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Decision Reminds Providers of Limits on Restricting Employee Communications with Media

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Hospitals and medical groups that bar staff from communicating with the media should take another look at those prohibitions following a recent federal appellate decision finding such a policy unlawful under the National Labor Relations Act (NLRA).

Multiple news accounts have detailed incidents where doctors and nurses were disciplined or fired for speaking out about staffing issues or inadequate Personal Protective Equipment. However, hospitals and medical groups should recognize that such complaints may be protected under both the NLRA and the Occupational Safety and Health Act (OSH Act), or similar state laws.

In May, a Maine hospital was required to reinstate an activities coordinator in the rehabilitation department after firing her for writing a letter to the editor expressing support for nurses and doctors in their respective labor disputes and urging management to heed the nurses' staffing demands and concerns about risk to patient safety. Her letter criticized management as out of touch with patient care and negatively affecting hospital staff and the local community.

The hospital had a policy providing that no employee "may contact or release to news media any information" about the hospital "without the direct

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involvement" of the media relations department or the COO. The policy provided that if an employee received an inquiry from the media, the employee should direct it to the media relations staff.

Immediately after the activities coordinator's letter to the editor was published, she was fired for violating that policy. The National Labor Relations Board (NLRB) brought charges on behalf of the nurse.

While employees have the right under Section 7 of the National Labor Relations Act to engage in "protected concerted activity," did she do so? The nurse was not a member of the union, was not directly affected by the alleged understaffing, and did not discuss her letter with any other employee prior to submitting it. The Administrative Law Judge who presided over the NLRB charge thought she engaged in protected concerted activity, the NLRB affirmed that decision, and the federal First Circuit Court of Appeals (covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) agreed.

Activity is "concerted" and therefore protected "if it is engaged in with or on the authority of other employees." But the court noted there are circumstances where concerted activity can include conduct engaged in by a single employee even if it is not specifically authorized by others. Instead, the key inquiry is not whether the employee acted individually, "but rather whether the employee's actions were in furtherance of a group concern," the court said.

Concerted activity may arise where employees use "channels outside the immediate employee—employer relationship to air shared grievances," the court said, noting that employee outreach to media outlets and governmental bodies has been found to be concerted activity. While the First Circuit expressed concern that "the facts here may be at the edge of the Board's definition of concerted activity," it nonetheless accepted the letter to the editor as

such and affirmed that the activities coordinator was unlawfully fired.

In addition to reinstating the activities coordinator and providing back pay, the hospital also was required to post notices stating that it would not "discharge, discipline or otherwise discriminate against employees for engaging in protected concerted activities and/or for supporting" the nurses' union.

The case serves as a reminder that in general, employees – whether unionized or not – have the right to engage in protected concerted activity, and that media and social media policies must be carefully crafted with those rights in mind.

Note, however, that those rights do not necessarily extend to all physicians. Employed physicians in supervisory roles with authority to hire, fire, or discipline employees, and those in managerial roles with authority to make, alter, or allow exceptions to policies are not covered by the NLRA's protections. In addition, physicians who work at a hospital but are not employed by the hospital would not be protected.

But employees with workplace complaints, regardless of whether they are in supervisory roles, have a second avenue under the OSH Act. All employees are entitled to a healthy and safe workplace under the OSH Act. Employers are obligated to keep the workplace free of known health and safety hazards, and employees have the right to speak up about hazards without fear of retaliation. It is illegal for an employer to fire, demote, transfer, or otherwise retaliate against an employee who complains to the Occupational Safety and Health Administration (OSHA).

Keep in mind that OSHA enforces 22 whistleblower laws, some of which provide protection to *non-employees*. For example, with respect to some types of fraud, a whistleblower can be a public or

private employee, a contractor or subcontractor, or a non-employee. When it comes to workplace safety, the OSH Act provides that an employer cannot take an adverse action against an employee for engaging in activities protected by whistleblower law. Protected activities can include filing an administrative action, testifying or otherwise assisting in an investigation, and even reporting an alleged violation to a supervisor.

OSHA encourages employers to have broad whistleblower protections that cover not just employees, but all workers. “An anti-retaliation program that enables all members of the workforce, including permanent employees, contractors and temporary workers, to voice their concerns without fear of retaliation can help employers learn of problems and appropriately address them before they become more difficult to correct,” OSHA says.

To ensure that all workers on a jobsite are protected, OSHA employs a multi-employer worksite doctrine pursuant to which it can cite more than one employer for a hazardous condition that violates an OSHA standard.

Moreover, although a non-employee or an independent contractor, such as a non-employee physician with hospital privileges, may not be considered protected under the OSH Act when making a complaint, such a non-employee can make a health and safety-related complaint to OSHA that could trigger an onsite investigation. The same non-employee could be covered under a different whistleblower protection under federal or state law. Regardless of protected status, the same individual could assist hospital employees in bringing health and safety complaints and acting as a witness on their behalf.

The takeaway for hospitals and medical groups: Encourage employees to bring their concerns to the attention of management, listen to those concerns, and address them. Employers can lawfully adopt

policies that prohibit employees from speaking to the media *on behalf of the employer*, but they should not seek to prohibit employees from discussing their terms and conditions of employment.

For assistance with your media policies or other workplace issues, contact your Akerman attorney.
