

# Legal and Regulatory Oversight of Hospital Employment Relationships

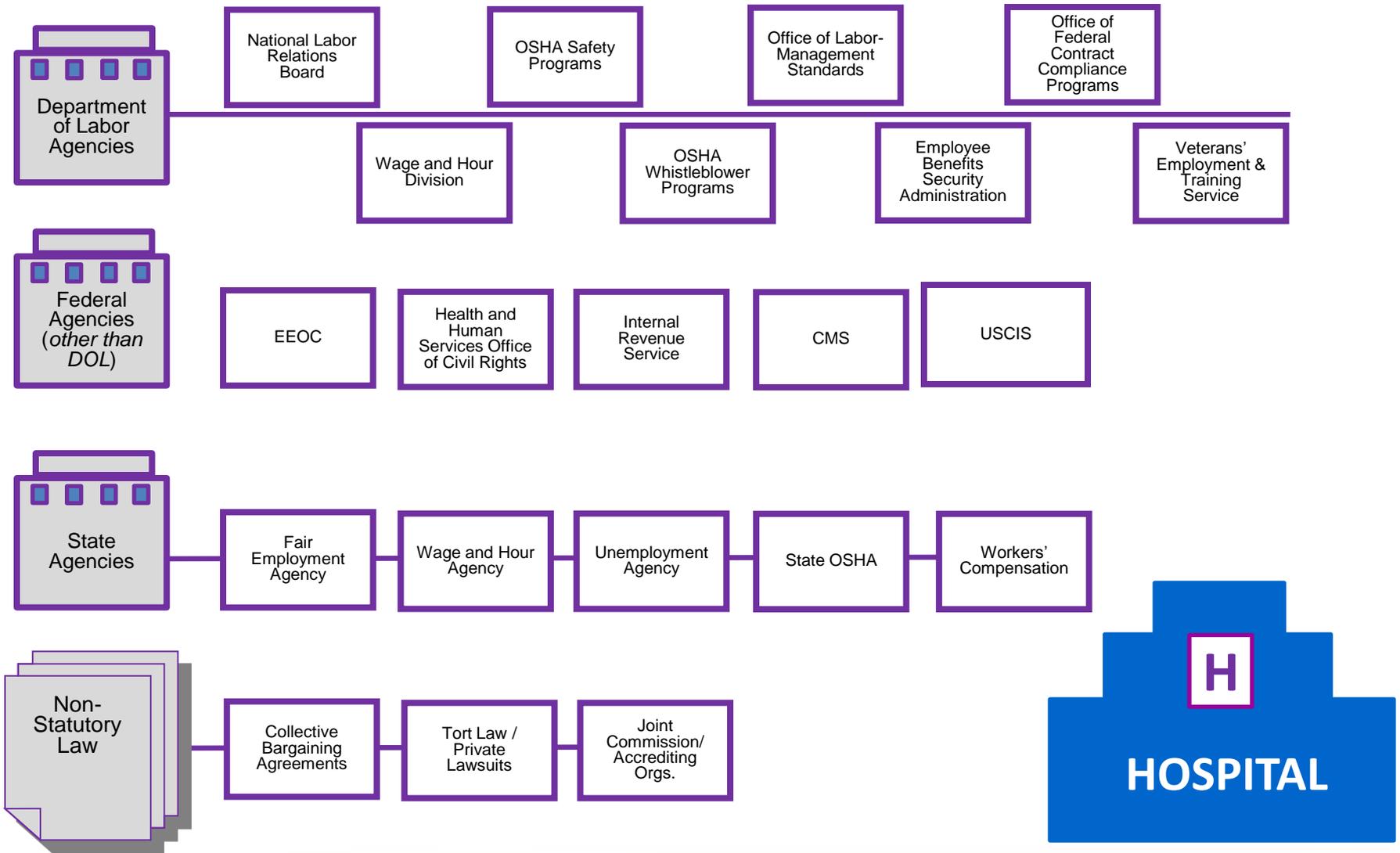
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# Governmental Oversight of Hospital Workforce Issues

- Health care is among the most heavily regulated industries in the U.S.
- Health care workforces are blanketed by laws and regulations affecting health care providers.
- Rules governing health care employment come from all angles:
  - Federal agencies such as the Department of Labor
  - State laws and local ordinances
  - Accrediting organizations
  - Collective bargaining agreements

# The Extensive Array of Governmental Oversight of Hospital Workforce Issues



# FEDERAL AGENCIES WITHIN THE DEPARTMENT OF LABOR

# National Labor Relations Board

- Enforces the National Labor Relations Act, including through conducting union elections and investigating unfair labor practices. The NLRA applies to both unionized and nonunionized workplaces. In FY 2009, over 16% of all representation elections were held in the health care and social assistance industry.
- Recent initiatives affecting hospitals include:
  - Proposed rulemaking on pre- and post- election procedures would expedite election process and lead to increased unionization
  - New union-friendly rule reinterpreting appropriate bargaining units for nonacute care facilities
  - Considering expansion of access rules for union organizers
  - Expedited injunctive relief against employers during organizing campaigns
  - Expanded rights of unions to engage in bannered and street theater
  - New rule requiring employers to post notice informing employees of their NLRA rights
  - New default language in voluntary settlement agreements likely to increase number of settlement violations
  - Considering electronic voting in union elections

National Labor Relations Board, Annual Report for the Fiscal Year Ending September 30, 2009, February 23, 2010.

Representation—Case Procedures, 76 Fed. Reg. 36812-36847, June 22, 2011.

*Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011).

# Wage and Hour Division

- Enforces federal labor laws pertaining to minimum wage, overtime pay, recordkeeping, child labor, and family and medical leave, among other topics.
- Substantial enforcement against hospitals. Health care was the fourth most-targeted industry for WHD investigations, accounting for 8.7% of all WHD investigations, from 1998 to 2008.
- Additional enforcement expected. A May 2010 DOL-commissioned report singled out health care as an industry WHD should target through strategic enforcement.
- Private lawsuits against hospitals' alleging violations of meal-period provisions under FLSA are increasing.
- WHD Factsheet #53 (revised July 2009) provides specific guidance regarding common FLSA violations found by the Wage and Hour Division during investigations in the health care industry.

David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division*, May 2010

Paul DeCamp, *Time to Eat? Health Care Employers Should Make Sure There Is*, Jackson Lewis Wage and Hour Update, Nov. 6, 2009

# OSHA – Safety Programs

- Works to prevent work-related injuries and illnesses by issuing and enforcing standards for workplace safety and health.
  - Measures affecting hospitals include:
    - Numerous OSHA regulations target hospitals. These rules pertain to disease transmission, hazardous substances, and other areas.
    - From 2006 to 2011, OSHA conducted 2,550 inspections at hospitals across the United States.
      - OSHA’s FY 2012 budget request asks an additional \$24,800,000 in funding over the FY 2011 budget, in part to hire an additional 25 investigators.
    - Increased enforcement efforts through:
      - Cooperation with local building officials; and
      - Ensuring that workers who do not speak English receive training in their native language
    - OSHA has lobbied to pass additional legislation—the Protecting America’s Workers Act—to strengthen employee protections.
    - Public Citizen, an SEIU affiliate, has asked OSHA to implement regulations limiting the number of hours resident physicians can work in a given period. (The Accreditation Council for Graduate Medical Education announced on July 1, 2011, certain limits on hours worked by Interns.)

OSHA, Safety and Health Topics: Healthcare Facilities, <http://www.osha.gov/SLTC/healthcarefacilities/index.html>

OSHA, Integrated Management Information System (IMIS), <http://www.osha.gov/pls/imis/industry.html>.

Secretary Hilda Solis, Remarks at the OSHA Latino Safety Conference, Houston, TX, April 14, 2010

# OSHA - Whistleblower Program

- Protects employees against retaliation for reporting employers' violations of 17 statutes.
  - Many whistleblower provisions apply to hospitals. These provisions are found in statutes addressing a wide range of areas, including workplace safety and health, nuclear safety, the environment, asbestos in schools, corporate fraud, and SEC rules or regulations.
- OSHA's FY 2012 budget request includes funding to hire an additional 45 staff working exclusively on whistleblower issues.
- Complaint filed recently against an Ohio dentist is a reminder that health care providers large and small are not immune from OSHA's whistleblower protections.
  - The complaint alleges that the dentist retaliated against employees for reporting two mercury spills to the agency.

OSHA Regional News Release, July 6, 2011.

# Office of Labor Management Standards

- Enforces most provisions of the Labor-Management Reporting and Disclosure Act, which generally requires unions and employers, including hospitals, to report and disclose to the government financial and other information pertaining to labor-management relations.
  - Under proposed regulations, employers, including hospitals, and their consultants and attorneys would be required to report information about the use of attorneys in labor disputes and union organizing drives. The proposed regulations would limit the LMRDA's "advice exception," which generally exempts "services of [a] person by reason of his giving or agreeing to give advice to [an] employer" from the Act's reporting requirements.

DOL Regulations - Live Q&A Session with OLMS, <http://www.dol.gov/regulations/chat-olms-201012.htm>.

Ben James, DOL Proposes Rule To Shrink LMRDA 'Advice' Exemption, Law 360, June 20, 20110.

29 U.S.C. § 433(c)

# Office of Federal Contract Compliance Programs

- Enforces numerous affirmative action and equal employment opportunity obligations applicable to federal contractors and subcontractors.
  - Many hospitals are subject to OFCCP regulations by virtue of having contracts or subcontracts with the federal government. These include hospitals that provide medical care to active and retired military personnel as well as teaching hospitals doing research under a federal contract.
    - A judge recently determined, for example, that any health care provider receiving more than \$50,000 in reimbursement from the Department of Defense's TRICARE program is considered a federal affirmative action subcontractor.
    - The OFCCP recently summarized its positions on jurisdiction over health care providers in Directive No. 293, an unpublished, internal memorandum. Significantly, the Directive indicated that the OFCCP believes it may have jurisdiction over health care providers based on their participation in Medicare Parts C and/or D.

*OFCCP v. Florida Hospital of Orlando*, 2009-OFC-00002 (Oct. 18, 2010)

Directive No. 293, Office of Federal Contract Compliance Programs, Department of Labor, December 16, 2003

# Veterans' Employment & Training Service

- Assists veterans obtain employment and enforce employment rights under federal statutes. These include the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA).
  - Employers are increasingly subject to enforcement actions from veterans returning from active duty.
  - New regulations proposed by OFCCP in April 2011 would strengthen affirmative action provisions under the Vietnam Era Readjustment Assistance Act, part of which VETS administers, by detailing the mandatory actions required by federal contractors in the areas of recruitment, employee training, recordkeeping, compliance evaluations, and the dissemination of affirmative action policies.

Howard S. Suskin and Benjamin J. Wimmer, Arbitrability of USERRA Claims: Battle on the Home Front, Law.com (Oct. 15,2008), <http://www.law.com/jsp/PubArticle.jsp?id=1202425266219>.

VEVRAA NPRM FAQs, OFCCP, [http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA\\_NPRM\\_faq.htm#Q8](http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_NPRM_faq.htm#Q8)

# Employee Benefits Security Administration

- Administers the provisions of the Employee Retirement Income Security Act (ERISA), which regulates employer-provided pension and health benefit plans.
  - Hospitals, like other employers, must comply with numerous ERISA provisions that regulate how hospitals administer and maintain pension and benefit plans.
  - EBSA sued a California health care group in March 2011 over alleged ERISA violations.

News Release, US Department of Labor sues Los Angeles-based healthcare group to recover retirement contributions and loan repayments owed to hospital workers, EBSA (March 16, 2011), <http://www.dol.gov/ebsa/newsroom/2011/11-243-SAN.html>.

# FEDERAL AGENCIES OUTSIDE THE DEPARTMENT OF LABOR

# Equal Employment Opportunity Commission (EEOC)

- Enforces federal laws that make it illegal to discriminate against an employee or job applicant on the basis of race, color, religion, sex (including pregnancy), national origin, age, disability or genetic information.
  - EEOC received nearly 100,000 charges against employers in FY2010—more than any other year in agency history. This number is likely to increase.
    - New regulations under the Genetic Information Nondiscrimination Act detail and interpret the new obligations GINA imposes on employers—particularly hospitals.
    - E-RACE (Eradicating Racism and Colorism from Employment) enforcement initiative targets employers such as hospitals that may use background checks to screen job applicants.
    - The ADA Amendments Act has expanded the number of individuals eligible to file age discrimination claims.
    - EEOC is targeting wellness plans for potential violations of discrimination laws.

EEOC, Fiscal Year 2012 Congressional Budget Justification (Feb. 2011).

29 C.F.R. § 1635 *et seq.*

E-RACE Goals and Objectives, <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm>

# Health and Human Services Office of Civil Rights

- Enforces health care providers' compliance with the medical records and genetic information privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA) and the Genetic Information Nondiscrimination Act. Also enforces civil rights laws to facilitate access to health and human services programs, such as Medicare.
  - Conducts compliance reviews of hospitals and investigates complaints to ensure compliance with HIPPA's Privacy Rule and antidiscrimination measures.
  - Enforcement of alleged HIPPA violations is on the rise.
    - \$4.3 million penalty against a Cignet Health facility in Maryland (February 22, 2011).
    - \$1 million settlement against General Hospital Corporation and Massachusetts General Hospital (February 24, 2011).

Health Information Privacy & Civil Rights Enforcement Pages, <http://www.hhs.gov/ocr>.

News Release, HHS imposes a \$4.3 million civil money penalty for violations of the HIPAA Privacy Rule (February 22, 2011), <http://www.hhs.gov/news/press/2011pres/02/20110222a.html>

News Release, Massachusetts General Hospital settles potential HIPAA violations (February 24, 2011), <http://www.hhs.gov/news/press/2011pres/02/20110224b.html>

# Internal Revenue Service

- Enforces the nation's tax laws, including many that affect hospitals and their employees.
  - In 2010, the IRS began auditing 6,000 employers across the nation to investigate independent contractor misclassification.
    - The Obama Administration expects to recover \$7 billion over the next ten years from federal crackdowns on independent contractor misclassification.
    - Plans to hire 100 additional investigators are underway.
  - The IRS also recently revised the IRS Form 990, which applies to nonprofit employers, many of whom are hospitals. The new form increases reporting and disclosure obligations for these organizations.

Steven Greenhouse, U.S. Cracks Down on 'Contractors' as a Tax Dodge, New York Times (Feb. 18, 2010), <http://www.nytimes.com/2010/02/18/business/18workers.html?pagewanted=print>.

# Center for Medicare and Medicaid Services

- Administers the federal Medicare program and monitors state Medicaid programs.
  - With 47 million Americans receiving Medicare, CMS regulations have a substantial impact on hospitals.
  - Through “conditions of participation” in Medicare, CMS regulates many aspects of how hospital employees perform their responsibilities, from organ donation to patient visitation policies and fire safety.
  - Recent CMS guidelines and regulations for Medicare and Medicaid contractors have imposed new requirements for how hospitals respond to a wide array of daily issues, such as infection control, falls and other accidents, and the use of restraints.

# United States Citizenship and Immigration Services

- Administers programs related to lawful immigration to the United States, including E-Verify, the system through which approximately 230,000 employers determine whether employees and potential employees are eligible to work in the United States.
  - Required by federal contracts with E-Verify clauses and mandatory in several states.
  - Although mostly voluntary under federal law, at least four bills have been introduced in Congress that would expand E-Verify requirements. One bill would require all employers, including hospitals, to participate in E-Verify.

Electronic Employment Eligibility Verification and Illegal Immigration Control Act, H.R. 483, 112th Cong.

# STATE AGENCIES

# State Fair Employment Practice Agencies

- State and local agencies that enforce state and local anti-discrimination laws, which often prohibit discrimination on a much wider basis than federal law.
  - Depending on the jurisdiction, these laws may enable employees to claim they were discriminated against on a number of grounds, such as race, religion, creed, ethnicity, national origin, color, ancestry, age, sex, sexual orientation, gender identity, domestic partner status, marital status, disability, AIDS/HIV, weight and height. As an additional basis, some jurisdictions prohibit discrimination that violates “public policy.”
- The size and variety of hospital workforces mean that many hospital employees are protected by state and federal law.
  - Although some employees have meritorious claims, these laws limit hospitals’ ability to lawfully discipline and remove low-performing employees, without regard to employees’ protected characteristic(s).

# State Wage and Hour Agencies

- Enforce state laws pertaining to minimum wage, overtime, child labor, employee misclassification, and other statutes often providing broader protections to employees than their federal counterparts.
  - Forty-five states have wage and hour agencies, subjecting hospitals to a patchwork of statutes.
  - Like the Department of Labor, states are escalating enforcement measures as well. At least, four states have created specific task forces to target alleged misclassification of employees.
    - The New York State Joint Enforcement Task Force on Employee Misclassification, for example, conducted 77 enforcement sweeps from September 2007 to September 2010. The sweeps, which targeted health care and other employers, found 44,000 allegedly misclassified employees and \$607 million in unreported wages. The state collected \$18.3 million in unpaid taxes.

Enforcement of State Wage and Hour Laws: A Survey of State Regulators, Columbia Law School National State Attorneys General Program, April 2011

BNA Daily Labor Report, 201 DLR B-1, Oct. 19, 2010.

# State Unemployment Agencies

- Administer state unemployment programs, and, in some states, collect payroll taxes and audit employers' payroll records.
  - In California, for instance, the Employment Development Department assesses employers' compliance with worker classification standards and can fine employers who misclassify employees as independent contractors.

# State Safety Agencies

- Federally-approved programs in 27 states that enforce job safety and health standards, which are often more stringent than federal law.
  - Hospitals are under pressure from state laws that regulate working conditions of health care professionals.
    - At least fifteen states, plus the District of Columbia, have mandated nurse staffing ratios.
    - At least nine states have laws that regulate patient lifting by health care employees.

American Nurses Association, <http://www.nursingworld.org>

# Workers' Compensation

- Provides financial assistance and medical benefits to employees who suffer work-related injuries. Also regulates the medical treatment of workers' compensation recipients.
  - Hospitals must keep abreast of constantly changing state regulations pertaining to reimbursement for services provided to workers' compensation recipients.
  - These regulations play a large role in treating many hospital patients.

# NON-STATUTORY LAW AND OVERSIGHT

# Collective Bargaining Agreements

- Regulate employees' working conditions, job responsibilities, pay and benefits at many health care facilities throughout the nation.
  - Unions are increasingly targeting health care employees to grow their memberships. For example, the largest private sector NLRB election in Oregon since 1996 was held at a Bend, Oregon hospital in January 2011.
  - The Service Employees International Union, which represents 1.1 million health care employees nationally, bills itself as both the nation's fastest growing union and the largest healthcare union.
- With the attendant collective bargaining agreements, hospitals' ability to direct their workforces to meet patient needs are limited.

Service Employees International Union, <http://www.seiu.org>

# Tort Law & Private Lawsuits

- Hospitals face increasing scrutiny and litigation costs from the medical malpractice plaintiffs' bar.
  - Professional liability insurance accounts for 1.5% of hospital spending.
  - As more and more doctors abandon their own practices and become hospital employees, hospital malpractice liability could increase.

The Cost of Caring: Drivers of Spending on Hospital Care, American Hospital Association, (March 2011).

Gardiner Harris, As Physicians' Jobs Change, So Do Their Politics, New York Times, (May 30, 2011)  
<http://www.nytimes.com/2011/05/30/health/policy/30docs.html?pagewanted=print>.

# The Joint Commission and Accrediting Organizations

- Accredits and certifies hospitals nationwide that meet high standards of patient care.
  - 19,000 health care providers are governed by Joint Commission standards.
  - These organizations have agreed to periodic evaluations that can result in loss of accreditation.
  - Hospitals must comply with frequently changing accreditation standards, which govern a wide array of hospital operations, from laboratory sanitation and infection control to fire safety, suicide prevention, and patient identification.
    - Recently revised requirements have brought changes to several areas of hospital functions, including medication management and safety, laboratory testing, documentation of care, and information management, among others.

<http://www.jointcommission.org/>