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2023 Health Care Employment Law Year in Review

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Employment matters in the health care industry once again prompted significant attention from federal and state governments in 2023. While much of our 2022 Year in Review discussed how states were beginning to address post-pandemic issues in the health care industry, 2023 demonstrated a continued focus on such topics. State legislatures enacted new laws and policies governing the wages, working conditions, and rights of health care workers ranging from COVID-19 vaccination requirements to licensure and registration of health care workers and entities to workplace violence programs. This alert provides an overview of many of these new legal standards.

STATE LEGISLATURES TARGET HEALTH CARE WORKER STAFFING SHORTAGES BY RAISING MINIMUM WAGES FOR HEALTH CARE WORKERS AND RELAXING LICENSURE REQUIREMENTS

Health care workers in several states received pay increases, as legislatures across the country raised minimum wages for health care workers. In California, SB 525 raised the minimum wage for covered health care employees at a covered health care facility to US$23 by 1 June 2024. Michigan's Public Act 119 raised the minimum wage for eligible direct care workers by US$3.20 and by US$0.85 for eligible nonclinical workers for 1 October 2023 through 30 September 2024. New York's Public Health Law Section 3614c also reflected an increase for home care worker pay, raising the minimum wage to US$18.55 beginning 1 January 2024.

Other states tackled health care shortages in a different manner: relaxing licensure requirements. New York, for example, passed A6697B and S7492B, which allow individuals applying for registered nurse and licensed practical nurse licensure to temporarily practice for up to 180 days while licensure is pending. To receive such permission, these workers must have licensure in good standing in another state and an endorsement from the worker's employing health care facility, program, or practice. Missouri's SB 157 enacted significant changes to licensure standards, adopting the Interstate Medical Licensure Compact and Counseling Interstate Compact to enable out-of-state physicians and professional counselors seeking to practice in the state to obtain an expedited

license. Missouri also expanded practice authority for physical therapists, physicians' assistants, and advanced practice registered nurses.

ILLINOIS PASSES LAW PROHIBITING INDIVIDUALS WHO OBSTRUCT ABUSE INVESTIGATIONS FROM EMPLOYMENT IN HEALTH CARE

Governor J.B. Pritzker signed SB0855 into law on 9 June 2023, which amends the Mental Health and Developmental Disabilities Administrative Act and was unanimously passed in the Illinois House of Representatives and Senate. The new law prohibits health care workers who materially obstruct investigations into abuse or neglect from further employment in the health care field. "Material obstruction" includes witness and evidence tampering and knowingly presenting false information to investigators. Workers who engage in obstruction of an abuse investigation will be added to the Department of Public Health's Health Care Worker Registry, which tracks substantiated complaints.

The legislation was introduced following reports of rampant abuse and cover-ups at a state-run mental health and development center that serves individuals with intellectual and developmental disabilities and mental illnesses. The news reports revealed a culture of cover-ups and detailed how employees lied to investigators, leaked sensitive investigation details, and retaliated against those who reported abuse. The new law applies to employees at state-run institutions and at privately operated community agencies operating under the oversight of the Illinois Department of Human Services and its Office of the Inspector General. Sponsors of SB0855 believe it will deter additional misconduct and encourage full and appropriate cooperation in reviews into abuse or neglect at state facilities.

FLORIDA PERMITS HEALTH CARE PROVIDERS AND PAYORS TO EXERCISE CONSCIENCE-BASED OBJECTIONS

Effective 1 July 2023, Florida, with SB 1580, will provide health care providers and health care payors the right to opt out of participation in or payment for any health care service on the basis of a conscience-based objection. "Conscience-based objections" are limited to specific health care services, and the law does not waive or modify any duty a provider or payor may have for other health care services.

More specifically, SB 1580 does the following:

- Establishes notification requirements for opting-out and prohibits a payor from opting out of paying for a service it is contractually obligated to cover.
- Prohibits health care providers from being discriminated against or suffering adverse action for declining to participate in a health care service based on a conscience-based objection. Whistleblower protections for providers or payors are provided in specific situations.
- Allows health care providers or payors to file complaints of violations to the Florida attorney general (AG) and authorizes the AG to bring a civil action for appropriate relief.
- Provides civil immunity for health care providers and payors solely for declining to participate in a health care service on the basis of a conscience-based objection, with some exceptions.
- Prohibits a health care practitioner regulatory board and the Florida Department of Health (FLDOH) from taking disciplinary action against a health care practitioner solely because he or she has spoken or written publicly about a health care service or public policy, including on a social media platform, as long as the speech or written communication does not provide advice or treatment to a specific patient or patients and does not separately violate any other applicable law or rule.

- Further authorizes a board within the FLDOH to revoke approval of any specialty board for revoking the certification of an individual for the same reason.

SB 1580 does not allow a health care provider or payor to opt out of providing health care services to any patient or potential patient because of race, color, religion, sex, national origin, or being a Medicaid recipient. It also does not override any requirement to provide emergency medical treatment in accordance with federal or state law.

NEW LAWS AIMED AT PROTECTING HEALTH CARE WORKERS FROM WORKPLACE VIOLENCE

Workplace violence is a recognized hazard in the health care field and impacts health care workers more than employees in any other industry. The Occupational Safety and Health Administration has emphasized the need for an industrywide standard regarding workplace violence and has taken steps toward developing a federal regulation. A Small Business Advocacy Review Panel convened in March 2023 to gather input from the industry with the goal of developing a comprehensive workplace violence standard for the health care and social assistance sectors.

While health care workers and employers await the development of a national standard, many states developed their own laws in 2023 to protect health care workers. Several states, such as Texas in SB 240 and Arizona in S.B. 1311, now require covered health care facilities to adopt, implement, and maintain a written workplace violence prevention policy. Part of a comprehensive violence prevention policy often includes regular hazard assessments, training programs, development of a workplace violence prevention plan, and designation of an individual to oversee and implement the plan.

North Carolina's Hospital Protection Act requires covered hospitals, in addition to conducting a risk assessment and developing a security plan, to increase the presence of law enforcement on site. Covered hospitals will also be required to provide an annual report to the North Carolina Department of Health and Human Services about assaults on hospital grounds.

Other states are taking a punitive approach, as nearly 40 states have established increased penalties for violence or threats of violence perpetrated against health care workers. For example, New Jersey in Bill A-3199 and Kansas in HB 2023 recently made it a criminal offense to threaten health care workers. Vermont's S.36 imposes fines against individuals who threaten or intimidate a health care worker or an emergency medical personnel, and Michigan doubled the financial penalty for individuals who assault a health professional or medical volunteer in HB 4520 and HB 4521.

Violence against health care and social assistance workers remains alarmingly high in the post-pandemic era. State law trends reflect an industrywide concern for worker safety. Health care employers should evaluate their own workplace violence policies to ensure they comply with applicable state law requirements and provide adequate protection to workers and volunteers.

STATES AND SUPREME COURT WEIGH IN ON COVID-19 VACCINES

Several States Lift and Propose Bans on Future Vaccine Mandates

On 9 May 2023, President Joe Biden issued Executive Order 14099, which revoked prior executive orders requiring federal employees to receive COVID-19 vaccinations (Executive Order 14043) and federal contractors and subcontractors to provide COVID-19 safeguards to their workers (Executive Order 14042). This move coincided with the official end to the COVID-19 public health emergency.

On 5 June 2023, the Centers for Medicare & Medicaid Services issued a Final Rule to formally rescind the requirement of most Medicare and Medicaid-certified providers' and suppliers' staff to receive a COVID-19 vaccination in order to participate in Medicare and Medicaid programs. Even after the federal government declared the official end of the COVID-19 public health emergency, states continued to issue executive orders and pass legislation aimed at preventing employers from imposing vaccine mandates. Some notable examples are described below.

California, New Jersey, and New York, which had previously required health care workers to be vaccinated against COVID-19, lifted those requirements in 2023. Effective 3 April 2023, the California Department of Public Health rescinded a 5 August 2021 State Public Health Officer Order, which had generally required all health care workers to be vaccinated against COVID-19. Similarly, on 12 June 2023, New Jersey Governor Phil Murphy signed Executive Order 332, which rescinded the COVID-19 vaccination requirements for employees in health care settings. New York followed suit when, effective 4 October 2023, the New York State Department of Health repealed the emergency regulation requiring covered health care employers to ensure that its personnel were fully vaccinated against COVID-19. None of these actions prevented health care facilities from voluntarily maintaining COVID-19 policies and vaccination requirements.

Other states went further than merely lifting existing mandates. Georgia (SB 1) and Arkansas (SB 3) both affirmatively banned COVID-19 vaccine mandates. Georgia's SB 1 made permanent an existing one-year ban on the state government implementing COVID-19 vaccination mandates. Arkansas' SB 3 specifically bans the state, a state agency or entity, a political subdivision of the state, or a state or local official from mandating or requiring an individual to receive a COVID-19 vaccination or discriminating against an individual for refusing to receive a COVID-19 vaccination (including coercing an employee into consenting to a COVID-19 vaccination and withholding career advancement opportunities or compensation increases from an employee who does not consent to receiving a COVID-19 vaccination).

Some states banned all employers, not just the state government, from imposing COVID-19 vaccination mandates. Idaho enacted the Coronavirus Stop Act, which went into effect on 6 April 2023. Under this law, employers doing business in Idaho are generally not permitted to require COVID-19 vaccination as a term of employment, unless required by federal law or where the terms of employment require travel to foreign jurisdictions requiring COVID-19 vaccinations for entrance. The law also provides exceptions from this vaccine mandate prohibition for business entities that receive Medicare or Medicaid funding.

Florida and Texas also created financial penalties for violations of their new COVID-19 laws. Effective 1 June 2023, Florida SB 252 prohibits businesses and governmental entities from requiring individuals to provide proof of vaccination or post-infection recovery for any disease to gain access to or service from those establishments. This proof is often referred to as a "vaccine passport." By enacting this law, Florida joined a growing number of jurisdictions moving to limit the ability of public and private entities to require vaccine passports or other proof of vaccination. SB 252 specifically prohibits employers from refusing employment to or discharging, disciplining, demoting, or otherwise discriminating against an individual solely on the basis of vaccination or immunity status. Finally, businesses and government entities are generally no longer permitted to require masks in order to gain entry to their facilities. Notably, business and government entities that violate these prohibitions may be subject to fines of up to US$5,000 per violation. Texas has enacted the most stringent ban on vaccination mandates to date. Governor Greg Abbott signed SB 7 into law on 10 November 2023, which prohibits private employers from taking an adverse action against an employee who refuses a COVID-19 vaccination. Individuals who believe they were retaliated against may file a complaint at

the Texas Workforce Commission, and employers who are found to have violated SB 7 may be fined up to US$50,000 per violation.

Potential Effects of Groff v. Dejoy on COVID-19 Vaccination Requirements

On 29 June 2023, the US Supreme Court issued a unanimous ruling[1] clarifying that Title VII's undue hardship standard means "substantial increased costs in relation to the conduct of its particular business." This ruling effectively replaced the long-standing *de minimis* standard, originating from the Supreme Court's 1997 ruling in *Trans World Airlines, Inc. v. Hardison*[2] for determining whether the impact of an accommodation qualifies as an undue hardship. This decision heightens the requirement on employers who want to deny a religious accommodation request because it would pose an undue hardship on the employer.

The petitioner in this case, Gerald Groff, was a US Postal Service (USPS) carrier whose religious beliefs prohibited him from working on Sundays. The USPS was unable to secure coverage for all of Groff's Sunday shifts. When Groff failed to report to work despite the lack of coverage, the USPS disciplined him. Groff resigned and later sued the USPS for failing to reasonably accommodate his religious beliefs.

Although the facts of *Groff* have nothing to do with COVID-19, this decision will likely become relevant to employers receiving religious accommodation requests from employees hoping to avoid COVID-19 vaccination requirements. Employers who deny religious accommodation requests on the basis of undue hardship must be prepared to show that the cost of accommodating the religious request would be unjustifiably high or that the impact on other employees would substantially affect the conduct of its business.

For more information, you can find our analysis of this case and its implications here.

WASHINGTON AND OREGON PASS "SAFE STAFFING" LAWS

Two states in the Pacific Northwest established new standards regarding hospital staffing to help ensure that hospitals are safely staffed for patient protection.

Oregon House Bill 2697

The Oregon Legislature passed HB 2697, which makes significant changes to Oregon's hospital staffing law. The bill requires hospitals to establish technical staff, nurse staff, and service staff staffing committees in order to develop staffing plans. In addition, the bill establishes minimum standards for staffing plans for direct care registered nurses, in addition to enforcement tools to enforce staffing requirements. The bill also creates a private cause of action for any hospital's failure to adopt or to comply with staffing plans. The bill requires the Oregon Health Authority (OHA) to post staffing plans to the OHA's website and to establish an online portal for filing complaints regarding hospital's failure to adopt or to comply with staffing plans by 1 January 2024.

By 1 June 2025, the OHA can begin imposing civil penalties for violations that occur on or after 1 June 2025. What is considered a valid complaint that OHA can investigate will depend in part on when hospitals are required to comply with certain sections of the bill. When all aspects of the bill are effective, the complete list of complaint bases will be as follows:

- Failure to establish a hospital professional and technical staffing committee or a hospital

service staffing committee.
- Failure to create a professional and technical staffing plan or a hospital service staffing plan.
- Failure to adopt a nurse staffing plan by agreement or after binding arbitration.
- Failure to comply with the staffing levels in the nurse staffing plan, including the nurse-to-patient staffing ratios, and the failure is not an allowed deviation under the bill.
- Failure to comply with the staffing levels in the professional and technical staffing plan or the hospital service staffing plan, and the failure is not an allowed deviation under the bill.
- Failure to comply with the staffing requirements in the bill.
- Requiring nursing staff, except as allowed by ORS 441.166, to work (a) beyond an agreed-upon prearranged shift, regardless of the length of the shift; (b) more than 48 hours in any hospital-defined work week; (c) more than 12 hours in a 24-hour period; or (d) during the 10-hour period immediately following the 12th hour worked during a 24-hour period.

Washington Senate Bill 5236

The state of Washington enacted SB 5236, which strengthens accountability to hospital staffing plans. By 1 January 2024, hospitals must charter a hospital-wide staffing committee comprised of administrative staff and nonmanagerial/nonsupervisory nursing staff, and by 1 July 2024, the committee must adopt an annual patient care unit and shift-based staffing plan for every area of the hospital where care is provided by registered nurses. The staffing plan must be submitted to the Washington Department of Health (WADOH) and thereafter on an annual basis, as well as posted on both the hospital's website and in a public area at each patient care unit (along with the staffing schedule on the unit).

If hospitals fall below 80% compliance with their staffing plans, they are required to report noncompliance to the WADOH and the Department of Labor & Industries (L&I). Noncompliant hospitals will be assigned a corrective action plan by L&I and WADOH, which may include elements such as safe staffing standards set by L&I.

In addition, effective 1 July 2024, all hourly frontline staff engaged in clinical services or direct patient care activities must have scheduled duty-free meal and rest breaks, unless there is an unforeseeable emergent circumstance related to patient care. As such, frontline staff who work more than five consecutive hours must be scheduled for a 30-minute uninterrupted and unpaid meal period, which must commence between the second and fifth hour of their shift. The hospital and employee may mutually agree to waive meal periods.

Frontline staff must also be scheduled for an uninterrupted and paid 10-minute rest break for each four hours of working time, scheduled at any point during each four-hour working period. Rest breaks cannot be waived. For any work period, the employer and employee may agree to combine a meal period and a rest break; however, the employee must be freely able to revoke any such agreement. Further, hospitals must record when an employee misses a meal period or rest break, and a quarterly report must be submitted to the WADOH noting the total number of quarterly missed meal periods and rest breaks.

Hospitals are also now prohibited from compelling all hourly frontline staff from working beyond their regularly scheduled shift or working overtime. Rather, employees must be free to choose to do either and must not be subject to any adverse action if they choose not to do so. Any employee accepting overtime who works more than 12 consecutive hours now must also be provided with the option of at least eight consecutive hours of uninterrupted time off following the time worked.

Beginning 1 July 2026, the WADOH can investigate any employee complaint regarding meal periods and rest breaks. Moreover, it may act on its own, without a complaint, if data is discovered suggesting a potential violation. If any hospital fails to submit a meal period and rest break quarterly report or is not 80% compliant with the meal period and rest break requirements, and more than 20% of meal periods and rest breaks were missed, a penalty must be enforced, ranging from US$5,000–US$20,000 (depending on the number of hospital beds), which is doubled for subsequent violations.

Finally, the WADOH can investigate an employee complaint regarding overtime if the violation occurred within three years of filing. Within 90 days of receiving the complaint, the WADOH must either issue a closure and determination of compliance or a citation and notice of assessment if a violation is found. The WADOH may levy a civil penalty of US$1,000 for the first three violations, US$2,500 for a fourth violation, and US$5,000 for each subsequent violation.

NEW YORK ADOPTS NEW REGISTRATION REQUIREMENTS FOR TEMPORARY HEATH STAFFING AGENCIES

On 3 May 2023, New York Governor Kathy Hochul signed the New York State Budget for fiscal year 2023–2024 into law. While introducing many new requirements for the home health care industry, the budget amended the New York Public Health Law to include new Article 29-K requirements for temporary health care staffing agencies. Starting on 17 August 2023, Article 29-K requires all "temporary health care service agencies" (THCSAs) to register annually with the New York State Department of Health (NYSDOH) and imposes a set of minimum standards that THCSAs must abide by. It is important to note that Article 29-K defines THCSAs as any person, firm, corporation, partnership, association, or other entity "in the business of providing or procuring temporary employment of health care personnel for health care entities."

In addition to the annual registration requirement, Article 29-K requires THCSAs to re-register with the NYSDOH following a transfer of ownership interest of at least 10% or upon management being sold or transferred. Article 29-K also imposes conditions of registration that, among other things, require THCSAs to: (a) document that each health care personnel provided meets the minimum licensing, training, and education standards; (b) comply with all requirements and qualifications for personnel employed in health care facilities; (c) retain all records related to health care personnel for six calendar years and make them available to the NYSDOH upon request; (d) not restrict the employment opportunities of health care personnel; (e) not require the payment of liquidated damages, employment fees, or other compensation should the health care personnel be hired as a permanent employee of a health care entity; (f) comply with any requests made by the NYSDOH to examine books and records; and (g) comply with any additional requirements NYSDOH may deem necessary.

[1] 600 U.S. 447 (2023).

[2] 432 U.S. 63 (1977).

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