

SECOND OPINION

INSIGHT ON PRIVATE & HEALTHCARE MATTERS



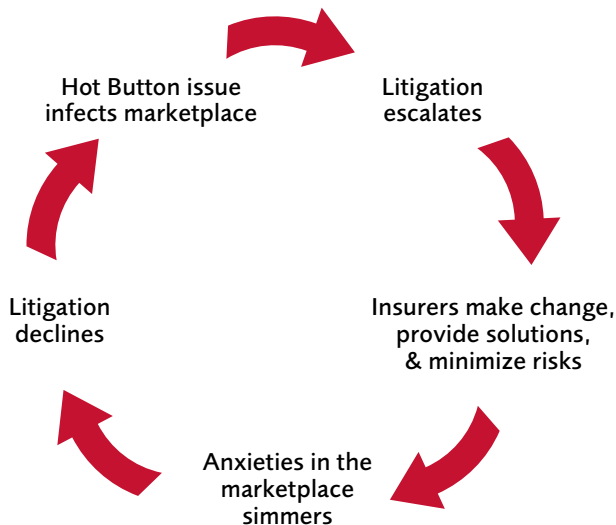
Reading Between the (Head)Lines Some chronic and emerging risks are under the radar

2018 proved to be another historic year of epic changes in the healthcare industry. The bold print headlines included massive Mergers and Acquisitions, the opioid epidemic, cybersecurity and unusual partnerships. Even the #MeToo movement has infiltrated the healthcare space. All of these disruptions lead to exposures that carriers are challenged to mitigate. With all the swirl around these attention-getting issues, one can lose sight of subtler, yet pervasive exposures that also exist. Do not let the headlines distract you from the significant challenges of chronic and emerging risks.

Chronic Ailments

There have always been systemic management liability issues that have continuously impacted healthcare organizations, such as regulatory fraud and abuse, wage and hour/FLSA, and antitrust. These types of issues have a propensity to have a cyclical effect on the marketplace (see diagram). These risks may not always make the headlines, but are nonetheless chronic and/or cyclical.

If an exposure is chronic, knowing where in the cycle of the marketplace the issue currently sits will help all parties involved have a better understanding of the terms being offered.



An Example: Fair Labor Standard Act (FLSA) Litigation:

The strength of the U.S. economy and shrinking unemployment rates have created an unanticipated problem for many healthcare organizations – incessant understaffing. Open positions are proving difficult to fill, leaving current staff to work longer hours. Overtime and/or missed break issues due to these shortages have been unfolding in courts.

FLSA litigation is a systemic issue in both the healthcare and non-healthcare arenas. Year over year, insurers have been challenged with how to best navigate through this rising trend of litigation. Insureds can effectively handle such matters with proper protocols, training, human resources and proactively engaging legal counsel. Insurers manage FLSA risk by reviewing data trends, loss history, managing terms and implementing risk management protocols.

Emerging Risks

The ability to foresee, identify and moderate emerging risks will aid clients as these matters shape the marketplace. New challenges have the potential to create havoc. Here are some recent topics and examples that may adversely affect the healthcare industry:

Discrimination Based on Sexual Orientation or Gender Identity:

Currently, there are no federal laws that explicitly prohibit discrimination against sexual orientation or gender identity.¹ However, multiple federal court cases have interpreted bias against transgender individuals as a form of sex discrimination.

Additionally, 20 states, the District of Columbia, and many cities have enacted nondiscriminatory laws that include protections for transgender people.² Even though the transgender community may not be federally protected, the exposure due to discrimination on these grounds grows daily. Interpretation of laws are evolving and additional states are beginning to offer protection to the LGBTQ community.

Evidence of Exposure:

- According to the National Center of Transgender Equality, about 25 percent of transgender individuals have lost their jobs.³ This requires careful attention as the topic of transgender discrimination and bias amplifies, given its partnership with the #MeToo movement.
- An eastern Pennsylvanian nursing home is in a legal proceeding against a recently fired employee. The nurse's assistant claims co-workers often slandered her as a male to patients and subjected her to a hostile work environment.⁴
- The Department of Health and Human Services has proposed a new rule that may affect hundreds of thousands of healthcare organizations. LGBTQ patients can potentially be refused treatment, thus creating a large risk.⁵

Sexual Harassment:

Sexual harassment in healthcare is not a new phenomenon. In 1995, 52 percent of women in medicine admitted to suffering from harassment in a male-dominated workforce.⁶ While the #MeToo movement began as an entertainment industry ailment, it has seeped into all industries, and healthcare is no exception. The examples below shed light into a spiraling issue that we believe is still in its infancy. These cases highlight the need for accountability and increased risk management training to help foster a safe and comfortable work environment.

Evidence of Exposure:

- Public Citizen, a nonprofit advocacy organization, conducted a recent study that indicated that 253 doctors were listed in the National Practitioner Data Bank for sexual misconduct (or paid a settlement related to such allegations). It also exposed that 170 of those doctors, nearly 70 percent, were not disciplined by their state medical board – even though these boards had access to the reports filed with the data bank.⁷
- Last year, Physical Therapy journal published a study that surveyed 900 therapists. Over the course of their careers, over 80 percent were subjected to sexual misconduct, such as sexual remarks, inappropriate touching, and indecent exposure. Alarming, about half admitted to experiencing sexual misconduct in the past year, similar to results from the 1990s.⁸

- According to the EEOC, #MeToo related suits increased by over 50 percent and nearly \$70 million has been recovered through litigation, up from \$47.5 million the year before⁹ and roughly 3,000 complaints were from hospital employees.¹⁰

ERISA Compliance and Voluntary Benefit plans:

When a company thinks about a voluntary plan, they often believe it exempts them from ERISA. However, this is only true if the appropriate requirements are satisfied, and even that may not prevent litigation. The ERISA laws are quite complex and employers could find themselves inadvertently exposed to litigation as an alleged plan sponsor or fiduciary.¹¹ This risk is increasing as more employers are turning to voluntary plans as low cost options for their employees.

Evidence of Exposure:

- In the 2018 plan year, 42 percent of employers have offered at least one type of voluntary benefit, and 18 percent have offered three.¹²
- A recent survey by Cigna on Voluntary Benefits has revealed millennials (the largest generation in the workforce domestically) are 22 percent more likely to turn to voluntary insurance benefits to help pay out-of-pocket costs.¹³

How to mitigate future risk?

The better we flag and responsibly manage concerns as an industry, the better we can ensure the long-term, overall health of our clients.

The steps below can be used as a tool for analyzing an insured's stance and projecting long-term risks:

1. **Awareness:** read between the (head)lines for items that may impact the industry or affect a specific insured; keep an open dialog; and share potential issues and risks.
2. **Assessment:** monitor historical data; review past and current matters; find solutions/options to present; and perform a "temperature" check of market conditions.
3. **Action:** advise compliance, training, and/or consultations with counsel; address industry conditions and concerns; and recommend options to best address and mitigate exposures and client needs.

The broker/carrier partnership is fundamental and essential to mitigate present and future risks in the insurance marketplace. Through a collaborative effort, insureds can receive the best options possible for their specific needs.

End Notes (websites last accessed 3/13/2019)

- ¹ EEOC: "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers" https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
- ² MAP: "Non-Discrimination Laws" http://www.lgbtmap.org/equality-maps/non_discrimination_laws
- ³ Marketwatch: <https://www.marketwatch.com/story/for-transgender-americans-workplace-discrimination-isnt-limited-to-the-military-2017-07-26>
- ⁴ 69 News: <http://www.wfmz.com/news/lehigh-valley/former-nursing-home-employee-says-she-was-fired-for-being-transgender/797704656>
- ⁵ The Atlantic: <https://www.theatlantic.com/health/archive/2018/01/when-the-religious-doctor-refuses-to-treat-you/551231/>
- ⁶ NBC News: <https://www.nbcnews.com/storyline/sexual-misconduct/harassed-hospitals-operating-rooms-women-medicine-await-their-metoo-moment-n846031>
- ⁷ NY Post: <https://nypost.com/2018/04/16/abusive-doctors-seem-immune-to-metoo/>
- ⁸ Oxford Academic, "Prevalence and Risk of Inappropriate Sexual Behavior of Patients Toward Physical Therapist Clinicians and Students in the United States," <https://academic.oup.com/ptj/article/97/11/1084/4085780>
- ⁹ Washington Post: "The #MeToo effect" https://www.washingtonpost.com/business/2018/10/05/metoo-effect-sex-harassment-charges-with-eeoc-rose-first-time-years/?utm_term=.8dd6b62243fe
- ¹⁰ Managed Care: "Sexual Harassment: Health Care, It Is #YouToo" <https://www.managedcaremag.com/archives/2018/2/sexual-harassment-health-care-it-you-too>
- ¹¹ Graydon Head & Ritchey LLP: <https://graydon.law/voluntary-benefit-plans-subject-erisa/>
- ¹² Benefitfocus: <https://www.hrmanagementapp.com/wp-content/uploads/2018/05/Benefitfocus-Report-State-of-Employee-Benefits-2018.pdf>
- ¹³ Cigna: <https://www.cigna.com/employers-brokers/insights/cgi-voluntary-survey-millennials>

AUTHORS:

Jessica Bhardwaj, Senior Underwriter,
Private Healthcare Division

Ryan Soteres, Assistant Vice President,
Private Healthcare Division

QUESTIONS?

Contact your local Allied World Underwriter.