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The Yellow-Brick Road of Good Governance

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Chair, Governance Committee
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There's a pivotal scene in the 1939 classic film *The Wizard of Oz* that relates to the importance of leadership. Dorothy and her companions have traveled through numerous challenges to find the Great and Terrible Oz so he can grant them their wishes. It's revealed that behind the smoke and mirrors there's just one man trying to do it all. There's a lesson here in leadership, communication, and looking behind the scenes that leads to a resolution for the characters. Dorothy and her crew see Oz for who he really is, and Oz helps them realize that they can, in fact, benefit from each other and receive their wishes. As in *The Wizard of Oz*, in associations there is a desire to pull back the curtain to see how current board structures and leaders govern the organization. Much like the winding road to Oz, AHLA's governance structure has been on a journey that has continued to evolve over time.

In 2014, AHLA's Board of Directors formed an ad hoc governance committee to study the governance process and board committee structure of the Association. The Board also worked with outside consultants to review its size and structure in relation to the Boards of similar-sized associations. Over the next few years, the Board made a series of recommendations and took needed steps to reduce its size, streamline its committee structure, and educate Board members about strategic governance versus operational management roles. These recommendations, including the new Board committee structure, went into effect in July 2019.

One of the recommendations made during the restructuring of the Board was to form a standing governance committee, whose primary purpose is to oversee the governance and functioning of AHLA as a whole. The committee's secondary purposes are to ensure that the organizational structure of AHLA is consistent with governance best practices and that performance standards for the Board and its committees are developed and maintained. From there, the committee's charge is to evaluate AHLA's overall governance effectiveness and efficiency and recommend improvements as appropriate.

During this term, the committee is focused on three areas that are closely aligned with the existing strategic plan of the Association. The first gets to the core of good governance, which is communication and providing tools for better communication between board members, between the board and staff, and between the board and members. The second is developing and recruiting board skillsets. The board benefits from diversity of leadership talent as well as substantive knowledge that can help move AHLA's strategic plan forward. Finally, the third focus area is the governance process. The committee will be reviewing other committee and council charters, studying how the Association should release public messages, and providing input into the next strategic planning process. AHLA also plans to release our Annual Report in the coming months, which will go into further details about this process.

AHLA thrives on the input and conversations we have within our membership. We've been surveying our membership throughout the years and using the information we learn to help steer our Board and mission. We also welcome new volunteers and are currently holding a Call for Leaders for the Board, Nominating Committee, Fellows, and Fall Program Planning Committees, which closes in December. Other Call for Leaders, i.e., for Practice and Affinity Group leadership, will be announced in the coming months. If you've ever considered serving as a leader or volunteering as a writer, speaker, or mentor, you can find more information here: https://communities.americanhealthlaw.org/volunteer/volunteer-opportunities.

In closing, the structure of governance does not always evolve on a straight line, similar to what Dorothy and her companions experienced on their journey to Oz. The function of a governance committee is to research issues, develop best practices, and help guide the board in fulfilling its overall strategic focus. All of these functions require good leadership and communication and enables AHLA to remain on a path moving forward.

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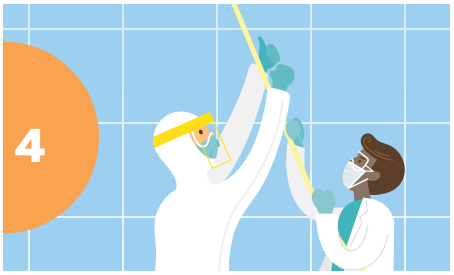

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Feature

Necessary Medicine: Solving Eight of the Most Common Pandemic-Related Wage and Hour Traps for the Unwary

Kristin McGurn, **Catherine Dacre,** and **Christina Jaremus,** Seyfarth Shaw LLP

Despite legislative efforts to provide loans, grants, and other sources of funding to health care organizations and hospitals that continue to carry Americans through surges of COVID-19 cases, many health care providers are hemorrhaging cash. These organizations were forced to forego lucrative elective and non-life-threatening procedures, they await clarity on the parameters of a post-pandemic payers' reimbursement landscape, and the boundaries of insurance coverage for business interruption remain untested in many corners. Simultaneously, many providers must defend or settle increasing legal claims. For the third decade in a row, collective and class claims dominate the wage and hour landscape. These claims are attractive to plaintiffs' counsel because certain pay practices tend to be uniform within organizations, which eases the path to class certification, the threshold for which is not typically onerous. Payouts and penalties in these representative actions can be vast. Unbudgeted litigation defense costs are expenses that health care organizations can scarcely afford. Recognizing and planning for the risks of employee wage-related challenges is a critical prophylactic measure.

COVID-19 has shocked the economy, overburdened health care organizations, and created new ways of working for which existing wage and hour laws lack clear and consistent answers. In the inevitable march toward widely anticipated additional waves of COVID-19, the tips below will help health care organizations flatten the curve of pandemic-related wage and hour litigation.

1. Reducing the Workweek Without Running Afoul of the Salary Basis Test

In lieu of outright layoffs, many health care organizations have opted to cut costs by reducing the length of their already-exhausted medical staff's workweek, with a proportional cut in compensation. Curtailing of hours does not create a problem for employees who are not exempt from overtime and minimum wage under the Fair Labor Standards Act (FLSA) and any equivalent state law.[1] Plaintiffs' counsel may argue, however, that this practice jeopardizes an employee's status as exempt from overtime because exempt, salaried employees generally must receive their full salary in any week in which they perform *any* work, subject to certain limited exceptions.

Under recent case law and the Department of Labor (DOL) Wage and Hour Division's COVID-19-specific FLSA guidance,[2] employers can reduce an exempt employee's workweek for economic reasons related to COVID-19, or a related economic slowdown, and prospectively reduce the employee's salary commensurate with the reduced workload so long as:

- The employee's new salary is implemented on a *long-term basis*;
- The employee's new salary *does not vary* based on the hours the employee works; and
- The employee still receives *at least $684 per week* on a salary basis (or higher applicable state salary threshold).

Any such reduction must be predetermined rather than an after-the-fact deduction from the employee's salary based on the employer's day-to-day or week-to-week needs. Moreover, any such salary change must also be *bona fide*, meaning the change is not an attempt to evade the salary basis requirements and is demonstrably due to COVID-19 or a related economic slowdown. A fluctuation in salary based on the quantity or quality of the employee's work performance is impermissible. For health care organizations seeking a short-term salary reduction to meet immediate cost-cutting needs, a safer approach is to incorporate a reduced schedule and salary, while requiring employees to use their already-accrued paid time off for the period of time during which their salary is reduced. The net effect is that the employee is paid their existing salary and thus their status as exempt is not even arguably jeopardized on salary-basis grounds, while accrued paid time off banks are simultaneously diminished.

2. Exempt Employees Can Perform Nonexempt Duties, Within Limits

Health care organizations that have laid off hourly workers may require essential salaried exempt staff to fill their shoes. Many organizations will rightfully be

concerned about whether staff members performing nonexempt job duties may still be categorized as exempt from minimum wage and overtime under the FLSA and any applicable state law.

The DOL has clarified that during the period of a public health emergency declared by a federal, state, or local authority for COVID-19, otherwise-exempt employees may *temporarily* perform nonexempt duties that are required by the emergency, without losing the exemption.[3] Wage and Hour Division regulations permit an employee who otherwise qualifies for an exemption increased latitude to perform nonexempt duties during emergencies that "threaten the safety of employees, a cessation of operations or serious damage to the employer's property" and that are beyond the employer's control and could not reasonably be anticipated.[4] This is true even if the performance of those nonexempt duties is at a level, during the temporary emergency, that might otherwise threaten the exemption in ordinary circumstances.

Significantly, the regulations do not define "emergency."[5] As the months pass and the pandemic arguably is viewed as a "new normal" that global workers are now expected to endure, questions arise about the temporal component of the DOL's proclamation. Even after the declaration of public emergency passes, however, exempt employees may still perform *some* nonexempt work without losing the exemption. Exempt employees will not become entitled to overtime pay so long as their "primary duty" consists of nonexempt work. Under federal law and some state laws, such as California's, ensuring that an employee spends at least 50% of their time on exempt job duties is a good rule of thumb. Under federal law, an employee's "primary duty" is viewed holistically, not on a week-to-week basis. As health care organizations continue to adapt and pivot redeploy-

Recognizing and planning for the risks of employee wage-related challenges is a critical prophylactic measure.

ments and job duties during the ongoing pandemic, they should recognize increased risk to the extent that exempt employees' duties persistently include more nonexempt tasks for prolonged periods of time.

3. Certain Pay Incentives Are Part of an Employee's Regular Rate When Calculating Overtime

To incent and reward employees who continue to work onsite amid the pandemic, especially in health care settings where the risk of exposure to the virus is particularly high, many organizations have provided employees (and many more unions and local legislatures are advocating for) so-called "hazard" pay or incentive bonuses. The FLSA does not address the subject of hazard pay, *except* to require that it be included as part of a federal employee's regular rate of pay in computing the employee's overtime pay.[6] The potentially overlooked effect of this requirement is that nonexempt employees end up with an unexpected "bonus" if they work overtime. An employer's failure to count "hazard" pay as part of the employee's regular rate in calculating overtime could quickly yield exposure for class or collective claims for unpaid overtime under the FLSA and any applicable state law.

A limited exception applies to bonuses that are a percentage of total earnings. For example, an organization may enter into a contract with a worker *prior to* the performance of services that provides for the payment of additional compensation in the form of a bonus at the rate of 10% of the employee's straight-time earnings and 10% of his overtime earnings. Such contractual arrangements may apply, for example, in settings where health care organizations engage traveling clinical providers. In such instances, payments according to the contract will satisfy in full the overtime provisions of the FLSA. The exception will not hold up, however, where this form of payment is used as a device to evade the overtime requirements of the FLSA rather than to provide actual overtime compensation.

4. Update Expense-Reimbursement Policies for Telework-Related Expenses

Pre-pandemic, many health care organizations did not have large (or any) portions of their workforces working remotely. For that reason, many providers' expense reimbursement policies were geared toward employee business travel expenses. The pandemic forced clinical providers to offer, and health plans to cover, telehealth services that span areas such as mental health and all manner of therapy and health care services that previously were not regulated for telemedicine. Video conference treatment platforms continue to gain more widespread acceptance for making a diagnosis, prescribing treatment, adjusting medication, or otherwise delivering care safely while assisting to slow and stop the spread of COVID-19. As companies announce long-term teleworking programs (high-profile employers recently announced plans to keep workforces remote until Summer 2021[7] and health care employers followed suit for non-clinical staff), the path is paved for telemedicine services to expand, thereby multiplying opportunities for clinical workers to work from home.

Many states' expense reimbursement laws apply to costs associated with working from home implicating personal cell phone and home internet expenses. Under California and Illinois law, for example, these expenses generally must be reimbursed.[8] In Illinois, "necessary" expenses incurred for telework are reimbursable,[9] so if an organization mandates work from home, it is well advised to reimburse for expenses necessarily incurred, such as for business use of personal devices. In California, employers must reimburse employees for expenses even when an employee chooses, but is not mandated, to work from home.[10] However, if an employee chooses and is not mandated to work from home (and the employer's offices are open for business and available to the employee), the employer likely need not reimburse for expenses outside of those provided for in any pre-pandemic teleworking policy. In such states, consider setting a policy providing for a stipend that represents a reasonable portion of employees' cell phone and internet bills that will be used for business purposes. In the age of unlimited cell phone data and set high-speed internet plans, estimating how much data and Wi-Fi will be used for business versus personal use is not an exact science. Any such policy should place the onus on the employee to request, seek approval for, and provide documentation of additional compensation if the employee believes the stipend does not accurately represent business-related expenses.

5. The Continuous Workday Is Now a Flexible Concept

Under the Wage and Hour Division's broadly applicable regulation and its continuous workday guidance,[11] *all time* except a meal period between the performance of the first and last principal activities of a workday generally has been considered compensable work time for

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For health care organizations seeking a short-term salary reduction to meet immediate cost-cutting needs, a safer approach is to incorporate a reduced schedule and salary, while requiring employees to use their already-accrued paid time off for the period of time during which their salary is reduced.

The DOL's guidance leaves a lot of room for litigation theories if employees later claim they were not compensated for on-the-clock time during their flexible workday.

nonexempt employees. Employers have been rightfully hesitant to allow for extended and/or random breaks during a nonexempt employee's workday in light of this rule. In the recently issued guidance, DOJ recognized "that applying this guidance to teleworking arrangements would discourage needed flexibility during the COVID-19 emergency."[12] As a result, an employer who allows employees to telework with flexible hours during the COVID-19 emergency need not count as hours worked all the time between an employee's first and last principal activities in a workday.

The DOL's guidance leaves a lot of room for litigation theories if employees later claim they were not compensated for on-the-clock time during their flexible workday. A best practice is to establish an agreed-upon schedule, even if it requires odd hours and breaks to account for childcare or home schooling. Employers with online-based timekeeping software can instruct employees to clock in and out using timekeeping software as they begin and end work throughout daily sessions. Alternatively, employers may require employees to self-report their own hours each day or week. Employers can also monitor employee's productivity as a check and balance to ensure they are not reporting their time improperly based on demonstrated productivity.

6. Is Time Spent Undergoing Temperature Checks and Putting on Personal Protective Equipment (PPE) Compensable Time?

Those who have left their house since March 2020 likely have experienced a thermal forehead scan at some point, if not on a daily basis. Health care organizations have been particularly vigilant in this regard in an attempt to control and monitor the spread of the virus to staff and patients requiring treatment for non-COVID related injuries and illnesses. Some temperature checks require an employee to stand in line for a few minutes while others can be accomplished with the same speed as driving under an automatic tollway portal.

It is an open question whether the time an employee spends undergoing a temperature check constitutes compensable time under state and federal law. State law often departs from federal law on this issue and leaves room for debate. Temperature checks may be interpreted akin to bag checks and security screens. For example, compare *Busk v. Integrity Staffing Solutions*,[13] which found time spent undergoing bag checks non-compensable under the FLSA, with *Frlekin v. Apple, Inc.*,[14] which found the time to be compensable under California law.

Particularly in the health care setting where workers routinely confront patients who may have been exposed to or currently have COVID-19, mandatory use of PPE is the norm to assure safety at work. The extent to which compensable time includes putting such equipment on and taking it off is a murky area of law. A good FLSA rule of thumb is that the more onerous the equipment (e.g., a hazmat suit rather than a face covering), and the longer it takes to put on (particularly if the specific equipment is required by the employer and must be put on and taken off in the workplace), the more likely the time spent applying and removing it will be deemed compensable. As illustrated by *Frlekin*,[15] employers must not overlook state law, which may apply a stricter standard than the FLSA. Adopt pay practices that meet the stricter applicable standard.

7. Claims Spurred by Cafeteria Closures

Many health care organizations have shuttered their employee cafeterias to help control the spread of the virus and discourage groups of people from congregating. Depending on the surrounding area and work site rules for entering and exiting the workplace during the pandemic, employees may find that their easiest or only option is to eat lunch in areas on the unit (out of the way of patient care). It is naturally more difficult to differentiate between work and break time when an employee eats at or directly adjacent to their workstation where interruptions may occur more easily or temptations to continue working while eating may overtake the need for rest.

Some states account for this by *requiring* employees to have the option to leave the workplace for their meal period (and even rest breaks) for the break to be considered *bona fide*. In California, for example, if the nature of the employee's job prevents her from taking a break from *all duties*, the employer may provide an on-duty meal period.[16] This time must be paid, however, and the employee must agree to the on-duty break, in writing.[17] Similarly, under Wisconsin law, employers must pay employees for "on-duty" meal periods; one in which the employee is not provided at least 30 consecutive minutes free from work or is not free to leave the employer's premises.[18] The expectation that employees receive an unrestricted meal break on shifts lasting a certain number of hours, or payment for missed or

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interrupted breaks, are similar in Massachusetts and several other jurisdictions.[19] If an organization currently requires employees to remain on the premises for meal periods, it should examine whether to simultaneously adjust its pay practices consistent with state law.

8. Reporting Pay

Although there is no requirement to offer reporting pay under federal law, many states' laws guarantee pay for a certain number of hours of pay when an employee reports for a scheduled shift, even if the employee is then immediately sent home or instructed to depart early. During the pandemic, employers may prevent employees who cannot pass a temperature check from entering the workplace, as a fever is a known symptom of COVID-19. Similarly, COVID-19 exposure has and will continue to result in last minute partial or full workplace closures that may not be communicated to employees until immediately before a shift or when they arrive at the worksite. Under certain states' laws, these situations may require payment of reporting time pay.

For example, under California law, if an employee reports for her regularly scheduled shift but is required to work fewer than the regularly scheduled hours or is sent home immediately, generally that employee must be compensated for at least two hours, but no more than four hours, of reporting time pay.[20] Reporting time pay does not apply when operations cannot commence or continue due to recommendations of civil authorities. Reporting time pay may still be required, therefore, despite a declared a state of emergency, unless the state of emergency includes a recommendation to cease operations. Exceptions also vary by state. Some states do not require employers to provide reporting pay if the employer makes a good faith effort to notify the employee not to come to work and others (such as Massachusetts' requirement) are not triggered unless the employee was scheduled to work a minimum number of hours.[21] Given that last-minute closures and send-homes will be more frequent in a post-pandemic world, health care organizations are well advised to have a firm grasp of the specific reporting pay laws in the states in which they operate.

As surges ebb and flow throughout the nation and health care employers continue to lead Americans toward public health and disease prevention, they must also maintain their rightful place as prominent and well-respected employers in their communities. Compliant pay practices are a meaningful tool to eliminate unneeded risk, exposure, and expense, while attracting and retaining talent and rewarding those who continue to work hard during long and trying times to keep us all well.

Endnotes

1 29 U.S.C. §§ 201–219.

2 U.S. Dep't of Labor, Wage & Hour Div., *COVID-19 and the Fair Labor Standards Act Questions and Answers*, https://www.dol.gov/agencies/whd/flsa/pandemic#q19.

3 U.S. Dep't of Labor, Wage & Hour Div., *Covid-19 and the Fair Labor Standards Act Questions and Answers*, https://www.dol.gov/agencies/whd/flsa/pandemic#q16.

4 *Id.*

5 *See id.*

6 The amount of overtime pay due to an employee is based on the employee's regular rate of pay (meaning all forms of remuneration not subject to exclusion) and the number of hours worked in a workweek.

7 Rob Copeland and Peter Grant, *Google to Keep Employees Home Until Summer 2021 Amid Coronavirus Pandemic*, Wall St. J., July 27, 2020, https://www.wsj.com/articles/google-to-keep-employees-home-until-summer-2021-amid-coronavirus-pandemic-11595854201 (subscription required).

8 Cal. Lab. Code § 2802; 820 Ill. Comp. Stat. § 115/9.5.

9 820 Ill. Comp. Stat. § 115/9.5.

10 Cal. Lab. Code § 2802.

11 U.S. Dep't of Labor, Wage & Hour Div., Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2006-2.

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13 574 U.S. 27 (2014).

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15 *Id.*

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17 IWC Wage Order No. 1-2001, subd. 11(C).

18 Wis. Dep't of Workforce Development, *Breaks and Meal Periods*, https://dwd.wisconsin.gov/er/laborstandards/breaks.htm#:~:text=An%20%22on%20duty%22%20meal%20period,to%20leave%20the%20employer's%20premises.&text=No%2C%20if%20the%20break%20is,the%20employee%20is%20off%20duty.

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20 Cal. Dep't of Industrial Relations, Reporting Time Pay (Dec. 2016), https://www.dir.ca.gov/dlse/FAQ_ReportingTimePay.htm.

21 454 Mass. Code Reg. § 27.04(1)

AHLA thanks the leaders of the **Labor and Employment Practice Group** *for contributing this feature article:* **Elissa Taub,** *Siskind Susser PC (Chair);* **Dee Anna Hays**, *Ogletree Deakins (Vice Chair—Educational Programming);* **Martine Wells**, *Brownstein Hyatt Farber Schreck LLP (Vice Chair—Educational Programming);* **David Lindsay**, *K & L Gates LLP (Vice Chair—Member Engagement);* **Kristin McGurn**, *Seyfarth Shaw LLP (Vice Chair—Publishing); and* **Thomas O'Day**, *Husch Blackwell LLP (Vice Chair—Publishing).*

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**Unless otherwise noted, leadership appointments are for a two-year term, effective July 1, 2021.*

Diversity and inclusion are a part of AHLA's value system and are essential to the Association's ability to produce the highest quality non-partisan educational programs, products, and services concerning health law issues. AHLA values and seeks to advance and promote diverse and inclusive participation within the Association and there are numerous opportunities for all members to become involved in a way that best meets their professional development needs, expertise, and time parameters.

The Telehealth "New Normal"—Employment & Compliance Considerations

Hannah Caplan, Anna-Liisa Mullis, Ishra Solieman, and **Martine Wells,** Brownstein Hyatt Farber Schreck LLP

The dramatic increase in the use of telehealth—i.e., a patient using virtual communication technology to visit with a health care provider in lieu of an in-person visit—has permitted patients and health care providers to remain in safe contact during the COVID-19 pandemic. Particularly during the imposition of shelter-in-place or stay-at-home orders issued by state and local governments, the use of telehealth allowed patients to continue to obtain services from their health care providers without risking unnecessary exposure to COVID-19. Additionally, it has been an infection control strategy used by governments and employers to help prevent the spread of COVID-19.

Although telehealth will never be a substitute for every type of in-person visit, it is widely expected that the increased use of telehealth services in some form will be part of the "new normal" going forward.[1] However, the post-pandemic use of telehealth services will in many circumstances require government action. The emergency government orders promulgated in response to the COVID-19 pandemic, which permitted the rapid expansion of telehealth services outside of the niche areas to which it was previously largely relegated, will expire in the future when the pandemic abates. Further government action may be necessary to preserve and make permanent the changes that allowed the pervasive use of telehealth.

It is difficult to predict what future government action regarding the telehealth expansion will ultimately look like. Regardless of the future direction of telehealth, it is likely that the provision of telehealth services will continue for the foreseeable future and will continue to raise unique labor management and employment challenges, some of which are described below. Employers should carefully consider and develop strategies to address these challenges.

Remote Work as Reasonable Accommodation

Even during a global pandemic, employers are required to provide reasonable accommodations to qualified individuals with disabilities, which may include partial or full remote work.[2] One of the most common requests for accommodation related to the pandemic is to work from home, or to continue working remotely. To the extent such requests are made by individuals with disabilities or other considerations (such as age) that make them particularly susceptible to COVID-19, they should be handled in the same manner as other requests for accommodation—on a case-by-case basis and through the interactive process. In addition to the assessment of whether the employee has a "disability" as defined by the Americans with Disabilities Act (ADA) (which is likely "yes" due to the broad definition of "disability"), employers must assess whether physical presence at the worksite is an essential function of the employee's position. Moreover, employers should closely monitor state and local guidance. Many jurisdictions have promulgated guidance strongly encouraging employers to allow remote work to the extent possible, as well as prohibiting employers from taking adverse action as to employees whose work abilities are limited due to COVID-19-related reasons.

A recent decision by a federal judge in Massachusetts underscores the importance of engaging in the interactive process unique to the particular employee's circumstances during the COVID-19 pandemic. On Sept. 16, 2020, the plaintiff employee secured a preliminary injunction allowing managers to work from home as an accommodation under the ADA for 60 days or pending further order from the court.[3] By way of background, the employee, a manager, suffers from asthma, resulting in a potentially increased vulnerability to COVID-19. Managers had been permitted to work from home for a period of time due to COVID-19. When the employer, which operates a clinic program, required all managers to report to work in-person, the plaintiff made a formal request to work from home due to a physician recommendation to stay home to avoid contracting COVID-19 and the complications that could result given the plaintiff's asthma. However, the employer declined to make an exception and required the plaintiff report to work.

This federal ruling has several important components. First, the court held that the employee's asthma qualified as a disability, but qualified that holding by adding "at least during the COVID-19 pandemic," demonstrating that conditions that did not previously warrant an accommodation may now require one. Second, the court found that the employer's attempt to impose its blanket rule on managers returning to the office was not an adequate substitute for the interactive process considering the employee's circumstances. And third, the employee was able to demonstrate a likelihood of success on their discrimination claim to justify issuance of the injunction because their supervisor had written an email noting that the employee was performing all essential functions while working remotely.

The decision in this case may have been different had the plaintiff's job description contained physical attendance as an essential function, with evidence that physical presence is, indeed, essential. Importantly, on this point, the Equal Employment Opportunity Commission's (EEOC's) Enforcement Guidance provides that "[a]n employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, *but only if this accommodation would be effective and would not cause an undue hardship*."[4] Job descriptions can be a valuable resource in the accommodation analysis, but the practicalities of the position must also be analyzed to determine whether physical attendance is an "essential" function. To be proactive, an employer may elect to review all job descriptions and expressly add the requirement of physical presence, where appropriate for the position, to provide more justification if denying a remote work accommodation request.

Even during a global pandemic, employers are required to provide reasonable accommodations to qualified individuals with disabilities, which may include partial or full remote work.

The EEOC recently issued helpful guidance to employers regarding remote work during the pandemic and the employer's obligations post-pandemic, clarifying that by allowing an employee to work remotely during this state of emergency, the employer is not opening the floodgate to accommodation requests. Specifically, the EEOC provided:

> To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.[5]

That said, employers should be mindful that remote work during the pandemic is being leveraged to demonstrate the reasonableness of prior accommodations requests. For example, the EEOC recently filed suit against a health care employer alleging that the employee's successful telework experience from March 2020 through present demonstrated that the *prior* telehealth request the employee made in 2019 was a reasonable accommodation.[6]

In preparation for the eventuality that operations will increasingly return to in-person, employers should be clear in job descriptions of the extent to which "in person" is an essential job function of the role to help set the expectation and lay the groundwork that in-person attendance will be required when the crisis abates. Additionally, as employees return to in-person work and employers engage in the interactive process as to reasonable accommodations, an employee's requested accommodation (e.g., telework) is not the accommodation that must be provided; rather, employers may work with the employee and the employee's provider to determine how effective telework would be, as opposed to other accommodations that might be provided. Critically, and again, employers should be extremely thorough and precise in engaging in the interactive process to review accommodations requested to enable a disabled employee to perform the essential functions

of his role. Employers should also be aware that local guidance may be more restrictive about return to the physical workplace concepts; for example, instructing employers to continue telework for individuals who have cancer, chronic obstructive pulmonary disease, or Sickle cell disease, or are otherwise immunocompromised.[7]

Remote Wage and Leave Considerations

With providers working remotely, employers must be cognizant of continuing to properly pay exempt (generally salaried) and nonexempt (generally hourly) employees correctly under federal and state wage and hour laws.

Employers carry the burden to demonstrate an exemption applies to a particular employee, based on the employee's actual duties and method of pay, for the employer to be exempt from complying with the federal Fair Labor Standards Act (FLSA)[8] minimum wage and overtime requirements. To this end, even while working remotely, the employee's duties and salary payment must continue to comport with the FLSA and applicable state wage exemption law requirements. The U.S. Department of Labor (DOL) has promulgated guidance that during COVID-19, a temporary increase in nonexempt duties will not negate the exemption. Specifically, "during the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption."[9] Although the DOL's guidance only references the Section 213(a)(1) exemptions (executive, administrative, professional), presumably the rationale may apply to other exemptions. Note, however, the DOL's position is not binding on states whose wage laws may have more protective positions.

For nonexempt employees, who are generally paid on an hourly basis, it is critical that employers capture and pay for all hours worked, including wellness screens and certain travel activities, as well as to provide uninterrupted meal and rest periods as provided by the laws of the jurisdiction the employee is residing in.[10] Employers should require employees to track and record all working time and prohibit off-the-clock work to proactively mitigate risk of costly wage class and collective actions alleging violations of the overtime, meal, and rest period requirements. As to tracking hours, the DOL recently issued a Field Assistance Bulletin (FAB) providing that employers are obliged to track the number of hours of compensable work by employees teleworking or otherwise working away from the employer's premises.[11] The FAB reiterates that employers must pay for work even if it is not requested or allowed.

Finally, employers should be mindful that leave (both paid and unpaid) must be provided to employees, even those working remotely, under the federal Families First Coronavirus Response Act (FFCRA)[12] and related state laws. The FFCRA implementing regulations were amended on September 16, 2020, and now cover more health care employers.[13] Specifically, "healthcare provider" was re-defined to mean employees who meet the definition of that term under the Family and Medical Leave Act (FMLA) regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care. Thus, the FFCRA does not per se exempt health care employers from coverage; rather, certain positions within health care institutions are eligible for the paid leave and extended FMLA available under the FFCRA.

Temporary Relocation of Health Care Providers to a Different State

Unique issues surrounding health care provider requests to work remotely from another state on a temporary basis have also come to the forefront during the COVID-19 pandemic. For example, a provider may request that they be able to provide telehealth services to patients while temporarily relocated in a different state to ensure patient continuity of care. The temporary relocation may be due to the need to care for an ill family member or may simply be a desire for a change of scenery.

Whatever the reason, a provider working temporarily from a different state raises a host of issues that should be evaluated on a case-by-case basis, including considerations regarding the provider's professional licensure. During a telehealth patient encounter, the place of service is typically the location of the patient, and in general a provider must be either licensed or otherwise authorized to provide services in the state where the patient is located. However, depending on the laws of the state in which the provider plans to temporarily reside, the provider may need to become licensed in the state of temporary residence, even to provide services to patients outside of that state. For example, the State of Florida Board of Psychology has issued an opinion that a psychologist who, while living part-time in Florida, provides telehealth services to patients located in another state in which the psychologist is licensed,

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Unique issues surrounding health care provider requests to work remotely from another state on a temporary basis have also come to the forefront during the COVID-19 pandemic.

As with other facets of telehealth, the HIPAA and privacy considerations have changed dramatically, and temporarily, during the COVID-19 pandemic.

would also be required to become licensed in Florida.[14] Thus, practicing while physically located in a state in which the provider is not licensed could potentially subject the provider to disciplinary action.

Aside from professional licensure, other issues may arise associated with temporary work in another state, ranging from tax implications—discussed in the next section—to professional liability insurance coverage. Employers should thoroughly vet these issues and put in place policies addressing temporary relocation to, and remotely working from, other states.

Tax Implications When Work Is Performed in Different States

The spike in remote work triggered by the pandemic has also resulted in many individuals temporarily or permanently moving their residences to less populated or more desirable locations when physical proximity to the workplace is not as important as it once was. Employers are encouraged to consult with tax advisors regarding the impact of their employees' new residences on withholding taxes, as well as the employer's license to do business in certain jurisdictions. Some states are issuing temporary guidance to address these scenarios, but there is not clear guidance in all jurisdictions, necessitating an analysis of the employee's home and work locations to ensure proper withholdings.

Use and Return of Property

The pandemic rapidly escalated without advance warning. Many employees hastily grabbed the office equipment they thought would be helpful in building their home offices. Some employees may have continued borrowing office supplies when occasionally visiting the workplace. This activity, though not surprising and not inherently wrong, raises a variety of issues for the health care employer.

First, employees' use of electronic devices such as computers, tablets, and phones outside of the workplace could jeopardize the security of confidential information and protected health information (addressed in more detail below). Employees should be explicitly reminded that proprietary information such as software, standard operating procedures, and personnel information continues to be secret and entitled to protection when accessed and/or stored outside of the workplace. For example, employees should be required to safeguard all devices and information in their home office through password protections, secure storage of devices, and limiting printing of confidential information. To the extent applicable security and confidential information policies already address these issues, such policies should be re-issued and emphasized. And if existing policies do not require heightened employee attention to such security measures when working remotely, then such policies should be implemented immediately.

Second, employees should be aware that all technology security and monitoring policies apply with equal force when systems and devices are accessed outside of the workplace. Policies should be put in place (if not already) that emphasize the employer's ownership of electronic devices and systems (including document storage, email, voicemail, and instant messaging systems), and that employees have no expectation of privacy when working on such devices and networks—including outside of the physical workplace.

Third, in the rush to establish functioning home offices in the wake of the pandemic, employers likely did not thoroughly track and document the property and equipment borrowed by employees. We generally recommend a robust policy and procedure for employees to "check out" employer-owned property, which includes a description, serial number, condition of the item, value, and the employee's liability for damage, destruction, or loss. Depending on the jurisdiction, such a document can also establish the employer's right to deduct the value of property not promptly returned in good condition from an employee's wages and final paycheck. Some states have strict requirements for allowing such deductions,[15] and counsel should be consulted when drafting and acting on such provisions. But, if drafted carefully and in compliance with applicable law, deductions can be a useful tool for employers to recover amounts lost due to an employee's failure to return property.

Compliance with Privacy Obligations

Health care providers subject to the Health Insurance Portability and Accountability Act (HIPAA) must take care to consider the HIPAA implications of telehealth services. As with other facets of telehealth, the HIPAA and privacy considerations have changed dramatically, and temporarily, during the COVID-19 pandemic.

Prior to the pandemic, telehealth could be furnished only through HIPAA-compliant telecommunications systems. However, in March 2020, the U.S. Department of Health and Human Services (HHS) Office

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Presuming telehealth will not be a permanent fixture for all providers and employees, employers should be thinking ahead about return-to-work concepts to the extent telehealth is rolled back or reduced.

for Civil Rights (OCR) announced that during the nationwide public health emergency, it would exercise its enforcement discretion and not impose penalties for noncompliance with HIPAA against providers in connection with the good faith provision of telehealth services. Specifically, OCR stated that it would waive penalties for HIPAA violations occasioned by health care providers serving patients in good faith using popular, non-public-facing remote communications technologies, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19 or to a wholly unrelated condition, such as a sprained ankle or psychological evaluation.[16]

OCR's announcement of enforcement discretion also encouraged providers to notify patients that communication technologies potentially introduce privacy risks. OCR further noted that many communications technology vendors hold themselves out as HIPAA-compliant and will enter business associate agreements in connection with the provision of their products.[17]

Given that it is explicitly tied to the public health emergency, OCR's enforcement discretion will likely end when the official public health emergency ends. However, additional HIPAA guidance on telehealth may be promulgated in the meantime. In particular, Section 3224 of the Coronavirus Aid, Relief, and Economic Security Act, commonly known as the CARES Act, required that the HHS Secretary issue guidance on the "sharing of patients' protected health information" and compliance with HIPAA during the public health emergency.[18] It is possible that the HHS Secretary will issue additional guidance on HIPAA compliance as it relates to telehealth during the public health emergency.

Finally, aside from HIPAA, providers should always consider whether any state data privacy laws apply to telehealth services and take appropriate measures in the telehealth environment.

Return to the Physical Workplace Considerations

Presuming telehealth will not be a permanent fixture for all providers and employees, employers should be thinking ahead about return-to-work concepts to the extent telehealth is rolled back or reduced. That said, telehealth is a significant portion of the "new normal" for the foreseeable future and health care employers would be well advised to consider bolstered training and agreements for both employees working remotely, as well as their leaders, to ensure continued compliance with the complex interplay of employment law compliance considerations.

Endnotes

1 *See* Seema Verma, *The telemedicine genie is out of the bottle*, The Hill, July 17, 2020, https://thehill.com/blogs/congress-blog/healthcare/507874-the-telemedicine-genie-is-out-of-the-bottle.

2 *See, e.g., Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* EEOC Notice No. 915.002, 2002 WL 31994335, at *24 (Oct. 17, 2002); *Equal Employment Opportunity Commission v. Advanced Home Care, Inc.*, 305 F.Supp.3d 672, 676 (M.D.N.C. 2018) (holding the EEOC's complaint sufficiently alleged a failure to accommodate claim under the ADA by claiming plaintiff could perform the essential functions of her position, including answering telephone calls, while working from home).

3 *Peeples v. Clinical Support Options, Inc.,* No. 3:20-cv-30144-KAR (D. Mass. Sept. 16, 2020).

4 *Enforcement Guidance, supra* note 2, at *24 (emphasis added).

5 U.S. Equal Employment Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last visited Sept. 24, 2020).

6 *EEOC v. Gentiva Health Servs. Inc. dba Kindred at Home*, No. 1:20-cv-03936 (N.D. Ga.).

7 *See, e.g.*, Colo. Exec. Order D 2020 154 ("vulnerable individuals" as defined by the state must be accommodated).

8 29 U.S.C. §§ 201, *et seq.*

9 U.S. Dep't of Labor Wage and Hour Div., COVID-19 and the FLSA Questions and Answers, https://www.dol.gov/agencies/whd/flsa/pandemic#q2 (last visited Sept. 24, 2020).

10 *See, e.g.,* Colo. COMPS Order #36 (2020).

11 U.S. Dep't of Labor, FAB 2020-5 (eff. Aug. 24, 2020).

12 Pub. L. No. 116–127.

13 85 Fed. Reg. 57677 (eff. Sept. 16, 2020).

14 State of Florida Board of Psychology, *In re: The Petition for Declaratory Statement of Marc B. Dielman, Ph.D.*, Final Order No. DOH-06-0976-D5-MQA (June 5, 2006).

15 For example, employers may not deduct from a California employee's pay for breakage or loss of equipment that is not a result of the employee's dishonesty or gross negligence. *See* Cal. Lab. Code §§ 221-224 (authorizing very limited deductions from wages); DLSE Enforcement Manual § 11.2.4, http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf (last viewed Sept. 24, 2020).

16 Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency, https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html.

17 *Id.*

18 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3224.

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White Paper

Health Law Disruption: 2030 and Beyond

Anticipated Trends for the Health Care and Health Law Industries

AHLA created a 2030 Task Force in July 2019 to research anticipated changes in the health care and health law industries over the next ten years. To facilitate a constructive dialogue among stakeholders involved in the continually evolving health care industry, AHLA is sharing with the public and the health law community a White Paper that is based on and expands the Task Force's analyses and findings.

"Disruptive innovators," such as new providers, new care delivery models, new technology, and increased access to health law resources, are likely to feature prominently in the future. At the same time, there is an active innovation and evolution process taking place in health care and health law. The White Paper discusses the top trends driving that evolution and innovation, which we anticipate will occur in the health care and health law industries over the next ten years.

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"We are paying attention to the drivers and the disrupters in the health law and the health care industries, to share and understand what those drivers and disrupters mean."

–AHLA CEO, David Cade

"The White Paper gives members and others in the industry a view as to what to expect over the next ten years"

–Tim Adelman, General Counsel/Chief Legal Officer, Luminis Health, Inc.
Chair, AHLA 2030 Task Force

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Stephanie Noblit, Legislative Analysis and Public Policy Association

Stephanie Noblit, MLS (ASCP)CM is a legislative attorney at the Legislative Analysis and Public Policy Association. Prior to going to law school, she worked as a medical laboratory scientist. She graduated from Drexel University's Thomas R. Kline School of Law in 2019 and concentrated in health law. Stephanie is based in Philadelphia and is a member of the bar for the Commonwealth of Pennsylvania.

As professionals working in the field of health law, we know a thing or two about health care. Depending on your specialty within the field, you might have a decent amount of medical knowledge. Through our knowledge of the law and its intersections with health care, we act as bridges between the two worlds. While we know the law is not an easy thing to master, gaining the scientific and medical knowledge to apply these laws to the complex world of health care is a challenge all its own.

Scientific and medical jargon may come easier to some than others. For myself, coming from a science background, it is second nature, but for others there might be more of a learning curve. No one is asking health law attorneys and professionals to have the same level of knowledge as a medical practitioner or a research Ph.D., but we should all have a solid foundation. This knowledge is important to be competent advocates for our clients and to properly understand certain laws, policies, and regulations. Just like we keep up on our legal knowledge with continuing education, we should also continue to expand our scientific and medical knowledge.

There are many easy ways a health law professional can increase their scientific and medical knowledge. One of the simplest things to do is read. You do not need to dive into scientific journals; news and magazine articles can provide similar information in an easier to digest format. First, make sure the article comes from a reputable source. As we have seen with the coronavirus, false or misleading medical and scientific information is not uncommon. An easy way to find reputable articles is through a legal data base, like Westlaw, Lexis, or Bloomberg. AHLA is also a great resource for articles, through its member publications. This includes not only *Health Law Connections* magazine, which is published monthly. *Health Law Daily* is a daily digest email containing a list of articles pertaining to current issues in health law. *Health Law Weekly* is a similar email that is released every Friday. *The Journal of Health and Life Sciences Law* contains more substantive articles and is published three times a year. These AHLA publications are available to the entire membership, and the articles they offer will help you learn something new about both health law and health care.

Another great source for scientific and medical information are professional societies. Professional societies provide valuable resources to their members, but they also publish and post a variety of resources for the general public. By searching the website of a medical or scientific professional society you may find detailed information about the profession itself, positions taken by the professional organization, and items of concern to the profession. You will not only gain information on scientific and medical topics, but you may also gain an understanding of specific health law or policy issues from the point of view of that profession. When considering which websites to browse, think outside the box. There are many types of health care professionals beyond physicians and nurses who are often forgotten because they work behind the scenes. Make it a point to look at a variety of professional organization websites, including those for medical laboratory professionals and other professionals within the field of allied health.

Having a general understanding of science and health care can make us better health law attorneys and professionals. The better we understand the ins and outs of the health care field and what health care professionals do, the better we can apply the law and assist our clients.

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Tips for Maintaining Strong Connections with Colleagues in the Virtual Workplace

Dana Good,
Saint Luke's
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The COVID-19 pandemic has resulted in a major, immediate, and likely lasting shift in the way many U.S. employees work. In a July/August 2020 Gallup poll, 26% of U.S. employees reported working entirely from home, with an additional 12% reporting that they have worked from home at least 50% of the time in recent weeks.[1] This could become more permanent. A recent survey indicates that more than 82% of company leaders plan to allow employees to work remotely at least part time even after the pandemic.[2]

The shift to remote work has required obvious adjustments in workplace policies, processes, and technologies. One less visible adjustment concerns the challenges remote workers face in maintaining strong interpersonal connections with their colleagues. Workers no longer have the opportunity for in-person interactions where they can get to know the "human" side of their colleagues.

Studies have shown that workers with positive interpersonal relationships with their colleagues are more satisfied and engaged with their job, have lower rates of absenteeism, perform better, are more committed to their organization, and are less likely to turnover.[3] Conversely, isolation stemming from a lack of positive interpersonal relationships at work can lead to higher levels of job dissatisfaction, employee turnover, and even worsened physical and mental health.[4]

Here are some tips for maintaining positive and productive connections between colleagues in the virtual workplace:

Say Good Morning. The few minutes before the beginning of an in-person meeting provide an opportunity for us to quickly connect with our coworkers. Make a conscious effort to greet others.

Embrace Face Time. We use non-verbal communications such as facial expressions and body language to more fully understand the communication and behavior of others. Video calls facilitate a higher level of understanding, reducing the risk for misunderstandings.

Schedule Regular Huddles. These check-ins help reduce feelings of isolation and help us maintain a connection with coworkers and with our organization.

Socialize. Outside of work, virtual gatherings allow us to connect with coworkers on non-work issues, helping to build camaraderie.

Be Quick to Pick Up the Phone. Email allows many issues to be quickly and efficiently resolved, but it lacks the benefits of information-rich nonverbal cues such as tone, facial expression, and body language.[5] This can easily lead to miscommunications or hurt feelings. If an email discussion does not appear to be moving an issue toward resolution or appears to be headed toward conflict, be quick to make a phone or video call to resolve issues.

Overcommunicate. So much information is communicated in quick discussions between meetings and chance encounters in hallways. Virtual team members have fewer of these informal, serendipitous opportunities. If you question whether your coworker may want to know something, err on the side of overcommunication and provide them with a quick email or phone update.

Give Kudos. We may feel more anxious about our performance when working remotely because we are less "visible." Make a habit of offering praise and expressing appreciation to colleagues for their contributions. These simple gestures will pay dividends in increased morale and better connections with virtual team members.

Endnotes

1 https://news.gallup.com/poll/318173/remote-workdays-doubled-during-pandemic.aspx.

2 https://www.gartner.com/en/newsroom/press-releases/2020-07-14-gartner-survey-reveals-82-percent-of-company-leaders-plan-to-allow-employees-to-work-remotely-some-of-the-time.

3 *See, e.g.* Chiaburu, Dan & Harrison, David. *Do coworkers make the place? Conceptual synthesis and meta-analysis of lateral social influences in organizations,* Journal of Applied Psychology Vol. 93: 1082-1103 (2009), https://www.researchgate.net/publication/228627006_Do_coworkers_make_the_place_Conceptual_synthesis_and_meta-analysis_of_lateral_social_influences_in_organizations.

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5 https://www.psychologytoday.com/us/blog/threat-management/201001/managing-conflicts-email-why-its-so-tempting.

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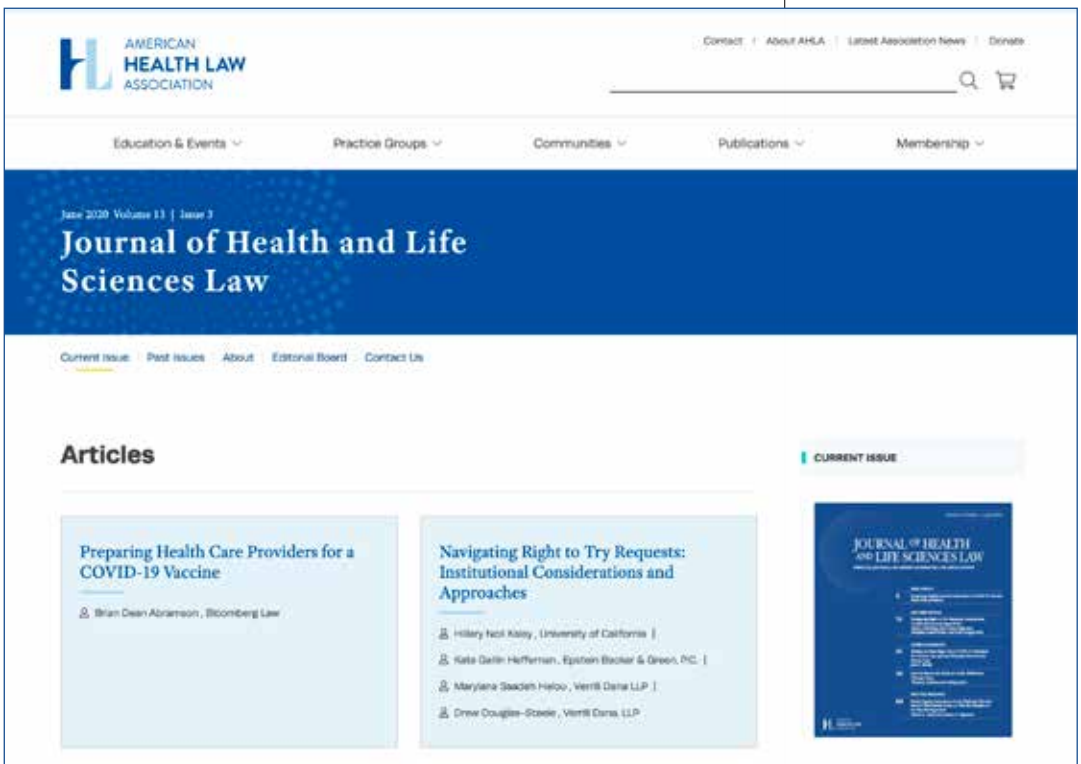
When you reach the *Journal* landing page, you will immediately see the current issue, where you can quickly jump to a specific article, navigate to Past Issues, or learn more about the *Journal* and its Editorial Board. Just remember, you need to be logged in to read each article and download the full PDF.

Fully Accessible on Day One

As soon as a member joins AHLA, they will have immediate access to both current and past issues of the *Journal*. As long as you're a member, you will have uninterrupted access to the past five years of issues (older issues are accessible with an active Health Law Archive subscription).

We are excited to make this content more accessible, discoverable, and user-friendly by allowing it to reside on our website with the rest of AHLA's substantive health law content. The now former *Journal* website (http://www.healthlawyersjournal.com/) will redirect you to the new *Journal* landing page at www.americanhealthlaw.org/journal/. If you have the old URL bookmarked, please take a moment to update it. If you have any questions, please contact us at journal@americanhealthlaw.org.



Member News

Steven Bender has been appointed Chief Legal Officer of Geisinger Health. Geisinger is a 12-hospital system and integrated delivery system that includes Geisinger Health Plan and Geisinger Commonwealth School of Medicine.

Mark S. Kopson, Partner at Plunkett Cooney, was named by *Michigan Super Lawyers* magazine to its 2020 list of "Super Lawyers" in the category of Health Care Law. Mr. Kopson is a member of AHLA's Board of Directors and the former Chair of AHLA's Payers, Plans, and Managed Care Practice Group. *Super Lawyers* selects attorneys using a patented multiphase selection process. Those named to the annual list represent only 5% of the state's licensed practitioners.

M. Natalie McSherry has been recognized as a "Litigation Star" in the areas of Commercial Litigation and Securities Litigation in the 2021 edition of *Benchmark Litigation*, a leading legal guide that provides an in-depth analysis of trial lawyers in the United States. Ms. McSherry is a principal in the litigation practice of the law firm Kramon & Graham in Baltimore, Maryland.

IN MEMORIAM

L. Edward Bryant Jr. passed away on September 20, 2020 at the age of 78. He was considered one of the founders of health law and the quintessential health care attorney. After graduating from Northwestern University School of Law in 1967, he began representing health care providers. He founded Gardner Carton & Douglas' Health Law Department in 1979. Mr. Bryant was also the former Chair of the Health Care Group at Faegre Drinker Biddle & Reath and held many management positions within the firm. He was widely known as a distinguished author and speaker at numerous conferences within the health industry. He was on the faculty for seven years at both the Kellogg Graduate School of Management at Northwestern University as well as Loyola University of Chicago School of Law, where he was the namesake of the L. Edward Bryant Jr. National Health Law Transactional Competition. His strategic insights led Ed to serve on numerous boards of directors, and to chair several of these boards, including that of a national health care system. Ed was highly regarded by his peers, as demonstrated by his selection as a "Top 100 lawyer," "Leader in the Field," and "Super Lawyer."

Steve Schuster, a long-time friend and early leader of the health law bar and AHLA, passed away on August 28, 2020 at the age of 77. Steve served as Associate General Counsel for Hospital Affiliates International, Inc., an Assistant U.S. Attorney, a partner in Wood Lucksinger & Epstein, a founding partner of the boutique firm Schuster & King, and most recently CEO and General Counsel of Innovative Anesthesia. He was a leader and avid supporter of one of AHLA's predecessor organizations, the National Health Lawyers Association, and served on its Board of Directors.

"Steve was a natural innovator and entrepreneur," notes his friend and law firm colleague, Tom Hyatt. "He took chances and he gave chances. And as your mentor, he had confidence in you even before you had it in yourself." There was a point in time, when asked what he did for a living, that he'd muse that he "delivered newspapers, baked cookies, and made babies," because while practicing law full time he was also simultaneously an investor in the National News Agency, Larry's Cookies, and an IVF business. "Steve was a big fan of David Greenberg and the Association in its early years," said Steve's former partner and former AHLA Executive Director Marilou King. "He loved trading war stories with colleagues at seminars and challenging conventional thinking about health law issues."

Many will remember Steve's love of the New York Yankees and baseball in general, his "up to something" grin and wicked sense of humor, his terrific and oft-embellished storytelling, his early advocacy for women and women-led businesses through his partnerships, his delight at being a maverick, and always "helping the other fellow" in any way he could. He was devoted to his wife Traci, his two girls Hannah and Gretchen, and his seven grandchildren.

Member Spotlight

Leann M. Walsh
Partner
K&L Gates LLP
Raleigh, NC
Leann.Walsh@klgates.com

Are you a collector of anything?

Yes, antique cookbooks! The recipes in them are (almost) universally tasty, and I love that they often include so much more than ingredients and instructions. They frequently contain tips for grocery shopping, budgeting, decorating, and throwing parties—which I know we'll be able to do again one day post-pandemic. My favorites are the cookbooks that were published right after the microwave was invented. The awe with which the authors describe the "miraculous" microwave is a good reminder to not take the little things we have in life for granted. Also, our family started a surprisingly successful vegetable garden (pictured here) during the pandemic, so we are enjoying finding fun and creative recipes for our homegrown food.

What is your favorite form of exercise?

Running outside, although I've also learned to enjoy the healing benefits of walking outside during the pandemic. Fresh air is so therapeutic! It has been helpful while walking outside to reflect on the fact that even though the world is quite "unprecedented" right now, nature continues as normal with its usual magic—the flowers bloom, the seasons change, and the birds, bugs, and squirrels just keep on going about their ordinary lives.

What is your favorite meal to cook for friends?

One of my mother's recipes, Poppyseed Chicken. It isn't the healthiest in the world, but it is hard to beat the taste. In addition to the chicken, it has cream of chicken soup, butter, poppyseeds, and Ritz crackers.

What was your first job?

My first job was working in a McDonald's restaurant, and I loved it. I tried every position available: cook, cashier, and drive-thru, and I loved them all. McDonald's did a great job with rigorous training, creating a fun team atmosphere, and teaching employees how to always put the customer first. These are lessons I still use today in my work in private law practice.

What movie have you watched multiple times?

I have two young daughters (one is three years old and the other is five years old), so I only watch cartoons in this season of life. As you can imagine, we have seen "Frozen" and "Frozen II" many, many, many times.

What was your best vacation?

Our family's favorite spot to vacation is in the Dominican Republic. The beaches are beautiful, the weather is great, and the culture and food are really fantastic.

What book is on your nightstand?

A daily devotional, "Jesus Calling," by Sarah Young.

Would you like to be featured in our new Member Spotlight section? Please contact agreene@americanhealthlaw.org. We'd love to hear from you!

Volunteer Recognition August 2020

Distance Learning, Publications, Resources, and Periodicals

Webinars

Going Vertical: FTC/DOJ Final Vertical Merger Guidelines

Sara Y. Razi, Simpson Thacher & Bartlett LLP

Joseph M. Miller, Mintz Levin Cohn Ferris Glovsky & Popeo PC

Alexis J. Gilman, Crowell & Moring LLP

Health Law Connections

The Coming Wave of Physician–Hospital Alignment: What the Antitrust Laws Have to Say About It

Herbert F. Allen, Polsinelli PC

Matthew C. Hans, Polsinelli PC

Compliance Corner—A Delicate Balance: New Privacy Challenges for Public Health Disclosures During the COVID–19 Pandemic

Jessica Lorraine Quinn, OhioHealth

Vladimir Edmonson, OhioHealth

Reining in the Anti–Kickback Statute? Commission–Based Payments and the Relevant Decisionmaker Test

Scott R. Grubman, Chilivis Grubman Dalbey & Warner LLP

AHLA's Communities: An Online Gathering Place for Health Law Discourse

Shannon B. Hartsfield, Holland & Knight LLP

From Drive Time to Thrive Time

Aaron Newcomer

Health Law Weekly

FTC and DOJ Issue Final Vertical Merger Guidelines

Alexis DeBernardis, Crowell & Moring LLP

Alexis J. Gilman, Crowell & Moring LLP

Shaina Vinayek, Crowell & Moring LLP

Law as a Social Determinant of Health and the Pursuit of Health Justice

Daphne McGee, Texas Legal Services Center

Andrew C. Stevens, Arnall Golden Gregory LLP

Federal Magistrate Judge Grants Government Late Intervention in Health Care Fraud Case

Christopher C Sabis, Sherrard Roe Voigt & Harbison PLC

HHS Issues Guidance Regarding Relief Fund Reporting and Auditing Requirements

Anna M. Grizzle, Bass Berry & Sims PLC

Dawn Perez–Slavinski, Bass Berry & Sims PLC

Danielle M. Sloane, Bass Berry & Sims PLC

Podcasts

Behavioral Health Strategies for Rural Hospitals to Meet COVID–19 Challenges

Kathryn Anne Culver, PYA

Jeanna Palmer Gunville, Polsinelli PC

William David Teague, VMG Health

Anna Stewart Whites, Anna Whites Law Office LLC

Client Development In Disruptive Times

Karen B. Kahn

Jennifer M. Nelson Carney, Bricker & Eckler LLP

Delphine P. O'Rourke, Duane Morris LLP

COVID–19 GC Roundtable—Part 8

Peter M. Leibold, Ascension

Hal McCard, Quorum Health Corporation

Sarah E. Swank, Nixon Peabody

COVID–19 GC Roundtable—Part 9

Stacy R. Bratcher, Cottage Health

Daniel W. Peters, The University of Kansas Health System

Sarah E. Swank, Nixon Peabody

Fraud and Abuse: What to Expect from the Final Stark/AKS Rules

Kristin Cilento Carter, Baker Donelson Bearman Caldwell & Berkowitz PC

Matthew E. Wetzel, GRAIL

Joseph N. Wolfe, Hall Render Killian Heath & Lyman PC

Increasing Adoption of Telehealth and its Effect on the Health Care Sector

Marshall E. Jackson Jr, McDermott Will & Emery LLP

Nathaniel M. Lacktman, Foley & Lardner LLP

Racial Disparities in Health Care

David S. Cade, American Health Law Association

Dawn Hunter

Montrece McNeill Ransom, CDC Public Health Law Program

Sarah E. Swank, Nixon Peabody

Rural Health Care and COVID–19, Part 2

Ellie Bane

Steve Clapp, Strategic Healthcare Advisers

Andrea M. Ferrari, HealthCare Appraisers Inc

Clevonne M. Jacobs, PHAROS Healthcare Consulting

Delphine P. O'Rourke, Duane Morris LLP

Michael R. Watters, Essentia Health

Volunteer Pool and Complete Your Volunteer Profile

AHLA has revised the volunteer process. To opt–in to the Volunteer Pool and complete your Volunteer Profile, visit www.american–healthlaw.org/volunteer. This will help us know what kind of volunteer opportunities you are interested in. Going forward, you will receive email alerts when we think you'll be a good fit for a new volunteer opportunity.

AHLA has a wonderful tradition of members sharing their expertise and insight with each other. Members generously donate their time and energy through speaking, writing, and other service to the organization. Volunteers are the heart of the Association—thank you for all you do!

The Future of American Medicine: The New Business of Health Care in a Post-COVID Era

Martin Makary, Johns Hopkins University

Charles D. Overstreet, FTI Consulting Inc

The Lighter Side of Health Law—August 2020

Norman G. Tabler Jr. (Ret.), Faegre Drinker Biddle & Reath LLP

Practice Group Bulletins

Medicare Conditions of Participation COVID-19 Waivers—Managing and Implementing the Waivers in Accordance with Accreditation Standards and Expectations

Brett McNeal, Lexington Medical Center

Practice Group Toolkits

Update to HIT Enforcement Summary Tables

Jessica M. Lewis, UNC Health Care

MENTORS AND MENTEES

Mentors

Robert Canterman

Tamala Choma

Kirk Nahra

Kim Looney

Mentees

Elizabeth LaPaugh

Amanda Jacobs

Jessica Ammons Flynn

Angela Bujaj

Alexandra Sumner

Upcoming Live Webinars

November 4

Virtual Medical Staff Hearings in the Time of COVID

November 5

What Providers Need to Know About Veterans Mental Health Care

November 10

False Claims Act and Antitrust—DOJ Double-Barrel Shotgun?

November 17

Interoperability and Information Blocking Final Rules

November 18

Getting back to Basics: FMV and Commercial Reasonableness

Upcoming Programs

November 5-6
Virtual Health Plan Law and Compliance Institute

November 11-13
Virtual Fundamentals of Health Law

January 27-28
Virtual Academic Medical Centers and Teaching Hospitals Institute

February 10-11
Virtual Physicians and Hospitals Law Institute

March 3-4
Virtual Long Term Care and the Law

March 24-25
Institute on Medicare and Medicaid Payment Issues

April 14-15
Health Care Transactions

For more information on all AHLA events and to register, go to www.americanhealthlaw.org/education-events or call (202) 833-1100, prompt #2.

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AHLA's Online Career Center will allow you to:

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- Access career resources and job searching tips and tools.
- Have your resume critiqued by a resume-writing expert.

Recruit for Open Positions:

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- Promote your jobs directly to candidates via the exclusive Job Flash email.
- Search the anonymous resume database to find qualified candidates.
- Manage your posted jobs and applicant activity easily on this user-friendly site.

For more information and to start the journey to enhance your career or organization, please visit the AHLA Career Center at https://careercenter.americanhealthlaw.org.

Online Career Center Snapshot

2900+
Employers

875+
Job Seekers

60+
Open Positions

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MISSION

The Mission of the American Health Law Association is to provide a collegial forum for interaction and information exchange to enable its members to serve their clients more effectively; to produce the highest quality non-partisan educational programs, products, and services concerning health law issues; and to serve as a public resource on selected health care legal issues.

AHLA Diversity+Inclusion Statement

In principle and in practice, the American Health Law Association values and seeks to advance and promote diverse and inclusive participation within the Association regardless of gender, race, ethnicity, religion, age, sexual orientation, gender identity and expression, national origin, or disability. Guided by these values, the Association strongly encourages and embraces participation of diverse individuals as it leads health law to excellence through education, information, and dialogue.

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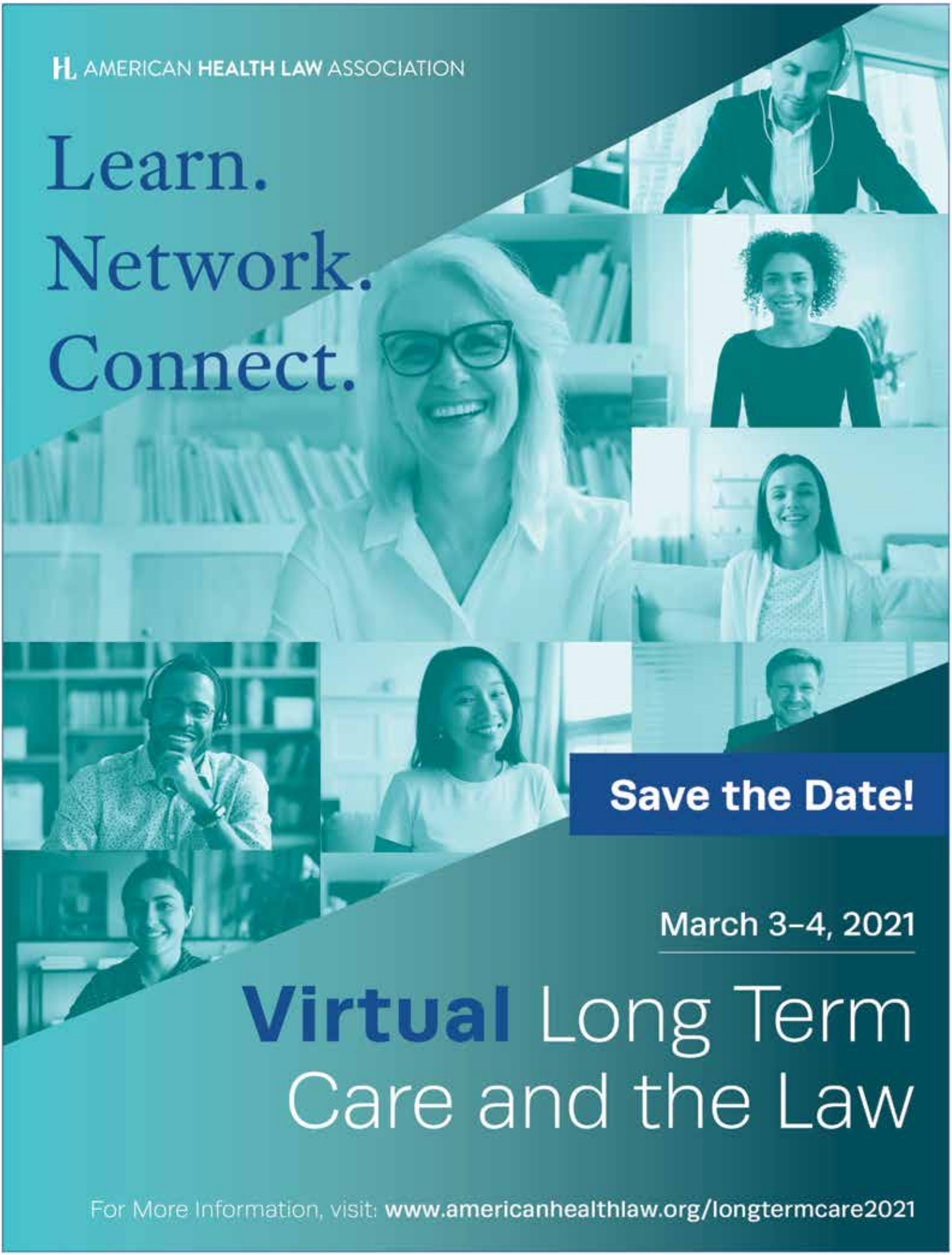
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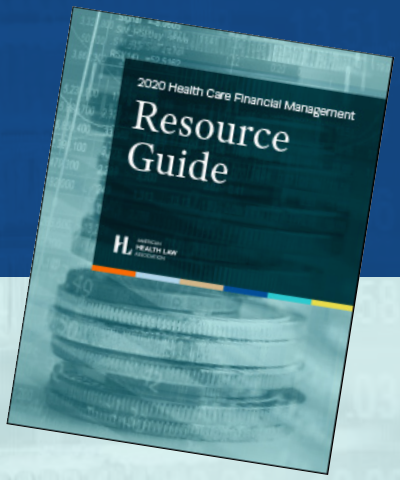
2020 Health Care Financial Management

Resource Guide



We are pleased to offer our business partners the opportunity to profile their expertise on a wide range of health care financial management issues in the *2020 Health Care Financial Management Resource Guide*:

- Post-Pandemic Crisis Affiliation: What is the New Normal? (Coker Group)
- How Much is Your Data Worth? (Duff & Phelps)
- Avoiding the "New Normal" Trap: Maintaining the Integrity of Fair Market Value and the Compliance Process Through the Pandemic (HMS Valuation Partners)
- Navigating Through Uncertain Times: Health Care Financial Management During a Time of Crisis (JTaylor)
- Guide to Financial Arrangements of Health Care Management Services Organizations (Weaver)
- Capital Financing During Uncertainty: How Due Diligence Helps Streamline the Process and Improve the Outcome (Wipfli LLP)

This *Resource Guide* contains valuable analyses and commentaries on significant financial management issues from leading health care experts. We are pleased to publish this collection of timely, practical, and valuable articles for the benefit of our members and the broader health law community, and we are pleased to add this resource to our impressive array of products and services. Thank you to each of our sponsors for making this possible.

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