medium=email&utm_source=govdelivery.

315 U.S. Dep't of Justice, News Release, *Drug Maker Pfizer Agrees to Pay \$23.85 Million to Resolve False Claims Act Liability for Paying Kickbacks* (May 24, 2018), available at <https://www.justice.gov/opa/pr/drug-maker-pfizer-agrees-pay-2385-million-resolve-false-claims-act-liability-paying-kickbacks>.

316 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.")

317 15 U.S.C. § 78u-6.

318 *Id.*

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

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

6. FCA's Whistleblower and Nonretaliation 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/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.³²¹ 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.³²²

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 nonretaliation 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.³²³ 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.³²⁴

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,³²⁵ a Republican-appointed ARB, and narrow judicial interpretation by the ARB and U.S. courts of appeal.³²⁶

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 L.L.C.*,³²⁷ 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 nonretaliation provisions, which utilize burden-shifting and damages measures unlike those available under other federal nonretaliation statutes, such as Title VII.

321 U.S. Dep't of Justice, *Fraud Statistics Overview*, October 1, 1987 to September 30, 20018, available at <https://www.justice.gov/civil/page/file/1080696/download>.

322 *Id.*

323 18 U.S.C. § 1514A(a).

324 18 U.S.C. § 1513(e).

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

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

327 134 S. Ct. 1158 (2014).

1. An Overview of the Statutory Scheme

a. SOX Employers

SOX's civil provisions apply to all public companies.³²⁸ 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.³²⁹ 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.³³⁰ 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.³³¹

b. Who is a Covered Employee: SOX Antiretaliation 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.³³²

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.³³³ 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.³³⁴

The U.S. Supreme Court resolved another issue of SOX coverage in *Lawson v. FMR, L.L.C.*,³³⁵ 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."³³⁶ In reaching this conclusion, the Court "boiled down" the antiretaliation 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.

328 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).

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

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

331 18 U.S.C. § 1514A(a).

332 29 C.F.R. § 1980.101.

333 *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.*, 2004-SOX-2 (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 nonpublic company that acted as an agent for publicly traded entities in limited financial transactions, was not protected by SOX).

334 18 U.S.C. § 1514A(a).

335 134 S. Ct. 1158 (2014).

336 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); *Johnson v. Siemens Building Techs.*, ARB No. 08-032, ALJ No. 2005-SOX-015 (Mar. 31, 2011)).

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

2. 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:

- the employee engaged in protected activity;
- the employer knew of the protected activity;
- the employee suffered an unfavorable (adverse) personnel action; and
- circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action.³³⁷

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).³³⁸

i) Protected Activity

The employee must first establish that he/she engaged in conduct protected by SOX. 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.³³⁹ The ARB has held that protected activity of an employee included reports of securities fraud by a third-party client of the employer.³⁴⁰

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.³⁴¹ 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.³⁴²

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/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."³⁴³ However,

337 29 C.F.R. § 1980.104(b); see also *Welch v. Chao*, 536 F.3d 269 (4th Cir. 2008), cert. denied, 129 S. Ct. 1985 (2009); *Allen v. Administrative Review Bd.*, 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).

338 49 U.S.C. § 42121; see also 18 U.S.C. § 1514A.

339 *Id.*

340 *Funke v. Federal Express Corp.*, ARB Case No. 09-004 (July 8, 2011).

341 *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. Int'l Game Tech.*, 577 F.3d 989, 1000-01 (9th Cir. 2009); *Welch*, 536 F.3d at 275; *Allen*, 514 F.3d at 477.

342 *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").

343 18 U.S.C. § 1514A.

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.³⁴⁴

Additionally, an employee's conduct may also be protected if he/she participates in an investigation, even if the employee is not the individual who reports the allegedly fraudulent or illegal activity.³⁴⁵

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.*³⁴⁶ 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 law identified in Section 806.³⁴⁷ In 2011, however, the ARB changed the law of protected activity in a dramatic way in *Sylvester v. Parexel International L.L.C.*³⁴⁸ 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.

ii) Employer Knowledge of Protected Activity

An employee cannot succeed on a SOX claim unless he/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.³⁴⁹

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."³⁵⁰ An employee can also show that the decision-maker could have reasonably deduced the employee's involvement in the protected activity.³⁵¹

344 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) (SOX does not protect employees who confer with peers or discuss accounting improprieties internally with subordinates).

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

346 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).

347 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. Int'l Game Tech.*, 577 F.3d 989, 997 (9th Cir. 2009) (deferring to the ARB's interpretation that communication must definitely 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").

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

349 8 U.S.C. § 1514A; 49 U.S.C. § 42121.

350 See U.S. Dep't of Labor, OSHA Whistleblower Investigations Manual, at 3-10 (Sept. 20, 2011), available at <http://www.whistleblowers.gov/> <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.")

351 *Id.*

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,³⁵² it is now relatively well-settled that the DOL's ARB will apply the broader *Burlington Northern*³⁵³ standard announced by the U.S. Supreme Court in connection with retaliation claims under Title VII.³⁵⁴ Under that standard, an employee need only establish the employer's action would have dissuaded a reasonable worker from engaging in the protected activity.³⁵⁵ Under the *Burlington Northern* standard, even conduct that is not a concrete job action may qualify as an adverse action.³⁵⁶

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.³⁵⁷

iv) Causation: Contributing Factor Standard

Significantly, an employee need only establish that his/her protected activity was a *contributing factor*, not necessarily a motivating factor, to the adverse employment action.³⁵⁸ 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/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.³⁵⁹

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

Once an employee satisfies his/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

352 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).

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

354 *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).

355 *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).

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

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

358 49 U.S.C. § 42121(b)(2)(B)(iii).

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

adverse action against a complainant absent his/her protected activity.³⁶⁰ 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.³⁶¹ 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 nonpublicly traded contractors of publicly traded companies, as well as the significant incentives for *qui tam* whistleblowers, healthcare employers should consider a number of preventive 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 antiretaliation policy could also include reporting under the company’s antidiscrimination 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 nonretaliation awareness training;
- holding wrongdoers accountable;
- ensuring confidentiality of reports;
- conducting independent and thorough investigations; and
- having employees periodically recertify that they are aware of no violations of the code of ethics or code of conduct.

³⁶⁰ 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).

³⁶¹ 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; and
- 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 Missouri jury awarded nearly \$17 million in a negligent supervision case against a teaching hospital for failing to properly supervise a physician who overmedicated a patient.³⁶²
- A Wisconsin jury awarded nearly \$8.5 million in a negligent hiring and training case against a nursing home whose employees allowed a mentally incapacitated resident access to a dangerous substance, which further incapacitated him.³⁶³
- A Georgia jury awarded nearly \$3 million in a negligent hiring, training, and supervision case against a hospital whose nurse who caused debilitating injuries to an in-transit patient.³⁶⁴

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

³⁶² *Koon v. Walden*, 539 S.W.3d 752 (2017) (upholding jury's verdict on appeal).

³⁶³ *Hinich v. Next Step in Cmty. Living, L.L.C.*, 2017 WL 7735224 (Wis. Cir. Ct. - Milwaukee Cnty. Apr. 26, 2017).

³⁶⁴ *Byrom v. Douglas Hosp., Inc.*, Case No. 13-SV-00346 (Georgia Super. Ct. - Douglas Cnty. July 25, 2018).

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.³⁶⁵

Even if an employer can avoid an adverse jury verdict or costly settlement such as those discussed above, the bad employment decisions typically at issue in these types of matters can often result in serious internal and external reputational damage to the company. This type of damage presents its own unique, monetary and nonmonetary challenges that may be difficult to overcome.

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 wellbeing. 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 *Goines v. Lee Memorial Health System*,³⁶⁶ a female patient sued a hospital for several causes of action, including negligent hiring and retention, regarding a male night nurse's alleged sexual assault. Prior to hiring the male nurse in 2014, the hospital conducted a background check on him. The search did not reveal any arrests, charges, or convictions. He had, however, been subject to a number of temporary restraining orders due to allegations of domestic abuse. The temporary restraining orders were not present on the background checks and the hospital stated it would not have based a hiring decision on the records because there was never a legal determination that he had committed any of the alleged actions.

In 2015, approximately one year after the night nurse's hiring, a female patient accused him of sexual assault. The patient reported his actions to the hospital and an officer from the local police department. The hospital promptly investigated the incident and, the following day, informed the Florida Department of Health that the patient's allegations could not be substantiated.

In July 2016, the night nurse was arrested by the local County Sheriff for battery. The alleged victim was his brother. The night nurse informed his supervisor of the arrest the following day – the hospital neither suspended him nor investigated the incident. One week later, the plaintiff was admitted to the hospital and assigned to the night nurse who subsequently sexually assaulted her. The plaintiff reported the assault to a different nurse. The hospital then placed the night nurse on leave and subsequently terminated his employment.

The hospital moved for summary judgment on the negligent hiring and retention claims. In response, the plaintiff withdrew the negligent hiring claim, but argued there was sufficient evidence of negligent retention. The court agreed. First, the court found that the hospital was on notice of the previous sexual assault claim and battery, which indicated the night nurse had a propensity for sexual assault and/or violence. Next, the court found there was sufficient evidence that the hospital failed to take appropriate action. Specifically, the court held that the evidence demonstrated the hospital's investigation into the first assault was insufficient because it was concluded in less than 24 hours and may not have conformed to the hospital's own policies (namely preservation of evidence, postinvestigation training and education, and prosecution of false accusations). The court also found that the hospital's failure to investigate the subsequent battery arrest demonstrated knowledge of general violence and unfitness and failure to take any action.

In this particular case, the hospital was penalized for its inadequate investigation into the initial assault complaint and failure to investigate the subsequent battery charge. The hospital could have benefited from taking

365 *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, Pa. (settled Jan. 31, 2011 following jury selection but prior to opening arguments).

366 *Goines v Lee Memorial Health Sys.*, 2019 WL 497706 (M.D. Fla. Feb. 8, 2019).

its time with the investigation of the initial allegation and ensuring that it followed its own policies regarding investigations, evidence retention, and employee training (even if a complaint is unsubstantiated). In addition, the hospital would have benefited by suspending the night nurse following the battery arrest and investigating its impact on his fitness for duty, especially given his direct patient care role. The hospital's failure to thoroughly investigate and respond to such matters resulted in its failure to obtain summary judgment and limit its fees and potential exposure.

In a somewhat similar case, *Doe v. Fulton-Dekalb Hospital Authority*,³⁶⁷ 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 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

367 *Doe v. Fulton-Dekalb Hosp. Auth.*, 2007 U.S. Dist. LEXIS 76247 (N.D. Ga., Oct. 5, 2007), 628 F.3d 1325 (11th Cir. 2010).

application discrepancies, presumably rejected him for employment, and avoided defending an expensive, protracted lawsuit.³⁶⁸

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 Insurance Co. v. TLC Safety Consultants, Inc.*,³⁶⁹ 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 have screened 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 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*.³⁷⁰ In *Navarette*, an adolescent patient who was

368 See also *Chichester v. Wallace*, 150 A.D.3d 1073 (2017) (denying home health company's summary judgment motion on plaintiff's negligent hiring, supervision and retention claims regarding an aide's sexual assault because company's failure to investigate aide's job application discrepancies and gaps raised triable fact issues).

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

370 *Navarette v. Naperville Psychiatric Ventures*, No. 2-10-0614 (Ill. Ct. App. Dec. 16, 2011), available at http://www.illinoiscourts.gov/R23_Orders/AppellateCourt/2011/2ndDistrict/2100614_R23.pdf.

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. In addition, 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. Stamford Hospital*,³⁷¹ 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.

371 2011 Conn. Super. LEXIS 387 (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 *Saima* 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 postemployment 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 & Medical Center*,³⁷² 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.³⁷³

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

372 72 A.3d 929 (2013).

373 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.

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 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:

- require an applicant to fully complete a job application;
- 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 and discrepancies, 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); the General Services Administration (GSA) System for Award Management (SAM) excluded parties list; and the National Practitioner Data Bank;
- retain a qualified, professional screening vendor to perform criminal background checks to determine any risks to coworkers, patients and/or third parties; and
- 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 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 help 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 antidiscrimination 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 affect some individuals and can violate Title VII if the policy is not job-related and consistent with business necessity.

In 2012, the EEOC issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 ("Guidance"). The Guidance was intended to aid employers in developing background check policies that comply with Title VII and other federal antidiscrimination laws.³⁷⁴ The EEOC continues to scrutinize these types of employment screening policies and is aggressively pursuing enforcement activities nationwide regarding them.³⁷⁵

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 in this instance 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. Nearly three dozen states, the District of Columbia, and more than 150 counties and municipalities have adopted such laws. While many of these laws extend only to government employers and government contractors, some

³⁷⁴ See www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Guidance remains the subject of hotly contested litigation between the State of Texas and EEOC and is on appeal to the U.S. Court of Appeals for the Fifth Circuit. The focus of the appeal is whether the Guidance, which was issued without public comment, is unenforceable because it is a regulation that was not properly procedurally implemented under federal rulemaking requirements. *Texas v. EEOC*, Case No. 18-10638 (5th Cir.).

³⁷⁵ See Rod M. Fliegel & Julie A. Stockton, *EEOC Continues to Scrutinize Criminal Record Screening Policies*, LITTLER ASAP (Oct. 1, 2018); Rod Fliegel & Allen Lohse, *The EEOC Continues to Press Litigation Under Title VII Concerning Employer Criminal Record Checks*, LITTLER INSIGHT (Dec. 21, 2017).

apply to private sector employers.³⁷⁶ To date, California, Connecticut, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington, along with certain localities (including Baltimore, Chicago, Los Angeles, New York City, Philadelphia, Portland, San Francisco, and Seattle) have passed laws that apply such laws to private employers.

Governments have taken different approaches to banning the box. Some states, 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, an 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 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

³⁷⁶ See Rod M. Fliegel & Molly Shah, *Ringling in 2018 with New Ban-The Box-Laws*, LITTLER INSIGHT (Jan. 8, 2018).

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, county-to-county and municipality-to-municipality. For example, as discussed above, the EEOC, as well as several states, counties 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).³⁷⁷ 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.³⁷⁸ 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).³⁷⁹ Importantly, HCQIA immunity does not apply to claims brought under civil rights statutes.³⁸⁰

"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.³⁸¹ 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).³⁸²

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."³⁸³

³⁷⁷ 42 U.S.C. §§ 11101-11152.

³⁷⁸ 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 nonmonetary relief. See *Islami v. Covenant Med. Ctr.*, 822 F. Supp. 1361, 1376 (N.D. Iowa 1992).

³⁷⁹ 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 section VII below, 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.

³⁸⁰ 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 antidiscrimination 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.*, 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).

³⁸¹ 42 U.S.C. § 11151(9).

³⁸² 42 U.S.C. § 11112(a).

³⁸³ *Id.*

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.³⁸⁴ 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.³⁸⁵ The HCQIA contains a separate immunity provision pertaining to reports made to the NPDB.³⁸⁶ However, a healthcare entity cannot benefit from either of the HCQIA immunity provisions if it fails to satisfy the NPDB reporting requirements.³⁸⁷

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.³⁸⁸

The definition also includes formal decisions not to take such actions or make such recommendations.³⁸⁹ 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 prepaid health plan, are not “professional review actions.”³⁹⁰ 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.”³⁹¹

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.”³⁹² In this regard, concern about “quality health care” is “not limited to clinical competence, but includes matters of general behavior and ethical conduct.”³⁹³ Many courts have recognized that disruptive physician behavior poses a threat to patient health and safety.³⁹⁴

To that end, the Sixth Circuit recognized in *Meyers v. Columbia/HCA Healthcare Corp.* 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.”³⁹⁵

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

384 42 U.S.C. § 11133(a)(1)(A).

385 42 U.S.C. § 11133(a)(1)(B).

386 42 U.S.C. § 11137; See *Hooda v. W.C.A. Serv. Corp.*, 2013 U.S. Dist. LEXIS 71809, at *12-13 (W.D.N.Y. May 17, 2013) (analyzing separate immunity provisions under HCQIA).

387 42 U.S.C. § 11133(c).

388 *Id.* §11151(9).

389 *Id.*

390 *Id.*

391 *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).

392 *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).

393 *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 468 (6th Cir. 2003).

394 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.”).

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

between that conduct and the ability to render patient care.”³⁹⁶ 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.³⁹⁷ 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.”³⁹⁸ 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.³⁹⁹ “It is enough that a physician is disciplined for conduct that could result in harm to a patient.”⁴⁰⁰ 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.⁴⁰¹ Similarly, the HCQIA also does not require that the professional review action result in *actual* improvement in the quality of healthcare.⁴⁰² Instead, it merely requires that the action “was undertaken in the reasonable belief that quality health care was being furthered.”⁴⁰³ The test for reasonableness “is an objective one.”⁴⁰⁴ 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.⁴⁰⁵

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.”⁴⁰⁶ 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.”⁴⁰⁷ 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.⁴⁰⁸

To meet this standard, however, a healthcare entity cannot merely rely on an asserted fact or a report regarding the physician’s alleged misconduct.⁴⁰⁹ 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

396 See *Moore v. Williamsburg Reg’l Hos.*, 560 F.3d 166, 172 (4th Cir. 2009).

397 *Id.* at 168-69.

398 *Id.* at 175.

399 *Leal v. Secretary, U.S. Dept. of Health and Human Servs.*, 620 F.3d 1280, 1285 (11th Cir. 2010).

400 *Id.*

401 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.”).

402 *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 468 (6th Cir. 2003).

403 *Id.*

404 *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.”).

405 *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 Med. Ctr., 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).

406 42 U.S.C. § 11112(a).

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

408 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”).

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

suspending an obstetrician/gynecologist for alleged poor clinical judgment and disruptive behavior.⁴¹⁰ 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.⁴¹¹

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.⁴¹² 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.⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵

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.⁴¹⁶ 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.⁴¹⁷ Instead, hospital leadership spoke to the reviewer about two of the cases, and then reported the information to the committee.⁴¹⁸ The court found that the committee's failure to take steps to obtain the reviewer's opinions directly and accurately was unreasonable.⁴¹⁹ Moreover, the committee did not interview any of the hospital's nurses or physicians, or the chair of the department.⁴²⁰ 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."⁴²¹

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.⁴²² 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.⁴²³

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."⁴²⁴ Generally, healthcare entities have bylaws that provide physicians with a

410 *Id.* at 327-28.

411 *Id.*

412 *Id.*

413 *Id.* at 330.

414 *Id.*

415 *Id.*

416 *Id.* at 333.

417 *Id.* at 333-34.

418 *Id.*

419 *Id.*

420 *Id.* at 334.

421 *Id.*

422 2014 U.S. Dist. LEXIS 151928, at *30-31 (D.N.J. Oct. 24, 2014).

423 *Id.*

424 42 U.S.C. § 11112(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.⁴²⁵

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.⁴²⁶ The notice must contain the following information:

- the reasons for the proposed action;⁴²⁷
- notice that the physician has the right to request a hearing on the proposed action;⁴²⁸
- any time limit (of not less than 30 days) within which to request such a hearing;⁴²⁹ and
- a summary of the physician's rights (as set forth below) in the hearing.⁴³⁰

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;⁴³¹
- a list of witnesses (if any) expected to testify at the hearing on behalf of the professional review body;⁴³² and
- the date of the hearing must not be less than 30 days after the date of the notice.⁴³³

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;⁴³⁴
- a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved;⁴³⁵ or
- a panel of individuals who are appointed by the entity and who are not in direct economic competition with the physician involved.⁴³⁶

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;⁴³⁷

425 *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.").

426 42 U.S.C. § 11112(b)(1)(A)(i).

427 42 U.S.C. § 11112(b)(1)(A)(ii).

428 42 U.S.C. § 11112(b)(1)(B)(i).

429 42 U.S.C. § 11112(b)(1)(B)(ii).

430 42 U.S.C. § 11112(b)(1)(C).

431 42 U.S.C. § 11112(b)(2)(A).

432 42 U.S.C. § 11112(b)(2)(B).

433 42 U.S.C. § 11112(b)(2)(A).

434 42 U.S.C. § 11112(b)(3)(A)(i).

435 42 U.S.C. § 11112(b)(3)(A)(ii).

436 42 U.S.C. § 11112(b)(3)(A)(iii).

437 42 U.S.C. § 11112(b)(3)(C)(i).

- the right to have a record made of the proceedings;⁴³⁸
- the right to call, examine, and cross-examine witnesses;⁴³⁹
- the right to present relevant evidence (as determined by the hearing officer), regardless of its admissibility in a court of law;⁴⁴⁰
- the right to submit a written statement at the close of the hearing;⁴⁴¹
- 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;⁴⁴² and
- 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.⁴⁴³

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.”⁴⁴⁴

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.⁴⁴⁵ The court held that a hearing was not necessary under the “unique circumstances” of the case.⁴⁴⁶ 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.”⁴⁴⁷ Accordingly, the court held that the hospital was entitled to immunity.

In *Zamanian v. Jefferson Parish Hospital Service District No. 2*, the hospital filed a motion to dismiss the physician’s claims, contending in part that the hospital was entitled to immunity under the HCQIA.⁴⁴⁸ The court noted that pursuant to Section 11112(c), the HCQIA permits for “immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.”⁴⁴⁹ Here, the hospital contended that Section 11112(c) applied to the physician’s suspension because “the Complaint reveals that circumstances existed that could result in the imminent danger to the health of a patient,” specifically, conflicting orders were provided to nurses due to a dispute that arose between the physician and the on-call radiologist with respect to a

438 42 U.S.C. § 11112(b)(3)(C)(ii). If, however, the physician wants transcripts of the proceeding, he/she must pay any reasonable charges associated with the preparation thereof. *Id.*

439 42 U.S.C. § 11112(b)(3)(C)(iii).

440 42 U.S.C. § 11112(b)(3)(C)(iv).

441 42 U.S.C. § 11112(b)(3)(C)(v).

442 42 U.S.C. § 11112(b)(3)(D).

443 *Id.*

444 42 U.S.C. § 11112(a).

445 467 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.”)

446 *Id.*

447 *Id.*

448 2017 U.S. Dist. LEXIS 128657, at *2-3 (E.D. La. Aug. 14, 2017).

449 *Id.* at * 12.

cardiology patient who appeared to be suffering from a heart attack.⁴⁵⁰ As a result, the court agreed that Section 11112(c) applied, such that “the professional review action is presumed to have met the standards necessary for protection under the HCQIA.”⁴⁵¹ Although the court noted that the physician did not set forth in his complaint any allegation as to why the hospital would not be entitled to immunity, the court permitted the physician an opportunity to conduct discovery given that the matter was still in the early stages and immunity is most often invoked in a summary judgment motion in lieu of a motion to dismiss.⁴⁵²

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 testified against him at a hearing that led to the termination of his privileges.⁴⁵³ 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.”⁴⁵⁴

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.⁴⁵⁵ The courts’ analysis of this standard closely tracks that of Section 11112(a)(1) (“reasonable belief that the action was in the furtherance of quality health care”).⁴⁵⁶ 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.”⁴⁵⁷

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.⁴⁵⁸ 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].”⁴⁵⁹

450 *Id.* at * 13-14.

451 *Id.* at * 14.

452 *Id.*; see also *Brandner v. Providence Health & Servs. – Washington*, 394 P.3d 581, 590 (Alaska 2017) (“It is possible, as Providence argues, that a physician’s dishonesty might in some circumstances be sufficient cause for emergency termination. But here this speculative possibility—raised as a post hoc rationalization rather than a demonstrated contemporaneous concern in Dr. Brandner’s case—does not rise to the level of a ‘realistic or recognizable threat’ requiring an emergency termination of hospital privileges. We therefore disagree with the superior court’s determination that the connection between Dr. Brandner’s ‘dishonesty’ and patient safety was sufficient to override Dr. Brandner’s due process right, and we conclude that Providence violated Dr. Brandner’s right to due process by terminating his hospital privileges without a pre-termination opportunity to be heard.”).

453 850 F. Supp. 2d 1216, 1235 (D.N.M. 2012).

454 *Id.* at 1239.

455 42 U.S.C. § 11112(a)(2).

456 See *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 384 (5th Cir. 2008); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 472 (6th Cir. 2003); *Brader v. Allegheny General Hosp.*, 167 F.3d 832, 843 (3d Cir. 1999).

457 *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’”).

458 423 Md. 690 (2011).

459 *Id.* at 707.

F. Reporting Requirements Under Federal and State Law

Congress enacted the 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.⁴⁶⁰ 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.⁴⁶¹

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,⁴⁶² boards of medical examiners are required to report sanctions imposed against physicians,⁴⁶³ and healthcare entities are required to report adverse professional review information.⁴⁶⁴

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 nonrenewed for a period longer than 30 days.⁴⁶⁵ 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.⁴⁶⁶ The reports must be made within 15 days from the date the adverse action was taken or clinical privileges were voluntarily surrendered,⁴⁶⁷ 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;
- such other information respecting the circumstances of the action or surrender as the Secretary of Health and Human Services deems appropriate;⁴⁶⁸ and
- the healthcare entity must also print a copy of the NPDB report and mail it to the appropriate state licensing board for its use.⁴⁶⁹

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 noncompliance 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.⁴⁷⁰

HCQIA contains two separate immunity provisions: immunity for reports made to the NPDB and professional review action immunity.⁴⁷¹ 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.

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

461 45 C.F.R. pt. 60.1; see also NPDB Guidebook, available at [www.npdb-hipdb.hrsa.gov/resources/NPDB Guidebook.pdf](http://www.npdb-hipdb.hrsa.gov/resources/NPDB%20Guidebook.pdf).

462 42 U.S.C. § 11131.

463 42 U.S.C. § 11132.

464 42 U.S.C. § 11133.

465 42 U.S.C. § 11133(a)(1)(A).

466 42 U.S.C. § 11133(a)(1)(B).

467 45 C.F.R. pt. 60.5(c).

468 42 U.S.C. § 11133(a)(3).

469 See NPDB Guidebook, *supra* note 466, at E-17.

470 42 U.S.C. § 11111.

471 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).

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.”⁴⁷² “[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.”⁴⁷³ In addition, Section 11137(c) immunity provides immunity from both damages and suits for injunctive relief,⁴⁷⁴ while professional review action immunity provides immunity only over actions for monetary damages, and not over actions for injunctive relief.⁴⁷⁵

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.”⁴⁷⁶

Reporting requirements exist under state law as well. Some states have reporting requirements similar to those set forth in the HCQIA.⁴⁷⁷ 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.⁴⁷⁸ In addition, some states impose hefty monetary penalties for failing to comply with reporting requirements.⁴⁷⁹ Other states require reporting of actions against physicians and nonphysician practitioners.⁴⁸⁰

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

472 *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).

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

474 See *Walker v. Mem’l Health Sys. of E. Tex.*, 2017 U.S. Dist. LEXIS 211605 (E.D. Tex. June 20, 2017) (Here, the physician successfully obtained a preliminary injunction against hospital, requiring the hospital to submit a void report to the NPDB effectively withdrawing a previously filed report. The hospital filed a motion for reconsideration, contending that 42 U.S.C. § 11137(c) foreclosed all civil liability related to NPDB reports. The court denied the motion, however, holding that the hospital had waived its § 11137(c) argument by failing to raise it previously in either the opposition to the preliminary injunction or in the request to stay the injunction.).

475 See *Sheikh v. Grant Reg’l Health Ctr.*, 2014 U.S. Dist. LEXIS 69, at *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).

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

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

478 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”).

479 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).

480 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 claims⁴⁸¹ as the Equal Employment Opportunity Commission (EEOC) continues to move forward with its Strategic Enforcement Plan (SEP).⁴⁸² The agency's SEP includes an emphasis on combating systemic discrimination and addressing selected discrimination issues in many areas, including pregnancy, genetic information, sexual orientation or gender identity, and others. 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*,⁴⁸³ 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).⁴⁸⁴

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). The plaintiff, 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. She remained on an unpaid leave of absence during the term of her pregnancy. The plaintiff sued, claiming 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 this accommodation. The Court noted, however, that this

481 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 antidiscrimination 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 antidiscrimination and antiharassment laws.

482 On October 17, 2016, the EEOC approved its updated SEP for 2017-2021, which builds upon its prior 2012-2016 SEP by reaffirming its commitment to six overarching substantive priorities, including: (1) eliminating barriers in recruiting and hiring; (2) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (3) addressing selected emerging and developing issues; (4) ensuring equal pay protections for all workers; (5) preserving access to the legal system; and (6) preventing systemic harassment. For more information on the updated SEP, see Barry A. Harstein, *EEOC's New Strategic Enforcement Plan Takes Aim at Gig Economy, Other Emerging Workforce Issues*, LITTLER ASAP (Oct. 18, 2016), available at <https://www.littler.com/publication-press/publication/eeocs-new-strategic-enforcement-plan-takes-aim-gig-economy-other>.

483 135 S. Ct. 1338 (2015).

484 Joseph P. Harkins, Alexis C. Knapp, Steven E. Kaplan, *The Heavy Burden of Light Duty: Young v. UPS*, LITTLER INSIGHT (Mar. 31, 2015), available at <https://www.littler.com/heavy-burden-light-duty-young-v-ups>.

reason must be more than an employer's claim that 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 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 nonpregnant employees, while failing to accommodate a large percentage of pregnant employees.

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.

After *Young*, the EEOC updated its Enforcement Guidance⁴⁸⁵ and expounded upon its views regarding the interplay between Title VII, the PDA, the ADA, the FMLA, and other statutes as they relate to pregnancy and pregnancy-related medical conditions.

Consequently (and perhaps more importantly), the EEOC has been increasingly active in bringing enforcement actions against employers based on pregnancy-related discrimination since the *Young* decision. For example, in September 2018, the EEOC brought suit against a national retailer, alleging the company violated Title VII by accommodating a large percentage of its nonpregnant workforce through light duty work while denying these same light duty accommodations to pregnant employees "similar in their ability or inability to work."⁴⁸⁶ Five days later, the EEOC brought a similar action against a medical services provider, alleging it violated Title VII when it refused to accommodate a pregnant employee's medical restrictions and instead placed her on leave.⁴⁸⁷ According to the EEOC, the pregnant employee applied for two vacant desk positions, which would have permitted her to work with her pregnancy-related medical restrictions; however, the hospital denied her requests and eventually terminated her employment. This action, as explained by the EEOC, was in contradiction of the hospital's policies towards nonpregnant employees with medical restrictions who were frequently accommodated with light duty work. While the lawsuit is still ongoing, the EEOC advised employers that "[t]he law is clear – an employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees. Employers must fairly and carefully consider the accommodation requests of pregnant employees with medical restrictions and not reject such requests simply because the restrictions are not the result of work injuries."⁴⁸⁸

In light of the Supreme Court's *Young* decision and the EEOC's increased strategic focus on enforcement actions, light duty policies that exclude accommodation of pregnancy-related restrictions or pregnancy-related disabilities have faced and will continue to 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

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

486 W.D. Wis. No. 3:18-cv-783 (Sept. 20, 2018); see also EEOC, Press Release (Sept. 21, 2018).

487 EEOC v. *Nix Hosp. Sys., L.L.C.*, W.D. Tex. No. 5:18-cv-01004 (Sept. 25, 2018); see also EEOC, Press Release, *EEOC Sues Nix Hospital System, LLC D/B/A Nix Healthcare System Services for Pregnancy Discrimination* (Sept. 25, 2018), available at <https://www1.eeoc.gov/eeoc/newsroom/release/9-25-18d.cfm?renderforprint=1>.

488 EEOC Supervisory Trial Attorney Eduardo Juarez, EEOC, Press Release, *EEOC Sues Nix Hospital System for Pregnancy Discrimination* (Sept. 25, 2018), available at <https://www1.eeoc.gov/eeoc/newsroom/release/9-25-18d.cfm?renderforprint=1>.

number of states providing ADA-like accommodation protections for pregnant employees,⁴⁸⁹ 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 (ADA). In *Equal Employment Opportunity Commission v. St. Joseph's Hospital, Inc.*,⁴⁹⁰ 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.

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.

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. However, the district court found that a jury issue existed regarding whether the plaintiff's reassignment to one of two open available positions for which the plaintiff met minimum qualifications would have been a reasonable accommodation. 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.

489 *Young* dealt with the application of the federal PDA to workplace accommodations. However, at least 37 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, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin.

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

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.⁴⁹¹ The court concluded that the evidence at trial supported the jury's finding that the hospital made good-faith efforts to accommodate the plaintiff (despite its failure to accommodate), and permitted the EEOC's motion to alter the judgment (which entitled plaintiff to equitable relief), however, the latter was reversed on appeal.

More recently, the EEOC has pursued similar claims against various employers. According to the EEOC's complaint in 2018 against an aerospace company, the employee was an administrative assistant who supported the vice president and other senior management.⁴⁹² Due to postconcussive syndrome and mild traumatic brain injury, the employee requested an accommodation to use a transcription or recording device to assist with tracking speech and note-taking. The company allegedly denied the request and the assistant had to take a medical leave of absence as a result. The EEOC alleges that after several other accommodation requests were denied, the company identified alternate administrative positions for which the employee was qualified to perform. Nonetheless, after she applied for over a dozen of these positions, the company did not reassign or select the employee; rather, it terminated her employment altogether.

Similarly, the EEOC brought suit against a hospital in 2017, alleging that it discriminated against an employee with a disability when it forced her to take leave at reduced pay and eventually terminated her employment.⁴⁹³ Here, the EEOC claimed that the hospital could have transferred the employee to a vacant position accommodating her indefinite lifting restriction. In 2018, the EEOC and the hospital entered into a settlement agreement, announced by consent decree, whereby the hospital will pay the employee \$15,000 in lost wages and be required to notify employees with qualifying disabilities that reassignment is a reasonable accommodation under the ADA, provide training on the ADA's requirements, and submit annual compliance reports to the EEOC during the decree's two-year term. According to the EEOC and its attorneys, these "lawsuit[s] demonstrate that employers should be aware of their obligation to provide a transfer as a reasonable accommodation for employees who are qualified individuals with disabilities."⁴⁹⁴

In short, the situations 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.

491 *EEOC v. St. Joseph's Hosp., Inc.*, 2015 U.S. Dist. LEXIS 106041 (M.D. Fla. Aug. 12, 2015), *aff'd in part, reversed & remanded in part*, 2016 U.S. App. LEXIS 21768 (11th Cir. Dec. 7, 2016) (affirming the jury's finding that the hospital failed to reasonably accommodate plaintiff and that it acted in good faith despite the failure to accommodate; but reversing the lower court's granting of EEOC's motion to alter the judgement entitling plaintiff to equitable remedies (reinstatement)).

492 *EEOC v. Lockheed Martin Corp.*, D. MD No. 8:18-cv-02976 (Sept. 26, 2018); see also EEOC, Press Release, *Lockheed Martin Sued by EEOC for Disability Discrimination and Retaliation* (Sept. 27, 2018), available at <https://www1.eeoc.gov/eeoc/newsroom/release/9-27-18.cfm>.

493 *EEOC v. St. Vincent Hospital and Health Care Ctr., Inc.*, S.D. Ind. No. 1:17-cv-3426 (Sept. 26, 2017); see also EEOC, Press Release, *St. Vincent Hospital to Pay \$15,000 to Settle EEOC Disability Discrimination Lawsuit* (May 30, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-30-18a.cfm>.

494 EEOC Regional Attorney Kenneth Bird, EEOC, Press Release *St. Vincent Hospital to Pay \$15,000 to Settle EEOC Disability Discrimination Lawsuit* (May 30, 2018,), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-30-18a.cfm>.

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

The EEOC in 2013 filed a systemic lawsuit against a skilled nursing and rehabilitation facility in New York.⁴⁹⁵ The lawsuit alleged that the facility violated the GINA by conducting a postoffer, 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/her family members—in making employment decisions and also restricts employers from requesting genetic information from applicants or employees. Furthermore, the lawsuit 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. The agency settled the case in 2014 for \$370,000 and directed employers to "take heed of this settlement because there are real consequences to asking applicants or employee[s] for their family medical history."

In a similar, although nonsystemic lawsuit, the EEOC alleged that an employer violated GINA when it refused to hire an applicant it believed to have carpal tunnel syndrome (CTS).⁴⁹⁶ Here, the EEOC claimed that the employee applied for a permanent "memo clerk" position with the company because her temporary position was set to expire. The company made her an offer of employment and sent her to its contract medical examiner for a customary drug test and physical, where she was also required to fill out questionnaires and disclose disorders in her family medical history. As a result, the examiner concluded that further evaluation would be required to determine whether the applicant suffered from CTS. The company instructed the applicant to receive an evaluation from her personal physician and provide the company with the results. After providing the results (which were negative), the company rescinded its offer because its medical examiner's tests indicated she did have CTS. In 2013, the parties settled the case for \$50,000 and the EEOC explained that "[e]mployers need to be aware that GINA prohibits requesting family medical history," and "[w]hen illegal questions are required as part of the hiring process, the EEOC will be vigilant to ensure that no one be denied a job on a prohibited basis."

In 2018, the EEOC settled a similar GINA-based charge against a company.⁴⁹⁷ Following an investigation, the EEOC found reasonable cause to believe that the company's Indiana facility required employees and applicants to undergo postoffer medical and fitness-for-duty examinations, which also required employees and applicants to disclose family medical history in questionnaires (including history of cancer, diabetes, and stroke). The EEOC claimed that such alleged conduct violated GINA. The case settled, requiring the employer to pay up to \$62,000 in monetary relief to applicants and employees. The EEOC explicitly noted that "[r]equiring an applicant or employee to answer questions about his or her family medical history, even when part of an otherwise permissible employment-related medical exam, violates federal law" and that "[e]mployers need to review all employment-related procedures and forms periodically to ensure legal compliance."

These lawsuits and EEOC charges serve as an example of the EEOC's focus on systemic litigation as part of its SEP⁴⁹⁸ and also as an expensive reminder regarding the limitations on the inquiries that can be made of applicants or employees. Moreover, these decisions have 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.

495 *EEOC v. Founders Pavilion, Inc.*, W.D. N.Y. No. 13-CV-01438 (May 16, 2013).

496 *EEOC v. Fabricut, Inc.*, N.D. OK No. 13-CV-248 (May 7, 2013).

497 EEOC, Press Release, *SMS Group to Pay up to \$62,000 to Resolve EEOC Discrimination Finding* (Oct. 18, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-18-18.cfm>.

498 The EEOC's Systemic Task Force defines systemic 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 Nonconformity

In line with its 2012-2016 SEP, the EEOC issued a potentially groundbreaking decision in 2015 when it found discrimination based on “sexual orientation” could be brought under Title VII.⁴⁹⁹ Moreover, since this case arose in the context of federal sector employment (the complainant was a front line manager at a Federal Aviation Administration facility), the decision applies to all federal employees. As such, the EEOC has taken the position that the decision applies to *all* employees; however, case law is presently split on the issue, with several circuits stating affirmatively that Title VII does not protect sexual orientation discrimination.⁵⁰⁰ Nevertheless, some courts, like the Seventh Circuit in *Hively v. Ivy Tech Community Collage of Indiana*, have held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII of the Civil Rights Act of 1964.⁵⁰¹ An affirmative answer to this question is forthcoming, as the Supreme Court recently granted certiorari to determine whether Title VII’s prohibition on discrimination ‘because of sex’ covers discrimination because of sexual orientation.⁵⁰² In the interim, healthcare employers should review any policies that, inadvertently or intentionally, treat employees differently based on their sexual orientation until a definitive answer is issued.

While the EEOC’s decision and the subsequent circuit split related to sexual orientation remains unresolved for the time being, federal courts and the EEOC have held for years that discrimination because of gender nonconformity or gender stereotyping is sex discrimination.⁵⁰³ Symbolizing its increased interest in this area, the EEOC has filed numerous sex discrimination lawsuits related to discrimination against transgender employees. In a 2016 lawsuit that settled in 2017, the EEOC alleged that a company demanded a transgender woman to behave and groom herself in ways that were stereotypically reserved for males.⁵⁰⁴ According to the EEOC, once the employee complained about her treatment, the company terminated her employment. As a result, the company paid \$15,000 and provided other relief to settle the charge.⁵⁰⁵

Likewise, in 2017, the EEOC brought suit on behalf of a male applicant whose job offer was retracted once the employer discovered he was transgender.⁵⁰⁶ According to the EEOC’s complaint, the applicant was offered a position as a services manager pending a drug test and background check. In the paperwork, the applicant identified his assigned sex at birth but also that he used another name associated with the female sex. The EEOC alleges that one hour after the company extended the job offer, a manager contacted the applicant asking if there was a mistake in the paperwork. After confirming it was accurate, the employer adopted a strategy of radio silence and hired someone else. On April 5, 2019, the parties entered into a settlement whereby the company will pay the employee \$60,000 in resolution of the charge.⁵⁰⁷

These cases serve as a warning that 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).

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

500 *See, e.g., Evans v. Ga. Reg’l Hosp.*, 840 F.3d 1248 (11th Cir. 2017).

501 853 F. 3d 339 (7th Cir. 2017)

502 *Bostock v. Clayton County*, 2019 U.S. LEXIS 2927, ___ S.Ct. ___ (2019); *Altitude Express, Inc. v. Zarda*, 2019 U.S. LEXIS 2931, ___ S.Ct. _ (2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 2019 U.S. LEXIS 2846, ___ S.Ct. ___ (2019).

503 *See Dawson v. H&H Elec., Inc.*, 2015 U.S. Dist. LEXIS 122723, at *9 (E.D. Ark. Sept. 15, 2015) (“It is well settled that Title VII’s interdiction of discrimination ‘because of [an] individual’s sex,’ 42 U.S.C. § 2000e-2(a)(1), prohibits an employer from taking adverse action because an employee’s behavior or appearance fails to conform to gender stereotypes.”); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018) (“[I]t is well-settled that gender stereotyping violates Title VII’s prohibition on discrimination ‘because of . . . sex.’”).

504 *EEOC v. Bojangles Rests., Inc.*, E.D. N.C. No. 5:16-cv-00654 (July 6, 2016).

505 EEOC, Press Release, *Bojangles’ to Pay \$15,000 to Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Dec. 20, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-20-17.cfm>.

506 *EEOC v. A&E Tire, Inc.*, D. Colo. No. 1:17-cv-02362 (Sept. 29, 2017).

507 *Id.* at ECF 75, “Consent Decree.”

E. Discrimination and Harassment by Third-Party Nonemployees

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 or gender preferences. For example, in 2010, the Seventh Circuit rejected a nursing home's policy of honoring the racial preferences of its residents when assigning care providers.⁵⁰⁸ The plaintiff, an African American nurse assistant, was 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. In 2017, the EEOC brought a lawsuit against an Indiana nursing home alleging that it prohibited black employees from entering rooms based upon the residents' preference for nonblack employees.⁵⁰⁹ Moreover, the EEOC claimed that the same black employees were subject to a barrage of racial slurs from these residents. While the lawsuit is still ongoing, the EEOC stated that "[i]t is difficult to comprehend that 50 years have elapsed since the adoption of the Civil Rights Act, and employers still do not understand that it is unacceptable to honor the discriminatory racial preferences of some or any of the customers."⁵¹⁰ These lawsuits serve as an all-important reminder for healthcare employers to consider legal protections for employees when evaluating patient preferences.

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 antidiscrimination employment laws, but only as to care that involves issues of intimate personal privacy, such as toileting or examination of private areas.⁵¹¹ There must be a specific patient request related to personal privacy, rather than a blanket policy of exclusion.⁵¹²

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.⁵¹³ Healthcare providers are also required to accommodate employees' sincerely held religious beliefs or practices, which can extend to dress (e.g., a Christian cross 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.

508 *Chaney v. Plainfield Health Care Ctr.*, 612 F.3d 908 (7th Cir. 2010).

509 *EEOC v. Village at Hamilton Pointe*, S.D. Ind. No. 3:17-cv-00147 (Sept. 19, 2017).

510 EEOC Regional Attorney Kenneth Bird, EEOC, Press Release, *EEOC Sues the Village at Hamilton Pointe and TLC Management for Race Discrimination* (Sept. 20, 2017), available at <https://www1.eeoc.gov/eeoc/newsroom/release/9-20-17a.cfm?renderforprint=1>.

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

512 *Id.*

513 Christina Puchalski, M.D., *Ethical Concerns and Boundaries in Spirituality and Health*, *AMA JOURNAL OF ETHICS*, Vol. 11, No. 10:804-815 (Oct. 2009), available at <http://journalofethics.ama-assn.org/2009/10/oped1-0910.html>.

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. In 2018, the EEOC filed suit against a home healthcare company in Colorado, alleging that it violated Title VII by subjecting its employees to sexual harassment by third parties.⁵¹⁴ The EEOC claimed that the company allowed its female employees to be subject to sexual harassment by a client's son, who touched their breasts and buttocks, exposed himself to them, and touched them with his genitals. According to the EEOC, the employees brought this conduct to the attention of the company who then failed to investigate the allegations or reassign them to another client. While the lawsuit is ongoing, it highlights the expanded risks healthcare employers face when dealing with charges of harassment.

Ultimately, 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. Accordingly, as evidenced by the matter discussed directly above, a healthcare employer has a legal duty to investigate and respond to any complaint of harassment made by an employee.

F. *Mandatory Flu Vaccinations*

In response to nationally elevated flu season activity, healthcare organizations are making efforts to combat the flu and influenza-like-illnesses a top priority.⁵¹⁵ Healthcare advocates often favor mandatory vaccination programs in healthcare settings as a cornerstone step in this effort.⁵¹⁶ 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.⁵¹⁷ 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."⁵¹⁸ In *Chenzira v. Cincinnati Children's Hospital Medical Center*,⁵¹⁹ the plaintiff had refused to submit to mandatory flu 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 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.

⁵¹⁴ *EEOC v. JoyVida L.L.C.*, D. Colo. No. 1:18-cv-02026 (Aug. 9, 2018).

⁵¹⁵ Center for Disease Control and Prevention, *2018-2019 Flu Season: Flu Activity Elevated Nationally* (Dec. 21, 2018), available at <https://www.cdc.gov/flu/spotlights/flu-activity-elevated.htm>.

⁵¹⁶ 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.

⁵¹⁷ EEOC, *Pandemic Preparedness in the Workplace and The Americans with Disabilities Act*, available at https://www.eeoc.gov/facts/pandemic_flu.html.

⁵¹⁸ EEOC Compliance Manual, Directive No. 915.003, Section 12: Religious Discrimination (July 22, 2008), available at <https://www.eeoc.gov/policy/docs/religion.html>.

⁵¹⁹ S.D. Ohio No. 1:11-cv-00917 (Dec. 27, 2012).

Additionally, healthcare employers need to be cognizant of their mandatory vaccination requirements in conjunction with their employees' religious beliefs. For example, in a 2016 lawsuit filed by the EEOC, a hospital required all employees to receive an annual flu vaccination by a certain date.⁵²⁰ However, employees could apply for an exemption based on a religious belief – so long as the request was submitted by September 1. After three employees failed to apply for an exemption on time, the hospital denied their requests and subsequently fired all three employees for failing to be vaccinated. The EEOC and the hospital settled the lawsuit on January 12, 2018 for \$89,000 and the EEOC reiterated that "Title VII requires employers to make a real effort to provide reasonable religious accommodations to employees who notify the company that their sincerely held religious beliefs conflict with a company's employment policy."⁵²¹

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.

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 and Health

Healthcare employers must also remain vigilant regarding the safety and health of their employees. 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.⁵²² 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.⁵²³ 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/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). In addition, this section discusses some recent regulatory and enforcement actions initiated by OSHA that are particularly relevant to the healthcare industry. Finally, there is a brief discussion on discrimination and retaliation under the OSH Act.

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.⁵²⁴ An *employer* is defined in the OSH Act as "a person engaged in a business affecting commerce who has employees."⁵²⁵ The definition of "employer" does not include federal

520 *EEOC v. Mission Hosp., Inc.*, W.D. N.C. No. 1:16-CV-00118 (Apr. 28, 2016).

521 EEOC Regional Attorney Lynette Barnes, EEOC, Press Release, *Mission Hospital Agrees to Pay \$89,000 to Settle EEOC Religious Discrimination Lawsuit* (Jan. 12, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-12-18.cfm>.

522 29 U.S.C. § 654(a)(1).

523 Codified at 29 C.F.R. §§ 1910.1-309 et seq., 1915.1-100, 1926.1-1092.

524 29 U.S.C. § 654(a).

525 Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maine, 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.

agencies (except for the U.S. House of Representatives and Senate) or any state government employees. In healthcare, some state hospitals and institutions may 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 OSH 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 temporary 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. More than 25 states and territories have achieved state-plan status.⁵²⁶ 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 that 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 OSH Act.⁵²⁷

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 recognized, serious hazards—even those not specifically covered by OSHA.

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 ergonomics 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.

⁵²⁶ 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).

⁵²⁷ See <https://www.osha.gov/SLTC/healthcarefacilities/>.

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. 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;⁵²⁸
- personal protective equipment;⁵²⁹
- electrical requirements including wiring methods, components, and equipment for general use;⁵³⁰
- medical services and first aid;⁵³¹
- injury and illness recordkeeping;⁵³²
- bloodborne pathogens;⁵³³
- exit aisle maintenance, safeguards, and operational features for exit routes;⁵³⁴ and
- respiratory protection.⁵³⁵

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.⁵³⁶

D. OSHA Inspections

The OSH 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.⁵³⁷

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 *Marshall v. Barlow's Inc.*⁵³⁸ held that the Fourth Amendment's protection against unreasonable search and seizure applies to OSHA and thus requires that administrative probable

528 29C.F.R. § 1910.1200.

529 29C.F.R. § 1910.134.

530 29C.F.R. § 1910.202*et seq.*

531 29C.F.R. § 1910.151.

532 29C.F.R. § 1904.1*et seq.*

533 29C.F.R. § 1910.1030.

534 29C.F.R. § 1910.37.

535 29C.F.R. § 1910.134.

536 29 U.S.C. § 657(a); 29 C.F.R. § 1903.3(a).

537 29 U.S.C. § 657(a).

538 436 U.S. 307 (1978).

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 29 U.S.C. § 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.

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."⁵³⁹ 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.

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 an intention to file an appeal.

The penalty for violations considered serious or other-than-serious is a fine of up to \$13,260 for each violation.⁵⁴⁰ Willful or repeat violations may be assessed a penalty of up to \$132,598 per 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 \$13,260 per day until abatement is accomplished.⁵⁴¹

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

⁵³⁹ 29 U.S.C. § 658(a).

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

⁵⁴¹ 29 U.S.C. § 666(a), (d).

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.

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 at times through continued discussions with the Area Director.

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, unappealable determination.

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.⁵⁴²

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.⁵⁴³

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.

⁵⁴² 29 C.F.R. § 1977.12(b)(2).

⁵⁴³ 29 C.F.R. § 1977.22.

J. Recent Developments of Interest to Healthcare Employers

Aside from the basic structure of the OSH Act and the ongoing obligations of healthcare employers, over the last several years OSHA has been very aggressive with new regulations and enforcement initiatives targeting the healthcare industry.

In 2014, OSHA announced a final rule for Occupational Injury and Illness Recording and Reporting Requirements (frequently referred to as OSHA's recordkeeping rule). Importantly for the healthcare industry, the rule expanded the list of severe injuries that all OSHA-covered industries must report to OSHA, regardless of size or partial exemption status. The previous rule stipulated that when there was a fatality or the hospitalization of three or more employees, the employer would need to inform OSHA within eight hours of the occurrence. Under the 2014 rule, a fatality (within 30 days of the work-related incident) must still be reported within eight hours of the death. However, employers will now have a 24-hour window in which to report to OSHA all work-related inpatient hospitalizations that require care and treatment of just a single employee, all amputations, and all losses of an eye. The available methods of reporting by the employer were also expanded. In addition to calling OSHA's confidential number (1-800-321-OSHA), or calling the local OSHA Area Office, employers can go to a web portal to make a report electronically.⁵⁴⁴

In another significant action regarding recordkeeping, OSHA issued yet another recordkeeping update – first in 2016 and then later revised in 2019 – that required certain employers to submit recordkeeping forms to OSHA electronically. That final rule requires employers with 250 or more employees (including part-time, seasonal or temporary workers) in each establishment to electronically submit their 300A forms to OSHA on an annual basis, and employers with more than 20 but less than 250 employees in certain identified industries to electronically submit their 300A forms, as well.

The final rule also requires employers to ensure that employees are not discriminated against in any way for reporting work-related injuries and illnesses.⁵⁴⁵ The Agency expressed concern about certain safety incentive programs (e.g., "bonuses" for avoiding recordable injuries or illnesses) and certain postincident drug testing programs that could serve as a disincentive to employees in reporting work-related injuries and illnesses. In the final rule, OSHA stated that the rule prohibits "employers from using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses. To strike the appropriate balance here, drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use."

Finally, workplace violence—an important issue in healthcare—remains a significant focus of the Agency. Under the General Duty Clause, as set forth above, employers are required to provide their employees with a place of employment that is "free from recognized, serious hazards." In OSHA's view, this includes workplace violence and OSHA published Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers providing specific recommendations to prevent violence in healthcare workplaces. Healthcare providers should ensure that they have considered workplace violence risks and developed a comprehensive approach to addressing those hazards.

OSHA remains active and the healthcare industry should not lose sight of employee safety and health.

544 29 C.F.R. § 1904.39(a).

545 29 C.F.R. § 1904.35.

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),⁵⁴⁶ Section 503 of the Rehabilitation Act of 1973 (Section 503),⁵⁴⁷ and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).⁵⁴⁸ 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, attempted to expand the definition of covered federal contracts so as to extend its jurisdiction over more healthcare providers. In particular, the agency took the position that providers participating in the TRICARE healthcare program⁵⁴⁹ 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.⁵⁵⁰

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 2021 its enforcement efforts relative to TRICARE employers⁵⁵¹ and has not yet been aggressive in seeking to audit providers based on participation in Medicare Parts C or 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.⁵⁵²

B. The Statutory Schemes Enforced by the OFCCP

1. Executive Order 11246

EO 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.⁵⁵³ 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. 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.⁵⁵⁴

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

⁵⁴⁶ Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965), as amended.

⁵⁴⁷ 29 U.S.C. § 793.

⁵⁴⁸ 38 U.S.C. § 4212.

⁵⁴⁹ The healthcare program of the U.S. Department of Defense Military Health System.

⁵⁵⁰ U.S. Dep't of Labor, OFCCP, Directive No. 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010).

⁵⁵¹ U.S. Dep't of Labor, OFCCP, Directive No. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

⁵⁵² 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 noncontractual 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. Exec. Order No. 11246.

⁵⁵³ *Id.*

⁵⁵⁴ See 41 C.F.R. pt. 60-2.

disabilities.⁵⁵⁵ 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.⁵⁵⁶

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.⁵⁵⁷ Employers with 50 or more employees and a covered federal contract or subcontract of at least \$150,000 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.⁵⁵⁸

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.⁵⁵⁹ 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.⁵⁶⁰

By contrast, federal grants and other financial assistance are not considered to be "contracts" or "subcontracts" so as to extend OFCCP jurisdiction.⁵⁶¹ Thus, there are arrangements by which healthcare organizations may receive federal funding without being a covered federal contractor.⁵⁶²

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 equal to or greater than \$50,000 to provide medical care to prisoners would be a covered federal contract.⁵⁶³ More complicated situations arise, however, in the context insurance arrangements.

Since 1993, it has seemed clear that participation in Medicare parts A and B do not subject providers to federal affirmative action obligations. In that year, the OFCCP, following several federal judicial decisions, issued Directive No. 189 acknowledging that, because Medicare and Medicaid are programs of federal financial assistance and not contracts, the OFCCP had no jurisdiction over hospitals receiving reimbursement. Although Directive No. 189 was later rescinded, OFCCP has never revisited this conclusion.⁵⁶⁴

555 29 U.S.C. § 793.

556 41 C.F.R. pt. 60-741.

557 38 U.S.C. § 4212.

558 41 C.F.R. pt. 60-300.

559 29 U.S.C. § 793 (Section 503); 38 U.S.C. § 4212 (VEVRAA); 41 C.F.R. § 60-300.2 (EO 11246).

560 *Id.*

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

562 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 pt. 60-4 (EO 11246).

563 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/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.

564 See <https://www.dol.gov/ofccp/regs/compliance/faqs/juristn.htm#Q5>.

The limits of the OFCCP's jurisdiction over providers were further delineated in 2000 by the decision of the Department of Labor's (DOL) Administrative Review Board (ARB) in *OFCCP v. Bridgeport Hospital*.⁵⁶⁵

In *Bridgeport Hospital*, 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 asserted jurisdiction over the hospital, claiming the hospital's arrangements with Blue Cross for reimbursement constituted a covered government subcontract.

The hospital objected to this assertion of OFCCP jurisdiction. The claim was eventually heard by the ARB, which ruled that the hospital 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 rendering medical services to FEHBP beneficiaries (and accepting reimbursement from Blue Cross), the hospital 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.⁵⁶⁶ 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 reviewed in *OFCCP v. UPMC Braddock*,⁵⁶⁷ 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.⁵⁶⁸

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

The Code of Federal Regulations defines a "contractor" as a prime contractor or subcontractor.⁵⁶⁹ *Prime contractors* include entities holding government contracts valued in excess of \$10,000 for purposes of the nondiscrimination mandate contained in EO 11246. Likewise, government contracts valued in excess of \$15,000 require compliance with the nondiscrimination mandate contained in Section 503.⁵⁷⁰ However, the more onerous

565 1997-OFC-01 (Jan. 21, 2000).

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

567 2013 U.S. Dist. LEXIS 45953 (D.D.C. Mar. 30, 2013).

568 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.

569 41 C.F.R. § 60-1.3.

570 41 C.F.R. pts. 60-1, 60-741, as amended by the Federal Acquisition Regulation, 75 Fed. Reg. 53129 (2010).

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.⁵⁷¹ VEVRAA's affirmative action obligations do not apply unless an employer: (1) has 50 or more employees; and (2) holds government contracts of \$150,000 or more.⁵⁷² 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.⁵⁷³

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.⁵⁷⁴ Subcontractors are subject to AAP requirements only if they, too, meet the 50-employee and \$50,000/\$150,000 thresholds.⁵⁷⁵

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.⁵⁷⁶

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.⁵⁷⁷ "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.⁵⁷⁸

4. Nondiscrimination Obligations

Federal equal opportunity obligations require several active measures by federal contractors and subcontractors. First, a contractor or 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 DOL's "Equal Employment Opportunity is the Law" poster at each physical location;
- adopting and communicating to applicants and employees specific policy language protecting employee communications regarding compensation; and
- if unionized, notifying unions with which the entity has a collective bargaining agreement of its equal employment opportunity and affirmative action obligations.⁵⁷⁹

571 *Id.*

572 41 C.F.R. pt. 60-300-40, as amended by the Federal Acquisition Regulation, 80 Fed. Reg. 38293 (2015).

573 40 C.F.R. pt. 60-2.1(b)(1).

574 40 C.F.R. pt. 60-1.3.

575 41 C.F.R. pt. 60-2.1(b).

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

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

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

579 41 C.F.R. § 60-1.4 (EO 11246), 41 C.F.R. § 60-741.5 (Section 503).

In addition, a contractor or subcontractor that has at least one federal contract or subcontracts worth \$150,000 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); and
- 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.⁵⁸⁰

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.⁵⁸¹ A contractor or subcontractor holding a single contract worth \$150,000 or more and with 50 or more employees must further prepare an annual affirmative action plan for protected veterans.⁵⁸²

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 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.⁵⁸³

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

⁵⁸⁰ 41 C.F.R. § 60-300.5 (VEVRAA).

⁵⁸¹ 41 C.F.R. pt. 60-1 (EO 11246), 41 C.F.R. § 60-741.40 *et seq.* (Section 503).

⁵⁸² 41 C.F.R. § 60-300.40 *et seq.* (VEVRAA).

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

administrative proceedings before the DOL's ARB—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.⁵⁸⁴

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.⁵⁸⁵ 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.⁵⁸⁶

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.⁵⁸⁷

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 DOL administrative law judge (ALJ).⁵⁸⁸ 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.⁵⁸⁹

The ALJ concluded that the hospital, through its participation in the TRICARE program, was performing a portion of HMHS's obligations to the DoD under its contract, thus making the 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.⁵⁹⁰ The hospital appealed the ALJ's decision to the DOL's ARB.

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

585 U.S. Dep't of Labor, OFCCP, Directive No. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

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

587 See, e.g., U.S. Dep't of Labor, OFCCP, Directive No. 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010).

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

589 *Id.*

590 *Id.*

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).⁵⁹¹ 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.*⁵⁹²

Relying on this provision, the ARB ruled in favor of *Florida Hospital* in October 2012.⁵⁹³ 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."⁵⁹⁴

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.⁵⁹⁵

4. Congressional Oversight

In 2013, continuing concerns in Congress led to the introduction in the House of Representatives, initially with bi-partisan support, of the Protecting Health Care Providers from Increased Administrative Burdens Act.⁵⁹⁶ 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 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.⁵⁹⁷

5. The OFCCP Twice Forestalls Resolution

On May 7, 2014, the OFCCP issued a directive establishing:

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

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

592 *Id.* at § 715 (emphasis added).

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

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

595 *Id.*

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

597 *Id.* at § 2.

assistance to provide greater clarity for the TRICARE subcontractor community about their obligations under the laws administered by OFCCP.⁵⁹⁸

On May 18, 2018, the OFCCP issued a second directive further extending the TRICARE moratorium until May 7, 2021.⁵⁹⁹

The directives make it clear that the OFCCP is still maintaining that it has jurisdiction over TRICARE providers. Indeed, the 2014 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.⁶⁰⁰ However, there is some hope that the 2018 directive, and its extension of the moratorium, may signal a first step toward OFCCP abandoning its claim of jurisdiction based on TRICARE participation. Specifically, the 2018 directive notes that the “OFCCP has determined that it would be beneficial to the national interest and the health of veterans and their families to extend the moratorium to provide additional time to receive feedback from stakeholders.” The 2018 directive also cites a Government Accountability Office report documenting the “difficulties active-duty and retired service members and their families have accessing healthcare” and expressing a concern “that the continued uncertainty over the extent to which the E.O., Section 503, and VEVRAA apply to TRICARE subcontractors has contributed to this difficulty.”⁶⁰¹

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.⁶⁰² 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.”⁶⁰³ 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.

In a 2010 directive (Directive 293), the OFCCP confirmed that Medicare Parts A and B are FFA programs outside of the agency’s reach.⁶⁰⁴ However, it claimed also that “potential covered contracts or subcontracts may

598 U.S. Dep’t of Labor, OFCCP, Directive No. 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014).

599 U.S. Dep’t of Labor, OFCCP, Directive No. 2018-02, TRICARE Subcontractor Enforcement Activities (May 18, 2018) (amending the moratorium in Directive 2014-01), available at https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_02_ESQA508c.pdf.

600 U.S. Dep’t of Labor, OFCCP, Directive No. 2014-01 (May 7, 2014).

601 U.S. Dep’t of Labor, OFCCP, Directive No. 2018-02 (May 18, 2018).

602 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).

603 U.S. Dep’t of Labor, OFCCP, Directive No. 189, Health Care Entities That Receive Medicare and/or Medicaid (Dec. 16, 1993).

604 U.S. Dep’t of Labor, OFCCP, Directive No. 293, Coverage of Health Care Providers and Insurers (Dec. 16, 2010).

include contracts related to Medicare Advantage (Part C) or Part D programs.”⁶⁰⁵ Additionally, the OFCCP stated that it could exercise jurisdiction over Medicare Parts A and B providers if they participated in Parts C and D.

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.⁶⁰⁶ 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.”⁶⁰⁷ 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.⁶⁰⁸

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

7. OFCCP May Have Jurisdiction over Participants in Medicare Parts C and D

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.⁶⁰⁹ Medicare Part C, or “Medicare Advantage,”⁶¹⁰ which was enacted in 1997 and 2003, allows individuals to receive their Medicare benefits from privately managed healthcare

605 *Id.*

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

607 U.S. Dep’t of Labor, OFCCP, Directive No. 301, Notice of Rescission (Apr. 25, 2012).

608 U.S. Dep’t of Labor, OFCCP, 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).

609 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.

610 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.

insurers, known as Medicare Advantage Organizations (MAOs).⁶¹¹ The MAOs may, in turn, contract with providers for services.⁶¹² Medicare Part D functions, as in the case of Medicare Advantage, through private companies.⁶¹³

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.⁶¹⁴ 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].⁶¹⁵

Additionally, the CMS has limited regulatory authority to intervene in payment disputes between MAOs and their providers.⁶¹⁶

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.

8. The VA Mission Act of 2018

Concerned that the costs of compliance with OFCCP's rules are preventing providers from contracting with the Veterans Administration or State homes to furnish hospital care, medical service, or extended care service to veterans, Congress passed legislation in 2018 applying the terms of OFCCP's TRICARE moratorium to eligible entities entering into Veterans Care Agreements.⁶¹⁷

611 See 42 C.F.R. § 422.300 *et seq.*

612 *Id.*

613 See 42 C.F.R. pt. 423.

614 See 42 C.F.R. § 422.304.

615 395 F.3d 555, 558-59 (5th Cir. 2004) (internal citations omitted).

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

617 Pub. L. No. 115-182, §§ 102, 103 and 107.

This recent Congressional action provides some cause for optimism that OFCCP may finally acknowledge that Congress, in passing the NDAA of 2012, had intended to deprive OFCCP of jurisdiction over providers based only on the providers' participation in TRICARE.

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, little has changed as a result of the OFCCP's continued 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 to 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.

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 2021 and could include within their scope periods as early as 2020.

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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