

Labor and employment law update 2020: What is next?

by William E. O’Gara

FOR HEALTHCARE EMPLOYERS SPRINTING (OR STAGGERING) TO THE FINISH LINE OF 2019, THE OBVIOUS QUESTION IS “WHAT AWAITS IN 2020?” While there is never a perfect crystal ball, the following are several trends and workplace issues that are likely to dominate 2020.

Worker shortages and union activity

A critical challenge facing the healthcare industry is a shortage of healthcare workers that shows no sign of easing. A recent study estimates that the United States will need to hire 2.3 million new healthcare workers by 2025 to care for its aging population. The shortages impact virtually every occupation, with both high skilled positions like nurse practitioner and other positions such as CNAs expected to face continuing and growing shortages. The magnitude of the problem is reflected in recent United States Department of Labor employment projections predicting that in the next decade just two classifications—home health aid and personal care aid—will require more than 1.1 million additional workers. In 2020 the shortage will almost certainly worsen.



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For many healthcare employers the ability to retain and compete for the limited pool of workers is constrained by low reimbursement from governmental and private insurers. The ongoing effort at the federal and state level to constrain healthcare spending has caused hospitals, nursing homes, and other institutional providers to do more with less and struggle financially. This, in turn, has impacted employee staffing and compensation.

The combination of labor shortages and a limited ability to compensate workers can create fertile ground for union organizing. For healthcare employers, understanding the basics of how unions organize is a must. While emphasis in the business media has often been put on the changes in the composition of the National Labor Relations Board (NLRB), the reality is that the basic process of organizing a workplace has not changed in decades. Employees have the legal right to engage (or not engage) in union activities and to decide if unionization is advantageous. The critical step in unionization is a secret ballot election conducted by the NLRB. If the union wins the election, the employer is legally required to recognize it and negotiate in good faith to reach a contract. A signed contract reached after negotiations will secure the union’s continued existence and provides a financial benefit to the union in the form of dues deductions.

The process of getting to an election is fairly straightforward. The union interested in organizing employees may be

approached by one or more employees dissatisfied with the status quo. Alternatively, the union may identify an employee as a good target to organize and reach out to employees to see if they are interested in forming a union. Assuming there is some basic interest, the next step is to encourage employees to “sign cards.” The pre-printed cards identify the union and indicate that the employee is supportive of the union representing him or her for the purposes of collective bargaining. The goal for a union is to have more than half of the employees sign the cards. When the union has more than half of the cards signed, it will present the cards to the local office of the NLRB. The NLRB will review the cards and contact the employer to schedule an election.

Often the employer does not learn of an organizing effort until the NLRB contacts it to schedule the election. The elections typically occur within a matter of weeks. For an employer, this limited window can impact its ability to effectively make a case to employees that it is not in their interest to vote in favor of the union. In addition, what an employer can and cannot say to its employees regarding unionization prior to an election is highly regulated by the NLRB. Not surprisingly, unions more often than not win these elections.

For employers, the take-away is that engaging with employees long before an organizing effort is critical. Unions successfully organize when workers believe that the employer has failed to respond to their issues and concerns. Employers need to be in constant communication with employees and must provide an effective process for issues and problems to be addressed and corrected. When that does not happen, your employees may view forming a union as the solution to all of their real and perceived problems.

Bullying in the workplace

In the past year there has been a growing focus on the problem of bullying in the workplace. Model legislation that would allow employees to sue employers based on bullying claims has been introduced in over 30 states. The issue shows no sign of fading in 2020 and the effort at the state level to pass legislation will likely continue to gain traction.

Employers should have a strong policy prohibiting bullying and a process to deal effectively with complaints. Much like the now familiar sexual harassment policies employers must have and enforce, employers should be on the front end of addressing bullying so that when workplace bullying laws are enacted, they are compliant from the beginning. Simply put, employers need to maintain a culture and work environment that does not tolerate bullying and effectively deals with issues in a timely manner.

Pannone Lopes Devereaux & O’Gara LLC will present a workshop on this issue in early 2020. Stay tuned.

William E. O’Gara is a Principal at Pannone Lopes Devereaux & O’Gara LLC. He leads the firm’s Employment Law, Litigation and Mediation teams. With over 25 years of experience, he has handled a wide range of cases including employment discrimination, wage and hour claims and sexual harassment claims. He assists clients in matters ranging from contract negotiations to arbitration and has successfully mediated a wide array of disputes both at the pre-litigation stage and before trial. As part of his practice, Attorney O’Gara conducts workplace investigations and provides training for managers and supervisors on employment-related issues, and represents clients before state and federal courts, as well as administrative and regulatory agencies. Attorney O’Gara earned his J.D. from Northeastern University and is admitted to practice law in Rhode Island and Massachusetts.