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Five Key Employment Law Issues Facing the Health Care Industry

Employers in the health care industry are dealing with a growing number of employment law challenges. In this edition of *Take 5,* we identify the key issues confronting health care employers and discuss how to manage these challenges.

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First, as health care employers continue to face a rise in the number of workplace violence incidents, we examine measures to address and curb these incidents. In addition, in light of the fact that health care employers are increasingly vulnerable to allegations of False Claims Act violations, we identify the steps that employers should consider when responding to resignation letters alleging health care fraud. We pinpoint the employment law risks that buyers should recognize and assess during the due diligence process as well as the restrictive covenant issues to consider in health care transactions. Finally, we focus on the data privacy and security requirements under Europe's new privacy law and the steps for complying with these requirements.

The five articles are as follows:

1. **Protecting Health Care Workers from Workplace Violence**
2. **What Is the Best Response to Righteous Indignation Resignation Letters Relating to Allegations of Health Care Fraud?**
3. **Buyer Beware: Hidden Employment Due Diligence Issues in Health Care Transactions**
4. **Restrictive Covenants in the Health Care Industry**
5. **What Health Care Employers Need to Know About GDPR's Privacy and Security Requirements**

1. Protecting Health Care Workers from Workplace Violence

By Nathaniel M. Glasser and Andrea K. Douglas

Incidents of workplace violence are on the rise overall. Health care workers suffer the greatest number of reported workplace injuries, with over 650,000 individuals injured each year. A recent report from the U.S. Government Accountability Office indicates that assaults and attacks in hospitals result in "at least" five times more lost work days than in private-sector employment settings overall. In addition to the physical toll of an assault, violence may have an adverse effect on health care workers' job motivation, potentially compromising the quality of care that they provide to patients and clients. While lawmakers have recently introduced legislation aimed at curbing incidents of workplace violence in health care settings, at present, there are no federal laws or regulations that explicitly address this problem. But other sources provide guidance to health care industry employers seeking to reduce the occupational hazard presented by workplace violence.

As we reported previously, governments and health care industry overseers have recently taken additional strides to combat violence in health care employment settings. In enacting the Workplace Violence Prevention regulation, effective April 1, 2018, California became the first state to require health care facilities to develop and implement comprehensive workplace violence prevention programs. In addition, on April 17, 2018, the Joint Commission—a nonprofit organization that provides accreditations to health care organizations—developed a list of steps that hospitals should take to improve safety and reduce the risk of workplace violence. Finally, the Occupational Safety and Health Administration ("OSHA") recently overhauled its Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers. The California law and the guidelines promulgated by OSHA and the Joint Commission provide important takeaways for health care employers evaluating workplace violence prevention programs.

Provide Workplace Violence Prevention Training

California's Workplace Violence Prevention regulation mandates that health care industry employers in that state develop a violence prevention plan that includes annual personnel education and training. Health care industry employers in all jurisdictions should consider implementing similar training programs to help employees recognize and report episodes of workplace violence. Both the Joint Commission's and OSHA's guidelines suggest that training should include a definition of "workplace violence" as encompassing a wide range of behaviors, which may include verbal assaults as well as physical acts of aggression. Educating health care workers on the behaviors that are considered "workplace violence" may help employees in health care settings recognize and appropriately report violent incidents.

Develop a System for Investigating and Responding to Violent Incidents

The Workplace Violence Prevention regulation also requires health care industry employers in California to adopt a comprehensive plan for responding to workplace

violence. Both the Joint Commission and OSHA recommend that response protocols include information about the use of de-escalation techniques, the response to alarm systems, the use of safe rooms, escape plans, and the reporting of any instance of physical or verbal violence towards health care workers. OSHA's guidelines identify steps to follow in conducting incident investigations, including reporting; identifying root causes; and reviewing relevant information, such as training records and past incident reports.

Implement Procedures to Assess Safety and Security Measures

California's Workplace Violence Prevention regulation also requires that health care industry employers annually evaluate factors that could prevent workplace violence in their facilities. Similarly, OSHA and the Joint Commission recommend that health care employers frequently assess the workplace to identify potential hazards that may lead to incidents of workplace violence and revise violence prevention plans appropriately. Health care employers should also solicit input from health care workers, security staff, and custodial personnel when inspecting the workplace and identifying physical spaces presenting greater risks of violence against employees. Employers should consider interventions tailored to health care settings, including maintaining clear sightlines when employees are caring for patients, providing access to panic buttons or phones to call for emergency assistance, and fortifying security at points of entry and parking lots.

By taking steps to address workplace violence, health care employers will foster a workplace that allows employees to focus on patient care. Implementing effective workplace violence programs can lead to improved employee safety and morale. Health care employers should consult counsel to develop workplace violence prevention programs that are effective and compliant with applicable laws.

2. What Is the Best Response to Righteous Indignation Resignation Letters Relating to Allegations of Health Care Fraud?

By Kathleen M. Williams, Jonathan K. Hoerner, and Ashley Creech*

Health care employers continue to remain vulnerable not only to allegations of False Claims Act violations but also to associated retaliation complaints. As noted in a Department of Justice ("DOJ") press release, in fiscal year 2017, the DOJ received $3.7 billion in settlements and judgments involving false claims—$2.4 billion in the health care industry, involving drug companies, hospitals, laboratories, physicians, and pharmacies. Many of these settlements and judgments grew out of *qui tam* lawsuits, a type of lawsuit under the False Claims Act that allows a person—known as a "whistleblower"—who exposes fraudulent information and activity against the government, to sue on behalf of the government.[1] While a *qui tam* lawsuit can be brought by any private person, it is often

[1] 31 U.S.C. § 3729 *et seq*. If the *qui tam* lawsuit is successful, whistleblowers can receive a reward of 15–30 percent of the government's recovery.

initiated by contractors, employees, or former employees as these individuals typically have greater access to detailed information about the operations of the health care entity.

Employees, as well as contractors, who are whistleblowers are protected under the False Claims Act from retaliation by their employer. If an employer takes an adverse action against an individual because that individual engaged in protected activity under the False Claims Act (such as making certain types of complaints that the employer's actions are illegal), the employer may be held liable for retaliation under the False Claims Act.[2]

Before filing a *qui tam* lawsuit, a resigning employee may submit a "righteous indignation resignation letter"—i.e., a resignation letter alleging discrimination, injustice, fraud, mistreatment, or other wrongdoing. Oftentimes, the departing employee claims to have been morally compelled to resign, in which case a claim of constructive discharge may be made. Generally, to establish constructive discharge, an employee must prove that working conditions were so intolerable that a reasonable person would be forced to resign. In some circuits, the employee would also generally be required to prove that the employer intentionally made working conditions intolerable in order to force the employee to resign. However, the U.S. Court of Appeals for the Sixth Circuit in *Smith v. LHC Group, Inc.*, 2018 U.S. Dist. LEXIS 5345 (March 2, 2018), recently held that an employee's claim may proceed absent proof of an intentional forced resignation where the resignation was a reasonably foreseeable response to inappropriate working conditions. More specifically, the court stated that "[t]he jury may find that the employer's alleged fraudulent behavior plus the employee's moral conscience and reasonable fear of being accused of participating in the employer's fraud is enough to justify quitting."

Appropriate "Response" to Righteous Indignation Resignation Letters

While it is impossible to prevent all fraud claims and retaliation actions, a health care employer should carefully consider the content of righteous indignation resignation letters, as well as the content of exit interviews.[3] Of course, health care employers should ensure that they have a robust compliance program—robust not only "on paper" but also in actual day-to-day operation—that includes information from multiple sources. The compliance program should include a formal complaint process as well as hotlines and other anonymous reporting mechanisms. This complaint process should include reporting pathways both up the chain of command as well as to people outside an employee's immediate department. One possible avenue is to advise employees that they can report concerns directly to the human resource ("HR") department or the compliance department. In addition to having a formal complaint process, health care employers must thoroughly investigate complaints received so that employees trust the process. This

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[2] 31 U.S.C. § 3730. Relief may include the reinstatement of an employee's position before the discrimination, twice the amount of back pay, interest on the back pay, and compensation for special damages as a result of the discrimination, including attorneys' fees.

[3] For a helpful checklist regarding responses to internal complaints, see https://www.ebglaw.com/content/uploads/2018/06/Garland-Glasser-Adams-Preventing-and-Responding-Internal-Retaliation-Complaints-Checklist-June-2018.pdf.

investigation should include matters that an employer first learns about as part of the exit interview process or through a post-resignation letter.

During employment, the complaint process should also include a mechanism for following up directly with the employee who submitted a complaint. This can help ensure that employees know that their concerns are being taken seriously and can also serve as a mechanism to educate employees when their concerns are misplaced. By addressing an employee's incorrect understanding of the law, employers can help prevent an employee from feeling like he or she has a "moral obligation," or is being forced, to resign. There may be different considerations in responding to a post-resignation letter, and, in some instances, reaching out to a terminated employee may not be wise. However, the content of such letters must be taken as seriously as one would take them during the course of employment.

As is the case with a comprehensive exit interview, a post-resignation letter could yield helpful information to the employer in identifying compliance issues and might also be one last opportunity to convince an employee that his or her opinions are heard and valued. This could prevent the employee from feeling compelled to file a whistleblower lawsuit. The post-resignation letter also presents an opportunity for employers to examine on a contemporaneous basis whether the employee made the same complaints during employment.

No magic solution exists for preventing all righteous indignation resignation letters or claims of unlawful retaliation. However, a health care employer can make sure that its employees have an opportunity for their voices to be heard in other ways so they do not feel that a scathing resignation letter is their only chance to be taken seriously by the employer.

3. Buyer Beware: Hidden Employment Due Diligence Issues in Health Care Transactions

By Denise Merna Dadika

Health care mergers and acquisitions have been on a tear in recent years and are proceeding at a rapid pace in 2018 with transactions reaching a record $156 billion in the first quarter of 2018. As the deal volume is expected to continue throughout 2018, buyers should make certain to consider all the legal implications of the transaction early in the planning process. In the health care industry, the due diligence process typically focuses on regulatory compliance and risks. Buyers, however, should not overlook the potential employment implications of a proposed transaction.

The employment issues that should be reviewed during the due diligence process include individual employment agreement issues; non-compete and trade secret agreements; executive compensation plans; immigration compliance; occupational health and safety risks; recent and pending discrimination, harassment, and/or retaliation claims; and federal and state facility closing and mass layoff laws. In addition, buyers should also

concentrate on uncovering independent contractor misclassification, employee misclassification under wage and hour laws, and pay inequities given the increased focus and risks associated with these issues.

Misclassification of Independent Contractors

The misclassification of independent contractors pose significant risks for buyers and should be a priority during due diligence. While the Trump administration has abandoned the aggressive enforcement initiatives established by the Obama administration, the U.S. Department of Labor and the Internal Revenue Service remain active in investigating and auditing companies regarding the use of independent contractors. In addition, an increasing number of state task forces have been formed, most recently in New Jersey, to combat worker misclassification.

Potential liability for independent contract misclassification can be quite costly and includes unpaid overtime or other wage-based claims (e.g., minimum wage as well as meal and rest breaks), federal and state payroll tax liability for unpaid employer and employee withholdings and payments and penalties for non-payment, liability for unemployment insurance tax premiums and penalties for non-payment, liability for workers' compensation and disability premiums and penalties for non-payment, and liability for benefits that should have been provided to the misclassified employee.

Given the increased scrutiny, the steady stream of class action lawsuits alleging misclassification, and the potential liability for independent contractor misclassification, buyers should focus on understanding whether there are misclassification concerns during the due diligence process. To evaluate the potential risk, a buyer initially should request and review the following: a contractor census, which should include a list of the contractors for the current and prior three years and a description of the services provided; pending and past misclassification claims; and/or any findings of contractor misclassification issued by federal or state agencies. An additional investigation may be needed depending on the potential concerns discovered during the initial review of documents.

Misclassification of Employees

Misclassifying employees as exempt also can lead to significant exposure for a buyer in a transaction. Exempt employees are paid on a salary basis for any and all hours worked in a week, whereas non-exempt employees must be paid the minimum wage for all hours worked and overtime pay for all hours worked in excess of 40 hours in a workweek. The rules relating to the exemption issues are complex, which leads to the misclassification of employees. Employers are regularly hit with large fines and overtime damages in class action litigation and Department of Labor investigations for misclassifying non-exempt workers as exempt.

Under federal law, employees misclassified as exempt may be entitled to back overtime wages and an amount equal to the unpaid back overtime wages in liquidated damages

for a two- or three-year period depending on whether the violation is found to be "willful," as well as the employee's reasonable attorney's fees. State laws may afford greater remedies; for example, New York law provides back overtime wages for up to a six-year period.

To understand the potential exposure for employee misclassification claims, a buyer should request and review the following during the due diligence process: the employee census, which should include each employee's job title, department, salary or hourly wage, and classification as exempt or non-exempt; organizational charts; job descriptions; internal and external classification audits; and any complaints (or demand letters) alleging misclassification.

Pay Equity Issues

Another area of increased focus by the states is equal pay. As we previously reported, there were approximately 100 bills relating to equal pay introduced in the state legislatures in 2017 in more than 40 jurisdictions. The activity has continued in 2018, with Washington State and New Jersey passing legislation to bolster pay equity requirements.

Equal pay laws prohibit employees from paying lower wages to employees of one gender (some state laws also prohibit unequal pay on the basis of race, national origin, or any protected class) than to employees of the other for performing equal work. The requirements vary among the state laws, with some requiring equal pay for "equal" work, and others requiring equal pay for "comparable" or "substantially similar" work.

An employer that fails to provide equal pay under federal law may be liable for back wages for a minimum of a two- or three-year period depending on whether the violation is found to be "willful." The back pay periods vary under state laws, with New Jersey providing the largest period—six years. Employers may also be liable for liquidated damages doubling or tripling the back pay award.

To assess the potential risk of unequal pay practices during the due diligence process, a buyer should request and review the following: the employee census, which should include each employee's job title, department, salary history, gender, and race; job descriptions; compensation policies; internal pay equity audits; and any complaints (or demand letters) alleging unequal pay practices.

In light of these potential employment law liabilities, buyers should retain employment counsel when a health care transaction is contemplated in order to uncover these and other employment law risks. By doing so, a buyer will have an opportunity to assess its potential liabilities and obligations and determine whether to withdraw from the transaction, modify the purchase price, and/or negotiate language in the purchase agreement to minimize its exposure.

4. Restrictive Covenants in the Health Care Industry

By Kevin J. Ryan

Restrictive covenants are common in the health care industry, particularly when there is a health care acquisition or merger. However, it is important to understand that the enforcement of restrictive covenants may depend on the entity that is trying to enforce them and applicable state law.

Health care transactions often include a host of restrictive covenants, which may be contained in purchase agreements, services agreements, management agreements, and employments agreements. The most common restrictive covenants are covenants not to solicit, covenants to maintain confidentiality, and covenants not to compete. These covenants are not always treated equally, and they may be enforced for some parties, but not others, and they may also be enforced in some agreements, but not others.

Restrictive covenants are subject to state laws, so each state may handle them differently. For example, covenants to maintain confidentiality may be enforced in all states with few limitations. Covenants not to solicit employees and customers of the existing company may have some restrictions depending on whether a solicited employee is a current or recently departed employee or whether the solicited customer is a current client or a prospective client. In some states, covenants not to compete are expressly prohibited in most employment circumstances, e.g., California. But California will allow enforcement of a covenant not to compete that is included in the sale of a business; so, a California health care provider selling his or her business may have a restrictive covenant upheld. There are other states that allow covenants not to compete in many industries but prohibit them for health care providers. Finally, many states allow covenants not to compete but limit their scope to a reasonable time and geographic restriction.

Enforcement of restrictive covenants may also depend on the party trying to enforce them. This is particularly true in the enforcement of covenants not to compete. There are many states that have a prohibition on a general business corporation practicing a profession, such as medicine, dentistry, optometry, or veterinary. Some of these same states have exemptions for hospital, health maintenance organizations, or licensed health care entities to employ the professional. These distinctions may allow a hospital to enforce a covenant not to compete against a physician group, while denying a private equity company from enforcing that same covenant against a physician group. The rationale for this distinction is that a private equity owner can’t own a professional corporation, so the private equity firm can’t restrict a professional from practicing a profession that the private entity can’t practice. As a result, private equity firms often form management companies that manage the professional entity to be able to enforce a covenant not to compete that restricts the professional from engaging in management services that are competitive with the private equity-owned firm. In addition, the private equity-owned entity may also be able to prevent the provider from contracting with any other management company that provides similar services to what the private equity-owned firm provides.

Because of these distinctions on who can enforce restrictive covenants and which restrictive covenants can be enforced in a given state, it is essential that entities that wish to purchase a health care company seek counsel with experience in these matters.

5. What Health Care Employers Need to Know About GDPR's Privacy and Security Requirements

By Alaap B. Shah and Daniel Kim

On May 25, 2018, the General Data Protection Regulation ("GDPR") went into effect, which replaces the Data Protection Directive 95/46/EC and imposes new data privacy and security requirements on entities in the European Union ("EU") and abroad.

The regulations seek to unify data protection laws across Europe and strengthen privacy protection for individuals (called "data subjects"). The new law's reach is extensive and may impact any entity that processes data of EU residents (not just citizens). For example, the GDPR could apply to a non-EU health care employer that hires EU residents, either as employees or independent contractors. Likewise, entities that provide health care goods or services to EU residents while processing their personal data (i.e., any information relating to an identifiable person who can be directly or indirectly identified in particular by reference to an identifier) may also be subject to the GDPR. As the health care industry continues to globalize, entities that intend to expand internationally should expect to be subject to the new law.

The GDPR also expands the rights and protections of data subjects. Specifically, data subjects have certain rights regarding if, how, when, and why their personal data may be used. The GDPR also imposes data security requirements. Noncompliance can result in stiff penalties of up to €20 million or 4 percent of global revenue. Therefore, health care employers should quickly determine to what extent the GDPR affects them and what they should do to comply.

Individual Rights, Transparency, and Consent for Processing Sensitive Personal Data

The GDPR imposes new requirements to document and transparently communicate the legitimate grounds for collecting and processing personal data. GDPR may also require health care entities to obtain valid consent from data subjects in some cases. For example, the GDPR requires "explicit" consent to process "special categories of personal data" (e.g., employees' health information). Accordingly, it may become more difficult to obtain certain HR data, depending on whether explicit consent is required.

With that said, the GDPR allows entities to rely on one or more exemptions for processing special categories of personal data. For example, processing special categories of personal data to carry out obligations under employment law may be exempted from the consent requirement. Yet, entities availing themselves of such exemptions should

adequately document their lawful bases for processing to put themselves in a defensible compliance position.

GDPR also gives data subjects various rights related to access, data portability, and rectification and deletion of their personal data. Entities should evaluate what operational and technical mechanisms are in place to afford such rights to data subjects.

Impact on Background Screening

It is likely that the GDPR will affect how employers perform background screening. The transparency requirements may require entities to provide candidates with information about the screening process, including information about the processing of their personal data. The new law will presume that consent to process data for background screening will not be valid for subsequent purposes unless a data subject has provided explicit consent for such purposes. Furthermore, employers may need to suspend background screening if data subjects exercise their rights to restrict the processing. Accordingly, employers will need to determine how best to navigate these new requirements in conjunction with continuing to fulfill background screening in compliance with the Fair Credit Reporting Act and other applicable laws.

Cybersecurity Requirements

The GDPR also establishes various data security requirements. First, entities must appoint a data protection officer. Second, the GDPR requires implementing “a process for regularly testing, assessing and evaluating the effectiveness of technical and organizational measures for ensuring the security of the processing” of personal data. Third, to the extent a health care employer outsources data processing, such third-party data processors must be contractually bound to have data security controls in place. Fourth, the GDPR establishes requirements for data breach response.

Practical Steps to Comply with the GDPR

Health care employers subject to the GDPR should immediately take the following steps:

1. Appoint a data protection officer.

2. Develop a personal data map that includes repositories and data flows.

3. Conduct a gap analysis of policies and procedures.

4. Review and update employee notices regarding collecting and processing personal data.

5. Evaluate background screening processes.

6. Implement GDPR-compliant contractual language.

7. Adopt and leverage a risk-based approach to data security, including conducting a risk analysis.

During the early stages of the GDPR's rollout, it remains unclear how aggressively the new law will be enforced. Thus, it is imperative that health care entities work on compliance in the short term to put themselves in a defensible position in the long term. The consequences of noncompliance with the GDPR are severe and should serve as incentive enough for health care employers to proactively work towards compliance.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters, or any of the authors of this *Take 5:*

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