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Issue 7

The Health Care Workforce: Addressing Conscience Clauses, Diversity and Inclusion, and Personnel Shortages

Gina W. Calabro

Alyssa Riggins

7.1 Introduction

Health care leaders and human resource professionals can expect to encounter a number of workforce challenges in 2020 and beyond. Increased demand, frequent burnout, the growing skills gap, and workforce mobility are just a few such challenges. This chapter examines how these challenges are affecting the health care workforce and looks ahead to current trends seeking to address the rapidly changing workforce. This chapter also looks at how our employees are shaping the environment and culture of our workplaces, whether through conscience objectors or diversity and inclusion programs, such as Employee Resource Groups. This chapter concludes with practice tips and tools to address commonly vexing issues for employment lawyers.

7.2 Overview Of Key Legal Issues

Historically, health care organizations have faced a host of legal issues surrounding their workforce, including union campaigns, wage and hour class actions, negligent hiring and retention claims, and high turnover. Now, the health care workforce is changing like never before, and it is doing so at a rapid pace. Workforce shortages and the use of non-physician providers, the rise of telemedicine, and the use of gig workers are just a few changes affecting the health care industry. This rapid change brings with it a host of legal issues to consider. And, like with many rapid changes, the laws and regulations governing the health care workforce have been slow to catch up.

Legislation and regulations affecting the health care workforce are on the horizon. At the federal level, the United States Department of Health and Human Services published "Protecting Statutory Conscience Right in Healthcare; Delegation of Authority," which was set to go into effect on July 22, 2019. But the rule was quickly challenged in three lawsuits, discussed *infra,* and its fate is uncertain.

States are increasingly active in legislating the health care workforce. One area where states have taken action is to address the health care workforce shortage among physicians and non-physician providers. In addition, advocacy organizations are pushing for states to uniformly address the certification, licensure, and authority of non-physician providers. Telemedicine licensure, too, is handled on a state-by-state basis, potentially putting practitioners at risk when and if engaging in the practice of medicine across state lines.

Diversity and inclusion initiatives also are at the forefront of the health care workforce, as health care institutions serve an ever-increasing diverse patient population. But these voluntary programs are not without their legal challenges, as seen below.

7.3 The Current Environment

7.3.1 Conscience Clauses And Religious Objections

7.3.1.1 State of the Law

A conscientious objection in health care is "the refusal to perform a legal role or responsibility because of moral or other personal beliefs."[1] Most states have "conscience clauses" setting forth the rights of health care providers to refuse to provide services conflicting with their morals.[2] These clauses, and the related federal regulations, were enacted after *Roe v. Wade* to allow providers to opt out of performing legalized abortions. Today conscience clauses cover a number of other topics, including but not limited to, prescribing or filling contraception prescriptions and sterilization procedures.[3] In fact, 46 states have some sort of conscience clause laws or policies in place.[4] However, health care providers with moral objections have an obligation to minimize the disruption in delivery of care and burdens on other providers, and must alert their colleagues and supervisors to these objections.[5]

7.3.1.2 2019 Changes to Federal Regulations and Subsequent Litigation

On January 26, 2019, the Department of Health and Human Services (HHS) Office for Civil Rights (OCR) published a notice of

[1] Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 35-39 (Mary Crowley ed., 2008) [hereinafter Berlinger, *Conscience Clauses*].

[2] *Id.* at 35.

[3] *Id.* at 35-36.

[4] Nsikan Akpan, *What the new religious exemptions law means for your healthcare,* PBS (May 3, 2019) [hereinafter Akpan, *What the new religious exemptions law means for your healthcare*], https://www.pbs.org/newshour/health/what-the-new-religious-exemptions-law-means-for-your-health-care.

[5] Berlinger, *Conscience Clauses* at 38-39.

proposed rulemaking called "Protecting Statutory Conscience Right in Healthcare; Delegations of Authority."[6] OCR published a final rule (2019 Rule) on May 2, 2019 after 60 days of public comment.[7] The 2019 Rule replaced a 2011 rule that, according to the HHS press release on the matter, had "proven inadequate."[8]

Ultimately, the new rule generally restored regulations from the George W. Bush era while changing definitions to allow health care providers to refuse to perform a broader range of services.[9] Under the 2019 Rule, health care workers with a "religious or conscience objection" can object to participating in anything "with a specific reasonable and articulable connection" to the "objectionable" procedure.[10] Practically, this means that all workers even tangentially involved in the procedure can object—from the employee checking in the patient, taking vitals, performing the procedure, providing post-procedure care, or even billing the procedure.[11] Further, the 2019 Rule applies not only to the health care workers themselves, but also to entire institutions, meaning that institutions themselves can object to providing a specific type of care.[12]

The 2019 Rule, originally set to take effect on July 22, 2019, was quickly challenged in three lawsuits. Because of these lawsuits,

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[6] HHS.gov, Conscience Rule Vacated (Nov. 8, 2019), https://www.hhs.gov/conscience/conscience-rule-vacated/index.html.

[7] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 98 (May 2. 2019) (to be codified at 45 C.F.R. 88).

[8] Press Release, HHS.gov, *HHS Announces Final Conscience Rule Protecting Health Care Entities and Individuals* (May 2, 2019), https://www.hhs.gov/about/news/2019/05/02/hhs-announces-final-conscience-rule-protecting-health-care-entities-and-individuals.html.

[9] Akpan, *What the new religious exemptions law means for your healthcare*.

[10] *Id*.

[11] *Id*.; Alison Kodjak, *New Trump Rule Protects Health Care Workers Who Refuse Care for Religious Reasons,* NPR (May 2, 2019) [hereinafter Kodjak, *New Trump Rule Protects Health Care Workers*], https://www.npr.org/sections/health-shots/2019/05/02/688260025/new-trump-rule-protects-health-care-workers-who-refuse-care-for-religious-reason.

[12] Kodjak, *New Trump Rule Protects Health Care Workers*.

HHS delayed the effective date until November 22, 2019.[13] On November 6, 2019, however, the federal district court in *New York, et al. v. HHS, et al.* vacated the 2019 Rule in its entirety, holding that the 2019 Rule conflicted with federal laws governing the obligation of employers to accommodate religious views, and hospitals' need to provide emergency care.[14] A California federal district court in *City and County of San Francisco v. Azar II, et al.*[15] quickly followed suit, granting Plaintiffs' summary judgment motion on November 19, 2019, with a federal district court in *Washington v. Azar*[16] vacating the 2019 Rule in its entirety as well, on November 21, 2019.

As a result, federal conscience clause regulations revert to the 2011 rule that was in place prior to the 2019 Rule. However, litigation regarding the 2019 Rule continues, as HHS appealed decisions in *New York, et al v. HHS, et al.* on January 3, 2019, and *Washington v. Azar* on January 17, 2019.

7.3.1.3 Religious or Conscience Objections to Vaccines in the Workplace

Today, more than 600 health care organizations have mandatory vaccination policies that require employees to get a flu vaccine or risk losing their job.[17] Challenges to these policies on religious grounds have risen in recent years.[18] The EEOC, which takes a limited number of cases in a given year, has filed three related lawsuits on this topic recently. In *EEOC v. Mission Hospital,* an Asheville,

[13] HHS.GOV, CONSCIENCE RULE EFFECTIVE DATE MOVED TO NOVEMBER 22, 2019 (July 3, 2019), https://www.hhs.gov/conscience/conscience-rule-effective-date-moved/index.html.

[14] 19 Civ. 4676 (S.D.N.Y. Nov. 6, 2019).

[15] 411 F. Supp. 3d 1001 (N.D. Cal. Nov. 19, 2019).

[16] No. 2:19-cv-00183-SAB (E.D. Wash. Nov. 21, 2019).

[17] Y. Tony Yang & Ross D. Silverman, *Mandatory influenza vaccination and religious accommodation for health care workers: Lessons from recent legal challenges,* VACCINE, Vol. 36, Issue 28, 3998-4000 (May 19. 2018), https://doi.org/10.1016/j.vaccine.2018.05.071.

[18] *Id*. at 3998.

NC hospital granted over 250 flu vaccine exemptions to employees who applied by the hospital's deadline, but failed to grant three untimely requests.[19] Ultimately, Mission Hospital either discharged or suspended without pay the three employees for their refusal to get the flu vaccine.[20] The EEOC alleged that the hospital treated these employees differently because of their religion, stating that the imposition of an "arbitrary deadline" did not alleviate the hospital from its duty as an employer to evaluate and provide a religious accommodation.[21] The matter was ultimately settled when Mission Hospital entered into an agreement to give monetary compensation to the employees in question and revise its policy.[22]

In *EEOC v. St. Vincent Health Center*, the EEOC and St. Vincent entered into a consent decree, whereby the hospital paid a $300,000 fine and reinstated six employees.[23] These employees were previously terminated for failing to comply with hospital policy that required employees to provide a statement from a clergy member attesting to their religious beliefs in order to receive an exemption—this policy was ultimately eliminated in the consent decree.[24]

In *EEOC v. Baystate Medical Center*, a human resources employee, who had no contact with patients, refused a flu vaccine

[19] EEOC v. Mission Hospital, Inc., Civil Action No. 1:16-CV-00118 (W.D.N.C. 2017).

[20] *Id.*

[21] *Id.*

[22] Press Release, EEOC, *U.S. Equal Employment Opportunity Commission, Mission Hospital Agrees to Pay 89,000 To Settle EEOC Religious Discrimination Lawsuit* (Jan. 12, 2018), https://www.eeoc.gov/eeoc/newsroom/release/1-12-18.cfm.

[23] Press Release, EEOC, *U.S. Equal Employment Opportunity Commission, Saint Vincent Health Center To Pay $300,000 To Settle EEOC Religious Accommodation Lawsuit* (Dec. 23, 2016), https://www.eeoc.gov/eeoc/newsroom/release/12-23-16.cfm.

[24] *Id.*; EEOC v. Saint Vincent Health Center, Civil Action No. 1:16-cv-234 (W.D. Pa. Sept. 22, 2016).

on religious grounds.[25] Baystate's policy required the employee to wear a mask, but when the accommodation prevented the employee from doing her job, she was placed on unpaid leave.[26] The matter is currently pending in the federal district court for Massachusetts on cross motions for summary judgment.

Given this growing litigation trend, health care employers should consider their policies and procedures for employee vaccination refusals. An employer has a duty under Title VII to evaluate a belief and provide a religious accommodation unless the accommodation would pose an undue hardship on the employer. The request for accommodation is triggered when an employee identifies a sincerely held religious belief that conflicts with a workplace requirement, in this case, receiving vaccination.

Title VII defines "religious" very broadly, including "all aspects of religious observance and practice, as well as beliefs." This definition applies not just to commonly known religions, but all religious beliefs, no matter how new the beliefs are, or whether or not they are part of a formal church or sect. Determining whether beliefs are religious can be difficult. Supreme Court guidance on religious objections makes clear that belief in God or divine beings is not necessary, and that nontheistic beliefs can also be religious as long as they "occupy in the life of that individual a place parallel to that filled by God."[27]

Circuit courts used this guidance to come up with similar tests for employment matters. For example, the Third Circuit test queries whether the individual's beliefs "address fundamental and ultimate questions having to do with deep and imponderable

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[25] EEOC v. Baystate Medical Center, Inc.,, 3:16-cv-30086-MGM (D. Mass. Oct. 30, 2017).

[26] *Id.*

[27] *See* Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 877 F.3d 487, 490-91, (3d Cir. 2017) (*quoting* Welsh v. United States, 90 S.Ct. 1792, 1796 (1970)).

matters," and whether those beliefs are "comprehensive in nature" and accompanied by "formal and external signs."[28]

These tests put employers on notice that beliefs, even ones that on their face appear not religious, could be. A district court found veganism to be a religious belief, where a plaintiff cited biblical passages in her request for religious accommodation.[29] In denying the hospital's motion to dismiss, the court held that the plaintiff sincerely believed in adhering to veganism as part of her religious views, and, as such, her refusal to receive a flu vaccine with animal by-products was based on religious grounds.[30] However, it is important to reiterate that the employee's belief must be religious, not simply a belief. A general belief that one should not harm their own body, or that a vaccine may do more harm than good, is not religious.[31]

Once an employer determines the employee's belief is religious and sincerely held, the employer should engage with the employee to determine an appropriate accommodation. It is important that the employer cooperate fully in this process so that the employer can evaluate if the accommodation is reasonable. An employer does not have a duty to implement an accommodation if it would create an undue hardship or unduly burden co-workers.[32]

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[28] *Fallon,* 877 F.3d 487 at 491.

[29] Chenzira v. Cincinnati Children's Hosp. Medical Center, NO. 1:11-CV-00917 (S.D. Ohio Dec. 27, 2012).

[30] *Id.*

[31] *See e.g., Fallon,* 877 F.3d 487 at 492.

[32] In evaluating whether an accommodation would unduly burden the employer, a court will look at (1) the type of workplace; (2) the employee's job duties; (3) the cost of accommodation, taking into account the size and operation costs of the employer; and (4) the number of employees needing accommodation. It is worth noting that in the context of mandatory flu vaccine policies, some courts have included in the evaluation for undue hardship (1) the assessment of public risk posed at a particular time, (2) availability of effective alternative means of infection control, and (3) potentially the number of employees who request the accommodation as part of the balancing test. *See e.g.,* Robinson v. Children's Hospital Boston, Civil Action No. 14-10263-DJC (D. Mass. Apr. 5, 2016).

Potential reasonable accommodations include wearing a mask; moving the employee to a non-clinical position; or, depending on the religious objection, offering vaccines without a problematic ingredient, such as gelatin free (which also means pork free) flu vaccines.[33] In some instances, the reasonable accommodation may even be encouraging the employee to transfer to another position, and offering assistance toward doing so, or even, as was the case in *Robinson,* allowing the employee to use her earned time off to apply for other positions.[34]

7.3.2 Diversity and Inclusion

Diversity and inclusion (D&I) initiatives are a priority within many health care systems. These programs are voluntary, business-driven strategies based on qualitative and quantitative data to address gaps in the workforce and integrate change in the workplace. Sound rationales exist for making D&I initiatives a priority: (a) tangible, positive impacts on the organization's bottom line; (b) increased employee creativity and productivity; (c) boosts to workforce retention, development, and cultural efforts; and (d) expansion or deepening of patient relationships and care. D&I initiatives, which are sometimes referred to as "voluntary affirmative action programs," increase the representation of underrepresented groups and create benefits of a diverse workforce. These voluntary, self-directed programs allow the organization to determine what initiatives to implement and how to implement them, generally without regulation by any outside entity.

Why the increased attention on D&I programs? Census data projects that the population will become majority-minority by 2045,[35] thus making it crucial for health systems to prepare and train

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[33] *Id.* at 2.

[34] *Id.* at 7.

[35] UNITED STATES CENSUS BUREAU, 2017 NATIONAL POPULATION PROJECTIONS TABLES, TABLE 4. (2017) https://www.census.gov/data/tables/2017/demo/popproj/2017-summary-tables.html.

a workforce that is culturally responsive and equipped to provide quality care in a multicultural society. Yet, the Association of American Medical Colleges (AAMC) reports only about nine percent of current physicians identify as black or African American, Native American or Alaska Native, and Hispanic or Latino with the number of underrepresented minorities remaining flat in recent years.[36]

In light of these statistics, health care systems and organizations increasingly understand the need—and desire—to cultivate an environment of diversity and inclusion. This need extends beyond the numbers to an environment that is culturally aware, educated, and supportive of patients from all backgrounds and experiences.

7.3.2.1 Why Quotas Are Not Enough: Creating, Implementing, and Managing D&I Initiatives

Before creating and implementing a D&I program, it is important to understand what is meant by a diversity and inclusion or D&I initiative, and to distinguish diversity initiatives from equal employment opportunity and affirmative action.

Equal employment opportunity (EEO) refers to legislation such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and other federal, state, and local laws that prohibit employers from treating people differently based on certain defined characteristics. These types of laws cover most employers and are generally passive and prohibitory, setting forth what employers cannot do in making employment decisions.

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[36] AAMC, *Creating and Sustaining a Diverse and Culturally Responsive Workforce*, https://www.aamc.org/news-insights/diversity-issues; Rebecca Bollinger Parker, MD, et al., *Why Diversity and Inclusion Are Critical to the American College of Emergency Physicians' Future Success*, Annals of Emergency Medicine, Volume 69, No. 6, 714-717 (June 2017) [hereinafter Parker, *Why Diversity and Inclusion Are Critical*].

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