

HEALTH CARE LAW UPDATE

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Walking The Tightrope: Liability Concerns For Hospitals That Terminate Employees Following Internal Complaints

Employee complaints about healthcare practices are on the rise. One of the most difficult situations facing health care facilities today is terminating employees who have complained about operational issues. A recent federal court case in New Jersey illustrates the concerns and potential litigation that can arise when hospitals terminate employees who have voiced concerns about the hospital's operations.

Set forth below is a brief summary of this recent case, followed by a description of the New Jersey Conscientious Employee Protection Act, and a list of practical recommendations for hospitals to avoid and/or minimize the risk of these liabilities.

The Facts

The plaintiffs were employed as LPNs at a New Jersey hospital which provided a variety of services to the community, including various specialized programs for the homeless, the uninsured, and women and children. At various times throughout their employment, plaintiffs were assigned to these specialized programs. Plaintiffs claimed that patients in these programs received medication from social workers who were not properly licensed to dispense this medication in violation of the New Jersey Pharmacy Act.

Plaintiffs were terminated, and then filed suit in federal court alleging claims under the federal False Claims Act and New Jersey's whistleblower law — the New Jersey Conscientious Employee Protection Act ("CEPA"). With respect

to CEPA, the nurses claimed that they were subjected to a "hostile work environment" and later terminated after they objected to unlicensed individuals dispensing medication in violation of the New Jersey Pharmacy Act.

The Court's Decision

Early in the litigation, the Hospital filed a motion to dismiss the Complaint, contending that there was no legal basis for the case to proceed.

To establish a claim under the False Claims Act, the plaintiffs had to allege that: 1) the Hospital presented or caused to be presented to the United States a claim for payment; 2) the claim was false or fraudulent; and 3) the Hospital knew the claim was false or fraudulent. On the facts alleged in the Complaint, even viewed in the light most favorable to the plaintiffs, the Court determined that the plaintiffs failed to allege a viable cause of action because none of the requisite elements was present. Accordingly, the False Claims Act claim was dismissed.

The Court did not address the merits of the CEPA claim because it involved an alleged violation of state law, and therefore dismissed the lawsuit. However, the plaintiffs retain the ability to file their CEPA claim in New Jersey state court.

Overview of New Jersey's CEPA Law

Under CEPA, it is unlawful for an employer to retaliate against an employee who objects to a practice which he reasonably believes violates a law, rule or regulation promulgated pursuant to law,

or which is incompatible with a clear mandate of public policy concerning the public health, safety or welfare, or protection of the environment.

CEPA specifically provides protection to health care professionals who “blow the whistle” based on the reasonable belief that their employer’s policy or practice constitutes “improper quality of patient care,” which is defined as a policy or practice which “violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics.”

If this case proceeds in state court, the nurses will likely contend that their complaint was about a violation of law (the New Jersey Pharmacy Act) and was the cause of their termination of employment. Although the ultimate burden would be on the nurses to demonstrate that their complaint led to their terminations, the Hospital will need to demonstrate that it terminated them for legitimate reasons unrelated to their complaint about the alleged violations of the New Jersey Pharmacy Act.

Practical Recommendations

CEPA claims are on the rise for all employers as Courts continue to expand the definition of what constitutes a violation of law, rule or public policy. Moreover, juries are generally sympathetic to whistleblower claims. Therefore, hospitals that terminate employees for legitimate performance problems and violations of policy may face litigation if such employees lodged cognizable complaints prior to their discharge.

Hospitals should consider the following measures to safeguard against these types of claims and to put themselves in the best position to defend potential CEPA claims:

1. Post the CEPA notice required by law;
2. Review and revise (as necessary) your hospital’s policy and procedure manuals and employee handbooks to reflect the

CEPA-related provisions of the Deficit Reduction Act of 2005, which went into effect on January 1, 2007. This law encourages states to enact legislation requiring companies receiving \$5 million a year in Medicaid payments to establish written policies on false claims, including notifying employees about false claims laws and whistleblowing protections. It is prudent for hospitals to comply with this provision, even prior to state enactment;

3. Designate a qualified individual or team to receive and handle internal complaints;
4. Ensure that the individual or team members designated to receive internal complaints are properly trained;
5. Accurately document all complaints that could be cognizable under CEPA at the time they are received;
6. Thoroughly and promptly investigate internal complaints, take proper corrective measures if the complaints are corroborated, and fully document all such efforts and actions;
7. Ensure that any disciplinary action taken against an employee who previously lodged a complaint is supported by clear and comprehensive documentation; and
8. If the employee is a member of a union, ensure that the Collective Bargaining Agreement is reviewed and followed whenever discipline is imposed, and ensure that employees have union representation, if requested, at any meeting that could result in disciplinary action.

We send these Updates to our clients and friends to provide information on recent developments in the law. The Updates, however, should not be relied on for legal advice in any particular matter. If you would like additional information, please contact Gary W. Herschman at gherchman@sillscummis.com or at 973-643-5783 or Steven M. Fleischer at sfleischer@sillscummis.com or at 973-643-5796

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