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A New "Top 10"

Threats, Traps And Surprises Emerging From The Changing Legal Environment

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If attracting, developing and retaining a high-performance workforce is not challenging enough, recent developments have opened the door to emerging new legal hazards for healthcare employers. Whether arising from legislative action, a court ruling or administrative decision, these issues merit serious attention.

Although some are less than obvious, overlooking these threats can lead to time-consuming and costly investigations or litigation. With this in mind, here is a Top Ten List of Traps emerging from our changing legal environment, with some comments about safeguarding your hospital or healthcare organization:

10. Rigidly following policies that limit leaves of absence

Historically, most hospitals' policies have allowed employees some additional time off after exhausting leave entitlements under the Family and Medical Leave Act (FMLA). Typically, such policies limited leaves to a specified number of weeks. After FMLA leave ran out, policies stated that reinstatement to the same or equivalent position was possible, but not guaranteed.

As the Americans with Disabilities Act (ADA) has evolved, these policies have been successfully challenged. Although counter to the general HR practice of consistent policy enforcement, rigid adherence to a policy limiting leave of absence to a fixed number of weeks almost certainly violates the ADA.

As a result, hospitals that have not already done so must update their leave policies and practices. They must ensure that leave involving an employee who is "disabled" includes some flexibility; specifically an interactive process and individualized analysis of the employee's circumstances. You can no longer strictly adhere to a facially non-discriminatory policy that limits the length of leaves. Moreover, a policy allowing up to six weeks leave after exhaustion of FMLA likely supports a presumption that the additional time is "reasonable."

But to be considered a "reasonable accommodation" under the ADA, additional leave *must also provide for reinstatement to the same or equivalent position*. For most hospitals, these developments demand a fundamental policy change. Accordingly, it's critical to review and revise leave policies and practices that do not reflect these requirements. Violations can be costly.

9. Automatic time deductions for employee meal periods

Both the Department of Labor and plaintiffs' lawyers continue to focus considerable attention on healthcare employers. One fertile area for unpaid wage claims has been missed meal periods, particularly where the hospital uses a timekeeping system that automatically assumes and deducts 30 minutes for a scheduled meal period.

Employers must maintain accurate records of time that non-exempt employees work. It is quite difficult to defeat wage claims by arguing that the employee had the responsibility to report and ensure correction of automatic deductions when unable to take a meal break. Accordingly, many hospitals are returning to the practice of having employees clock out for meal breaks and clock back in afterward. Even though neither employees nor supervisors necessarily like it, automatic deductions are apparently becoming a thing of the past. Thus, your hospital should review the reasons for and reliability of any automatic deductions programmed into its time-keeping system.

8. Overbroad restrictions on employees' social media activity

The explosive popularity of social media presents questions that did not even exist a few years ago. No longer predominantly the domain of younger employees, tweeting and posting to Facebook involves employees of all ages. As employers update their policies, new questions arise. For example, last year the National Labor Relations Board (NLRB) challenged an employer policy, contending that it illegally restricted workers' rights to engage in concerted, protected activity. The question arose when an employee criticized her supervisor, eliciting several related comments from her Facebook friends.

The company policy prohibited employees from disparaging the company or its supervisors on social media sites. This complaint was settled, so there remains little firm guidance regarding the social networking aspect of the issue. But it's clear that employees have the right to comment and confer with each other for the purpose of mutual aid or protection. These rights apply whether or not the workplace is unionized. Questions still remain as to precisely how and to what extent an employer may restrict an employee's posting on social media sites. In the meantime, hospitals must be cognizant that the Board will scrutinize this area closely and is poised to attack policies that it believes are overbroad.

7. Not knowing whether your organization is a federal contractor

Healthcare providers subject to federal contractor requirements must comply with affirmative action obligations under several federal laws, including implementation of a detailed, written Affirmative Action Program (AAP). They must also list all open positions with relevant state unemployment agencies and demonstrate outreach efforts for minorities, women, veterans and disabled applicants. Historically, receipt of Medicare reimbursement or federal grants has not created contractor status. But the Office for Federal Contract Compliance Programs (OFCCP) has recently extended its interpretation of just who is considered a federal contractor.

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Last year OFCCP expanded its reach by determining that coverage is triggered by participation in managed care networks that provide services to beneficiaries of TRICARE, Medicare Advantage and the Federal Employees Health Benefit Plan (FEHBP). (This development was discussed in detail in our February 2011 *Healthcare Update*). It can represent a significant change for some healthcare providers and underscores the importance of monitoring whether your organization is a federal contractor, especially in view of the OFCCP's new, more aggressive position regarding enforcement.

6. *Running afoul of a growing list of "whistleblower" laws*

When it comes to so-called whistleblower protection, provisions of the Patient Protection and Affordable Care Act and the False Claims Act represent just the tip of an iceberg that seems to keep growing. Both federal and state laws provide many whistleblower protections. In many cases, the scope of protected activity is extremely broad, making this a particularly thorny area for hospitals.

One of the best ways to safeguard against these claims is to, as always, thoroughly and precisely document the reason(s) for disciplinary actions and terminations. It is also especially helpful to ensure that policies and training materials provide and explain alternative ways for employees to make complaints or report suspected violations of policy, regulations or law. It may be a good idea to provide a hotline for this purpose. Additionally, policies *and practices* must make clear that the hospital will not tolerate retaliation for making such reports.

5. *Overlooking potential Title VII claims by third parties*

Following the U.S. Supreme Court's decision in *Thompson v. North American Stainless LP*, employers face potential retaliation claims by not only employees who actually engage in "protected activity" (such as making a complaint of unlawful discrimination), but also by employees who have a close relationship with whoever engages in protected activity. In *North American*, the Court said the fiancé of an employee who filed a discrimination charge could bring her own distinct retaliation claim. Even before this decision, retaliation was the leading category among all EEOC charges filed. That trend now seems certain to continue.

The decision sounds a warning for employers because, among other things, it does not define precisely what relationship is necessary to assert a retaliation claim. Thus, relatives or even friends of employees who engage in protected activity could bring their own claims if they experience actions such as demotion, discipline or termination. Keep this in mind when you contemplate taking any such actions.

4. *Overbroad solicitation and distribution policies*

This issue is important from both a policy and practice perspective, especially in areas where unions are attempting to organize workers. Employees can be required to limit solicitation activity to non-working times, away from immediate patient care areas, but blanket or across-the-board prohibitions are unlawful. A good general rule is, "working time is for work." A hospital may prohibit distribution of non-institutional materials in working areas at any time. Besides reviewing policy language, hospitals must ensure that they are actually doing what their policies say. Again, the current pro-labor Board is poised to intervene where it believes an employer is overreaching. As employers will receive little or no benefit of the doubt, it is important to ensure these policies and practices are current.

3. *Not keeping your HR policies up-to-date*

As in the previous example, it is important to ensure that your HR practices match your policies. Plaintiffs' attorneys like nothing more than showing that an employer did not follow its own written guidelines. For example, does your policy prohibit gambling in every form, while in practice, employees, including supervisors, actually participate in Super Bowl or March Madness pools? You can help avoid this dilemma by building flexibility into policy language and avoiding rules or prohibitions that are absolute.

On the other hand, policies such as those dealing with the FMLA demand detailed, precise language because regulations require specific communications and actions. To ensure that policies remain accurate and up-to-date, schedule regular reviews that incorporate input from supervisors who are responsible for day-to-day compliance. It is also vital to remind supervisors of these policies on a systematic basis.

2. *Adopting policies that overreach*

Recently some hospitals have implemented blanket rules against employing people who use tobacco. Such policies, which delve deeply into employees' legal conduct away from work, can be tricky and problematic. While they may be appropriate in some cases, it is important to examine the hospital's objectives and tailor the policy accordingly. Be especially careful about this when the policy could uniformly affect an entire group or class, such as tobacco users. In this situation, many state laws protect tobacco users from employment-related discrimination. Other legal issues, including ADA claims, could potentially arise in this context.

When considering policies that include broad prohibitions or penalties, it can be helpful at least to consider alternatives, such as encouraging or rewarding smoking-cessation programs. Similar approaches can be used to encourage exercise, weight-loss or other lifestyle changes. In any case, the employee relations aspects of such decisions are important and should also be taken into account. If a broad prohibition is best for your hospital, consider how you will handle unusual situations, including requests for exceptions, and address them in your policy.

1. *Failing to keep abreast of new developments*

Whatever methods you use, it is critical to follow legal, technological and cultural developments that affect your workforce. Though we do not know what specific changes will come next, there is little doubt that change will continue at a rapid pace.

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