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HEALTHCARE EMPLOYERS BEWARE: ARE LATE CAREER PRACTITIONER POLICIES DISCRIMINATORY?

Publication
May 14, 2020

As members of the healthcare industry, some of you may be aware of a situation where an aging physician whose physical or cognitive impairments (that went unnoticed or simply ignored) led to an unfavorable, or possibly catastrophic, patient outcome, such as a misdiagnosis, unnecessary surgery, or the even the death of a patient. This is not a new concern. The question of when a physician should retire, especially surgeons, has been a subject of debate for decades. As more and more practitioners work past the traditional retirement age, healthcare providers are faced with conflicting interests: keeping valuable late career practitioners content while maintaining patient safety.

POPULATION OF OLDER PRACTITIONERS IS GROWING

The United States currently has a large population of older physicians that is only expected to increase over time. According to a 2017 survey from the Association of American Medical Colleges (AAMC), physicians between the ages of 65 and 75 accounted for 10% of the country's workforce and those between the ages of 55 and 64 accounted for 26% of the workforce. The AAMC concluded that more than one-third of all active physicians will be 65 or older during the next 10 years. So what should you do to ensure you have the most skilled and experienced physicians practicing at your facility while still ensuring patient safety?

DO AGING PRACTITIONERS CREATE A PATIENT SAFETY RISK?

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While most experts would not agree that age should single-handedly dictate who can practice medicine, some studies suggest that physicians' skills may decline over time. A 2006 study from physicians at the University of Michigan found that patient mortality rates in complex surgeries were higher among surgeons older than 60, particularly those with low procedure volumes, versus their younger counterparts.

In 2017, the British Medical Journal (BMJ) published a similar study that found patients receiving care from older physicians had a higher mortality rate than patients treated by younger physicians. Specifically, the mortality rate for physicians under the age of 40 was 10.8%, which increased to a mortality rate of 12.1% for physicians over 60. Like the 2006 study, the BMJ researchers found that physicians who treated lower volumes of patients were the physicians who predominantly steered the connection between physician age and patient mortality.

Conversely, in 2018, another BMJ study found that operations performed by older surgeons actually resulted in lower mortality rates than those by younger surgeons. Overall, the literature on this subject is complicated and varies greatly, likely because there are many factors that cannot be fully accounted for – such as whether older surgeons purposely avoid performing more high-risk or difficult complicated cases.

ARE LATE CAREER PRACTITIONER POLICIES LEGAL?

Regardless of what the studies show, we have seen some patient safety experts and hospital administrators advocate over the past decade for policies requiring physicians over a certain age to undergo periodic physical and cognitive examinations in order to retain their hospital privileges and continue seeing patients. Indeed, several hospital systems have adopted such policies, including the University of Virginia Health System, Temple University Hospital, Stanford Hospital and Clinics, Cooper University Health Care, and Driscoll Children's Hospital in Corpus Christi, Texas.

The obvious question: Are such policies, based solely on the physician's age, a violation of the Age Discrimination in Employment Act (ADEA)? A not-so obvious question also needs to be asked: would such policies violate the Americans with Disabilities Act's (ADA's) prohibition against

medical examinations that are not job-related and consistent with business necessity?

Congress itself has approved fixed retirement ages for a number of professions that affect public safety, such as commercial airline pilots (age 65 and regular health screenings starting at age 40), Federal Bureau of Investigation (FBI) agents (age 57), National Park Ranger (age 57), air traffic controller (age 56), and custom/border protection officers (age 57). So what about medical practitioners?

EEOC SETS LATE CAREER PRACTITIONER POLICIES IN ITS SIGHTS

The Equal Employment Opportunity Commission (EEOC) has recently taken issue with late career practitioner policies that require certain testing for physicians that reach a particular age. In February of this year, the EEOC sued Yale New Haven Hospital claiming its policy requiring eye and neuropsychological medical examinations for practitioners older than 70 who seek medical privileges at the hospital violates the ADEA and ADA.

Yale New Haven Hospital commenced a "Late Career Practitioner Policy" in 2016. The policy mandates that any individual 70 and over must take both ophthalmologic and neuropsychological examinations in order to apply for or renew medical staff privileges at the hospital. The complaint filed by the EEOC alleges individuals subject to the policy must submit to the examinations "solely because of their age and without any particularized suspicion that their eyesight or neuropsychological ability may have declined."

A spokesperson for Yale New Haven Hospital disputed the allegations stating, "The Hospital's late career practitioner policy is designed to protect our patients from potential harm while including safeguards to ensure that our physicians are treated fairly. The policy is modeled on similar standards in other industries and we are confident that no discrimination has occurred and will vigorously defend ourselves in the matter."

Although the hospital has not yet filed its Response to the EEOC's Complaint, it appears it will raise a bona fide occupational qualification (BFOQ) defense to the allegation of age discrimination. This defense allows employers to discriminate against its employees and applicants on the

basis of age in those instances where age is a BFOQ “reasonably necessary to the normal operation of the particular business.” In other words, the BFOQ (i.e., being under a certain age) is essentially a work requirement necessary to the performance of a particular job.

SHOULD YOU IMPLEMENT A LATE CAREER PRACTITIONER POLICY?

While we have yet to see the outcome of the Yale New Haven Hospital case, healthcare providers should think twice before implementing late career practitioner policies based solely on age. Given the absence of high-quality data demonstrating that aging physicians generate more errors and adverse patient outcomes than their younger counterparts, any policy compelling mandatory retirement or screening at a certain age could be challenged as discriminatory.

Furthermore, we now know the EEOC is scrutinizing such policies and will be pursuing claims against employers that utilize them. This is not to say that hospitals should let physician competency go unchecked. Instead, you should apply such screenings on an individualized basis and regardless of age, i.e., where there is a reasonable belief that the physician’s faculties are comprised in some regard. In the meantime, we will continue to monitor the Yale New Haven Hospital case and keep you updated on any developments.

For more information, contact [the author](#).