Aging Clinicians: Opportunities And Challenges For Healthcare Employers

Insights
11.03.14

The aging of the U.S. workforce poses some unique challenges for employers in the healthcare industry. Older clinicians often possess experience and institutional knowledge that is highly valued and difficult to replace, and many such providers deliver excellent care into their late 60s and beyond. On the other hand, there may sometimes be legitimate concerns that some older workers are prone to physical and cognitive impairment or diminished competence, which can impact quality, lead to poor performance, and pose a risk to patient safety.

Given these concerns and the legal obligation of healthcare institutions to monitor the quality of care rendered by practitioners, some hospitals and other institutions have considered the delicate topic of how best to monitor the performance of older clinicians.

While such concerns may be genuine, actually treating older clinicians differently on the basis of age would create risky challenges. Any thought about implementing such practices must include consideration of the Age Discrimination in Employment Act (ADEA) and other employment discrimination laws.

The traditional approach to monitoring clinician competence and performance has been to require a period of focused review for new practitioners, and to conduct assessments when issues affecting the provision of safe, high-quality patient care are identified. For clinicians, whether they are physicians or other healthcare professionals, licensing requirements and medical staff bylaws obviously play an important role in maintaining high-quality care. The Joint Commission's Ongoing Professional Practice Evaluation process also plays an important role in this regard.

Some employers concerned about the prospect of waiting for a concrete indicator of trouble have considered taking a more proactive approach designed to identify potential impairments among

their employed clinicians.

Different methods of providing increased oversight of older practitioners have been considered. These include requiring periodic physical and cognitive screening exams of clinicians after they reach a certain age and conducting focused reviews of their cases.

For practitioners who normally go through a medical staff reappointment process every two years, hospitals could consider reducing the reappointment period from two years to one year when physicians reach a certain age, and requiring an accompanying fitness-for-work evaluation by a qualified vocational professional. Some have even toyed with the concept of mandatory retirement. Each such age-based option carries with it the real risk of a discrimination claim.

Age As A "Bona Fide Occupational Qualification"

Although the ADEA prohibits discrimination on the basis of age, it allows age to be used in an employment decision if it is a "bona fide occupational qualification" (BFOQ) of the job. To establish a BFOQ, an employer must demonstrate that the classification is reasonably necessary to the normal operation of the business, and that the employer is compelled to rely on age as a proxy for safety-related job qualifications. Age will be deemed to be a valid proxy only if it can be shown that either 1) the employer had reasonable cause to believe all or nearly all employees above a certain age lack the qualifications required for the position; or 2) it is impossible or highly impractical to deal with older employees on an individualized basis.

Applications of the BFOQ test has supported certain age-based restrictions for airline pilots, bus drivers, law enforcement individuals, and firefighters, but no court has yet made a definitive ruling that age is a BFOQ for physicians or other clinicians. But the courts have made it clear that it is not easy to claim age as a BFOQ.

The successful assertion of this defense as permitting age-based monitoring policies for clinicians would require a showing that the policy effectuates a public safety goal because all clinicians over a certain age are likely to develop or possess some physical or cognitive issue that impacts their ability to provide quality care, and that there is no acceptable alternative to advance that goal that would not have a discriminatory impact.

Age-Based Monitoring Under The ADA

Policies providing for increased monitoring of older physicians also may be subject to challenge under the Americans with Disabilities Act (ADA). The ADA prohibits discrimination on the basis of a disability, and defines disability as: 1) a physical or mental impairment that substantially limits one or more major life activities, 2) a record of such an impairment, or 3) being regarding as having

or more major life activities; 2) a record of such an impairment; or 3) being regarding as having such an impairment. Included among the ADA's disability discrimination prohibitions are restrictions on an employer's ability to make disability related inquiries or require medical examinations of employees.

Such inquiries are permitted only if they are "job related and consistent with business necessity." A medical examination may be job related and consistent with business necessity if it is based on reliable information that job performance or safety may be impaired, or a reasonable belief that there is a direct threat to the employee's own safety or that of others. Therefore, a policy that requires clinicians to undergo medical examinations when they reach a certain age could violate the ADA – unless the employer can demonstrate that the age of a clinician, *by itself*, raises legitimate concerns about patient safety.

The ADA poses additional challenges to age-based monitoring practices. A requirement that a clinician undergo medical screening at a certain age based solely on the assumption that age leads to impairment could trigger a discrimination claim that the employed clinician is "regarded" as disabled.

If a medical screening is performed and discloses an impairment, you will be required to engage in an individualized and interactive process for determining whether and how the impairment impacts the clinician's ability to perform job functions, and whether there are reasonable accommodations that will permit the clinician to perform the job. Action based solely on the finding of an impairment, without more, could also violate the ADA.

Balancing Patient-Safety Concerns And Compliance

Recognizing the potential legal implications of a policy that imposes increased monitoring requirements on aging clinicians, employers should focus attention on the quality of care actually provided. If you develop legitimate concerns that an impairment is impacting a practitioner's ability to safely provide care – based on objective observations rather than assumptions – requesting a medical evaluation may be job related and consistent with business necessity, and therefore compliant with the ADA.

Similarly, requiring a focused review of an older clinician's cases as a response to legitimate quality concerns, or asking an older clinician to undergo a medical or cognitive evaluation as a response to a legitimate concern about a performance-impeding impairment should also survive scrutiny under the ADEA, because such action is based on factors rather than age. Each situation will require an individualized assessment of the circumstances.

A balance can be struck between the seemingly competing obligations to protect patient safety and comply with employment discrimination laws. A proactive approach that involves a careful, organized and uniform system for measuring competency and addressing performance issues can help achieve this balance.

These are some of the basic concepts that you should incorporate into any performance monitoring system to reduce the risk of a violation of discrimination laws:

- require ongoing practitioner performance evaluations for all clinicians not just those who reach a certain age;
- identify specific non-age-related triggers that indicate the need for increased performance monitoring and intervention;
- develop criteria to be used for evaluating the performance of practitioners both periodically and when issues affecting safe care are identified;
- identify options for addressing performance deficiencies that permit the clinician to continue working while protecting patient safety (e.g., the elimination of certain functions or narrowing the scope of functions); and
- commit to address performance issues that are identified immediately.

In the end, there is still no substitute for careful and consistent quality-monitoring systems, which include individualized performance evaluations and recredentialling processes. Treating older clinicians differently strictly on the basis of age is a high-risk proposition.

But by establishing an organized and clearly defined performance monitoring and management system, and by being diligent and consistent in the application and enforcement of policies focused on the quality of care, healthcare employers should be able to protect the rights of both the patients they serve and the clinicians they employ.

The author may be contacted at BOlivier@laborlawyers.com or 207.774.6001.