

**HEALTH LAW UPDATE**

**NPO PAAC Petoskey**

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## **I. Sexual Harassment in Health Care in the era of #MeToo**

### **A. Statistics**

1. Number of Claims filed with EEOC has remained pretty steady, averaging 12,500 per year.
2. However, claims are now being made publicly which adds a public relations impact.
3. Health care is the largest source of jobs in the United States as of 2017, with physicians comprising a greater portion of the healthcare workforce than ever before.
4. Greater number of employees means a greater risk of sexual harassment claims.
5. In 2016, the number of sex discrimination claims including harassment, filed with the EEOC put the health care industry number one in claims out of all industries.
6. One of the biggest sex harassment jury verdicts (\$168 Million dollars) was in a 2012 lawsuit filed by a female physician against the hospital she worked for in California.
7. Risks are high for Health Care Employers due to:
  - a. the large number of highly trained, professional employees in non-traditional supervisory and other positions of influence;
  - b. the higher percentage of intimate situations that occur behind closed doors;
  - c. uniquely stressful work environments; and
  - d. the inherently personal nature of health care services and the level of trust involved.

### **B. Title VII and Elliott Larson Civil Rights Act**

1. **Federal law – Title VII**, only applies to employers with 15 or more employees and does not have individual liability, claims are against the employer.
2. Michigan law – Elliott Larson Civil Rights Act applies if you have 1 employee and creates liability for individuals as well as employers.
3. Protects more than just conduct of a sexual nature:
  - conduct that occurs because an individual does not conform to certain sexual stereotypes is sex harassment

- prohibit any unwelcome conduct that is based on sex and is so frequent or severe that it creates a hostile or offensive work environment
- Harassing conduct includes unwelcome sexual advances, requests for sexual favors and inappropriate verbal communication, physical interactions, or pictures
- Harasser can be same or different sex of the individual being harassed
- Harasser can be a supervisor, coworker, patient, visitor, or vendor
- Quid pro Quo - prohibits conditioning some aspect of employment on submission to sexual advances or sexual favors

#### 4. Employer Liability

- a. May be automatic if a supervisor – harasser causes the employee to suffer an adverse employment action (e.g. loss of job, promotion or benefit)
- b. Only liable for harassment by a co-worker or third party if it:
  - 1) failed to provide a reasonable avenue for complaints and
  - 2) it knew, or in the exercise of reasonable care should have known, about the harassment and failed to take action.

5. Companion claims include intentional infliction of emotional distress, negligent retention or supervision, invasion of privacy, defamation, and civil assault and battery that can be based on the unwelcomed conduct.

6. Stale claims have been brought forward and are expected to continue.

7. EEOC study found that 3 out of 4 individuals who experienced harassment never talked to a supervisor, manager, or union representative about the conduct.

#### C. Lower the Risk

1. Create an anti-harassment culture that flows from the executive level down.
  - a. make it clear from the top that employees should report any incidents of inappropriate conduct they see or experience;
  - b. that any such reports will be appropriately addressed, and that individuals who make a complaint in good faith will be protected from retaliation
  - c. the individuals responsible for operational, legal, compliance, public relations, and HR should present a united front to reinforce the anti-harassment culture.
2. Address issues before they arise to the level of harassment.
  - a. red flags regarding a person's (including physicians) conduct, even gossip, should not be ignored. Address it directly or refer to HR.

3. Employee handbooks and policies should go beyond prohibiting intimidating, bullying and abusive conduct within the parameters allowed by the NLRB.
4. Employees should know they are expected to report issues of misconduct by patients, vendors and non-employees as well as misconduct by coworkers and members of management.
5. Employment Agreements should address consequences for harassment
6. Have an effective policy for reporting harassment or suspected harassment.
7. Training employees at all levels
8. Create a plan for handling issues observed and complaints received
  - a. supervisors need to report observations even if no complaint filed
  - b. consider third party investigator when harasser is a partner or owner or in a position of authority
  - c. complaints about non-employees – difficult but gather as much info as possible and make a decision based on the info gathered
    - Vendor – get reassigned to another account
    - Patient – always have a third person in the room or in extreme cases refer patient elsewhere if possible

## **II. Opioid Crisis**

### **A. Legislation**

1. December 2017, Michigan Legislature passed a number of laws to address controlled substance abuse and diversion.
  - a. MCL 333.16282 – requires a health profession licensee or registrant who treats a patient for an opioid related overdose must provide the patient with information on substance use disorder services.
  - b. MCL 333.7333 – pharmacist may, consistent with federal law and regs, partially fill in increments a schedule 2 controlled substance prescription.
  - c. MCL 333.733a- requires reporting of all schedule 2-5 Controlled substances to MAPS- except in inpatient setting or where prohibited by federal law (certain treatment programs)

d. MCL 333.7303a(4) – licensed prescribers must register with MAPS before prescribing or dispensing a controlled substance

e. MCL 333.7303a(3) – must review a MAPS report before prescribing more than 3 day supply of controlled substance

f. MCL 333.7303b – before giving a minor the first prescription for an opioid the prescriber shall provide the parent/guardian specified information and obtain the dated signature of the parent/guardian on a start talking form. The prescriber must also sign the form and place it in the minor’s record. Must discuss such things as:

- Risk of addiction and overdose
- Increased risks of addiction for individuals suffering with both mental and substance use disorders
- Danger of taking an opioid with a benzodiazepine, alcohol or other central nervous system depressant

g. MCL 333.7303c – before prescribing an opioid for minors or adults, a licensed prescriber or another health professional must obtain the patient’s/patient’s representative’s signature on a form prescribed by DHHS indicating the patient/patient’s representative received specified information.

h. LARA and DHHS created the Opioid Start Talking Form:  
**Form MDHHS-5730 (4-18a)**

i. MCL 333.7333b – when treating patient for acute pain, shall not prescribe more than a 7 day supply of an opioid within a 7 day period.

j. MCL 333.7303a(2) – with certain exceptions, a prescriber must be in a bona fide prescriber-patient relationship with a patient before prescribing schedule 2-5 Controlled substances. Must also provide follow-up care to monitor efficacy of controlled substance in treating the patient’s medical condition, or refer patient to his/her primary care provider for follow up.

k. MCL 400.109 – Medicaid beneficiaries may receive medically necessary treatment for substance use disorders, including medical detoxification and residential care.

### **III. Marijuana in the Workplace**

#### **A. Medical Marijuana**

1. Michigan Employers have been able to prohibit employees, even those with medical marijuana cards from possessing, using, being under the influence at work, etc., if they have a comprehensive policy.

## **B. Recreational Marijuana**

1. Michigan Employers will still be able to prohibit employees from possessing, using, being under the influence, etc., at work if you have a comprehensive policy.

2. Marijuana is still illegal under federal law.

3. The new law specifically protects employers stating in pertinent part:

(3) "This act does not require an employer to permit or accommodate conduct otherwise allowed by this act in any workplace or on the employer's property. This act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of Marijuana. This act does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marijuana."

4. From a practical standpoint, it is difficult to manage.

a. You need a strong drug and alcohol policy which prohibits use and allows for testing.

b. marijuana will be available in many forms, so have to ban all - how will you know if it's a regular brownie?

c. have to be more alert to changes in performance and indicators of intoxication.

d. testing can be random or reasonable suspicion based

e. Determining "under the influence" can be difficult

f. need predetermined definition and also protocol for positive results

g. EAP referral, automatic termination, and/or action plan and/or last chance agreement

5. I recommend at least a 30 day grace period if you are going to start testing and haven't had a policy in place.

#### **IV. Proposed legislation on Paid Sick Days**

##### **A. Michigan**

1. House Bill (HB) 5247 (2017)- Introduced and referred to committee on November 9, 2017. No action has been taken since then.

a. "A bill to require employers to permit use of sick leave to address issues arising from sexual assault, domestic violence, or stalking; and to provide remedies."

b. only applies if you already offer sick leave, you have to allow its use for the above reasons.

2. HB 4307 (2017) - Introduced and referred to committee on March 7, 2017. No action has been taken since then.

a. "A bill to require employers to provide paid sick leave to certain employees; to specify the conditions for accruing and using paid sick leave; to prohibit retaliation against an employee for requesting, exercising, or enforcing rights granted in this act; ..."

b. would apply to employers of 1 or more; small employer has 10 or fewer; count all fulltime, part time or temps including through temp agencies.

c. provide 1 hour of paid sick leave for every 30 hours worked up to 40 hours in a calendar year for small employers and 72 hours for all other employees.

d. carries over from year to year, but only have to allow employees to use 40/72 in a year.

e. new employees have to wait 90 days before using accrued sick leave

f. exempt employees presumed to work 40 hours, unless normal work week is less than 40.

g. employers with PTO already, are presumed to be in compliance if it can be used as allowed in the act and accrues at the same rates.

3. Senate Bill (SB) 0212 (2017)- Introduced March 2, 2017 and referred to committee that day with no further action.

a. "A bill to require employers to provide paid sick leave to certain employees; to specify the conditions for accruing and using paid sick leave to prohibit retaliation against an employee for requesting, exercising or enforcing rights granted ..."

b. similar to the HB 4307

4. SB 665 (2017) – Introduced November 28, 2017, and referred to committee that day. No further action taken.

a. Senate version of HB that allows use of sick time to address issues arising from domestic/sexual assault.

B. Federal Laws proposed

1. HR 4219 – introduced November 2, 2017. Committee hearing held July 24, 2018.

a. extends ERISA to establish a voluntary workflex option under which employers who provide flexible work options that include a combination of paid leave are exempt from certain state and local laws regarding employee benefits. Plan must provide 12 -20 days minimum paid leave a year, depending on size of employer and tenure of employee.

b. plan also must provide at least one flexible work option.