

# Managing Physician Issues

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# Sexual Harassment – What is it?

Legal Definition –

*“Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”*

That:

- Results in a tangible employment action (“*Quid Pro Quo*”)

OR

- Is sufficiently severe or pervasive to “create an abusive environment sufficient to alter the conditions of employment” (“Hostile Environment”)

# Employer Liability for Harassment and Discrimination

- Employer “strictly” liable for harassment by supervisors and managers
- Employer liable for harassment by other employees, if it knew or should have known, and failed to correct
- Also liable for harassment by patients, vendors, and other third parties like physicians, if it knew or should have known, and failed to correct

# Physicians Are Different

- Not generally employees
- Not clearly “supervisors” for employment law purposes
- Direct work by “subordinates” anyway
- Treated like 3<sup>rd</sup> parties if not employed by employer of the claimant

# What Does “*Knew or Should Have Known*” Mean?

- When any member of Management:
  - Witnesses harassment or discrimination
  - Hears about harassment or discrimination

# Harassment Scenarios

What if an employee complains and says . . .

- “I don’t want anything done”
- “Don’t say it was me who complained”
- “I’m afraid I’ll be fired or disciplined”
- “It’s my word against his – no one else was there”

# Dating and Harrassment Claims

Dating a subordinate or co-worker is a bad idea, but the law does not forbid it.

- Consider the relationship between a doctor & a “subordinate”
- What about other employees who claim they were treated unfairly because of relationship?
- What if the relationship ends?

# Retaliation

## Elements of Retaliation –

- Employee engages in "protected activity"
- Supervisor takes "adverse action"
- There is a causal connection between the two

# Retaliation

Protected activities include –

- Complaining of harassment or discrimination
- Complaining of health or safety violations
- Protesting or refusing to carry out a supervisor's directive if employee believes it unlawful
- Participating in an investigation
- Complaining or reporting to an administrative agency
- Filing a lawsuit
- Requesting leave

# Retaliation

What are retaliation claims and why are they so easy to make?

- Retaliation is human nature
- Most people suspect bosses retaliate
- Legal standards vague and easy to meet

# Retaliation

Examples of adverse action --

- Fired
- Harassed
- Hours reduced
- Transferred
- Denied training
- Given less prestigious work

*Because of . . . .*

# Employer Obligations Facing Claims of Harassment, Discrimination, or Retaliation

When a complaint is made . . .

- Meet with employee in an appropriate location. Listen carefully and consider all complaints as possible harassment, discrimination, or retaliation claims
- Conduct a prompt and thorough investigation
- Take appropriate corrective action
- Relay your findings to the complaining person
- Document your actions

# Keys to Avoiding Harassment Claims

1. Have clear policies that cover everyone in the workplace, including non-employee physicians
2. Insist on compliance with the policies
3. Conduct training for physicians and supervisors that includes discussion of:
  - Liability, including personal liability for physicians and supervisors for harassment
  - Dating, and how it can lead to claims of harassment
  - Retaliation, and how to avoid it or the appearance of retaliation
  - Real life examples of harassment, discrimination, and retaliation in the workplace
3. Take all complaints seriously. Promptly investigate and take corrective action.
4. Be able to prove you did all of the above. Document it!

# Handling Complaints of Sexual Harassment by Physicians

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# How Are Physicians Different?

- In the healthcare workplace, physicians generally are not employees, nor are they supervisors who work for the employer and thus are subject to the employer's obligation to provide mandatory sexual harassment training to its supervisors.
- Because of their unique status, physicians may not be well-informed about what constitutes sexual harassment, what the employees' rights are, etc.

# How Are Physicians Different?

- Physicians who are subject to discipline by hospital medical staffs or other “peer review bodies” (as defined by statute) have very specific procedural rights under California statutory and common law, which in many instances include the right to a formal hearing similar to a court trial.
- The federal Health Care Quality Improvement Act also imposes some procedural requirements that must be met to qualify for HCQIA immunity.

# How Are Physicians Different?

- If a complaint of sexual harassment by a physician is investigated under the aegis of the medical staff or other peer review body, then the proceedings and records of that investigation are immune from discovery in civil (and possibly also criminal) cases under California Evidence Code section 1157. Other states also have laws protecting peer review documents.
- Section 1157 protection is a two-edged sword, but it should be possible to use protected records where needed to defend a case, and still maintain the protection as to others who might want the records, by entering into an appropriate protective order.

# Strategies for Preventing Sexual Harassment by Physicians

- Be aware that in some studies of women who work in healthcare settings, **as many as 1/3** reported being subjected to sexual harassment by male physicians.
- Affected women included:
  - Female physicians, including residents
  - Other medical trainees
  - Nurses
- Study participants also said the harassment adversely affected their ability to do their jobs.

# Strategies for Preventing Sexual Harassment by Physicians

- Establish (in writing) a clear harassment policy; in a hospital, this is required by Joint Commission and can be in the medical staff bylaws or rules.
- Endeavor to ensure that physicians are familiar with the policy.

# Strategies for Preventing Sexual Harassment by Physicians

- Provide group sexual harassment training as part of the doctors' continuing medical education, and/or refer them to such programs.
- As part of the training, include the following questions for physicians to ask themselves about their remarks/conduct:
  - Would I want to see this remark quoted or this behavior described on the front page of the newspaper?
  - Would I say/do this in front of my spouse/other family members?
  - Would I want someone else to say/do this to someone I care about?
  - Will this remark/action be welcomed by the other person?
  - Does this remark/action further our goal of providing quality healthcare to patients?
- If the answer to any of these questions is “no” – don't say/do it!

# Strategies for Investigating Employee Complaints of Sexual Harassment

- Establish reporting and screening processes.
- Be sure all complaints are tracked and trended.
- Where an investigation is needed, involve both an HR representative, and a medical staff representative designated by the Chief of Staff or other medical staff leader, in interviews and other investigative processes.
- Spell out the steps of the investigation in your policy.

# Strategies for Investigating Employee Complaints of Sexual Harassment

- Be sure the physician understands that retaliation against the complainant(s) will not be tolerated, and constitutes an independent ground for discipline.
- Provide for the possibility of informal resolution at the conclusion of the investigation process, but where that is not possible, refer the matter to the medical staff for corrective action.

# Strategies for Progressive Discipline of Physicians Who Sexually Harass

- Provide individual education internally.
- Send the physician for outside education, for example, the PACE Program's Professional Boundaries course.
- Enter into a behavioral contract with the physician, which may include (for example) suspensions of increasing length for subsequent infractions. Depending upon the circumstances, this may require reporting and trigger hearing rights.

# Strategies for Progressive Discipline of Physicians Who Sexually Harass

- Shorten the length of the physician's reappointment term, e.g, grant only six months or a year rather than the typical two years.
- Impose conditions on reappointment.
- Terminate a physician who cannot comply despite prolonged efforts to work with the physician. Depending upon the circumstances, this may require reporting and trigger hearing rights.

# What if Discipline Doesn't Work?

- You may have to pick your lawsuit – would you rather be sued by the employees or the doctor?
- If you have made a good record, the physician lawsuit should be easier to defend. See the *Maheshwari* case materials provided.

# Unfair Competition Claims in Physician Recruitment

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# Noncompetes: Trade Secrets and Physician Recruitment

- Physicians and Groups often enter into noncompetition and nonsolicitation agreements.
- Physicians may have knowledge about trade-secret processes.
- Groups are increasingly aggressive in attempting to stop departing physicians from competing for their patients.

# Trade Secret Fast Facts

- Trade Secrets lawsuits are on the rise – as much as 20% between 2006 and 2007.
- We have seen an increase in demand letters.
- Trade Secret Litigation is expensive.
- 2004 Median cost of litigation through trial of a case valued between \$1-25 million
  - Los Angeles: \$812,500
  - San Francisco: \$2,000,000
  - New York City: \$725,000
  - “Other West”: \$1,000,000
- Additional costs due to lost staff time and distraction

# California's Ban on Noncompetes

California Business & Professions Code Section 16600:

*“Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”*

# Section 16600 Bans:

- Agreements that prohibit a physician from working for a competitor after completion of employment;
- Agreements that impose a penalty on physicians who work for a competitor after completion of employment;
- Agreements not to solicit patients; and
- Prohibitions on giving notice to clients/patients of a change of employment/work setting.

# Section 16600 applies to all businesses in California

- Regardless of choice of law provisions;
- Regardless where the business is located; and
- Even if the physician formerly worked in a state that permitted noncompetes, if the physician moved to California, California law **may** apply.

# Exceptions to the Ban on Noncompetes / Nonsolicit Clauses

- A medical group may protect its “trade secret” information,
- A database or list of patient contact information may qualify as a trade secret.
  - California courts have found that customer lists can be trade secrets.
  - No reported California decision has ruled whether the patient list of a medical practice group qualifies as a trade secret.
  - Other jurisdictions addressing the issue are split, with the majority holding that a patient list is not a trade secret.
- A physician who sells his or her practice may be restricted from competing in the same geographic area for a limited time.

# Patient's Right to Notice of a Physician's Change of Affiliation

- Over 30 years ago, the California appellate court held that a “patient may not properly be regarded as the subject of ‘ownership’ and his right to seek and obtain treatment from a licensed physician of his own choice may not be denied him in order to protect the ‘property rights’ of any competing physician or clinic.”

# AMA Opinions on Noncompetes

- AMA Opinion on restrictive covenants:
  - Noncompetes “restrict competition, disrupt continuity of care, and potentially deprive the public of medical services.”
  - Such covenants “are unethical if they . . . fail to make reasonable accommodation of patients’ choice of physician.”
- The AMA Opinion regarding patient notification:
  - “The patients of a physician who leaves a group practice should be notified that the physician is leaving the group. Patients of the physician should also be informed of the physician’s new address and offered the opportunity to have their medical records forwarded to the departing physician at his or her new practice location. It is unethical to withhold such information upon request of a patient.”
  - “If the responsibility for notifying patients falls to the departing physician rather than to the group, the group should not interfere with the discharge of these duties by withholding patient lists or other necessary information.”

# HIPAA and Privacy Issues

- HIPAA may allow a departing physician to notify patients of his or her relocation, but it definitely permits a provider to use protected health information for purposes of providing treatment.
- “Treatment,” in turn, includes the “coordination of management of health care and related services by one or more health care providers.”
- As with trade secret law, the safest course to stay within the law is to limit communications to notifications of practice setting changes only.

# “DOS” AND “DON'TS”

## DO:

- Analyze:
  - Did the physician sell his or her practice and goodwill?
  - Is the physician bound by a lawful noncompetition clause entered in connection with the sale of goodwill or the dissociation from a partnership?
  - What other agreements did the physician enter that might impact the analysis?
  - Does the physician's agreement provide for an announcement?
- Preferably, any announcement should be sent by the physician.
- If the Hospital makes an announcement:
  - Purchase a commercial mailing list of patients in the area in the physician's specialty and send all of them an announcement of the relocation.
  - Keep the physician “tombstone” simple.
  - Retain any patient list or similar material in a manner that complies with HIPAA and Hi-Tech.

# “DOS” AND “DON'TS”

## DON'T:

- Do not make any use of any patient list from the prior practice once the “tombstone” announcement has been sent.



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