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Inside this Issue

OCR Guidance on HIPAA and COVID-19 Vaccination Status Disclosures

Clients have been asking us at Quinn & Quinn, P.S. about the confidentiality of information relative to vaccination status, which is shared with their employer. Ever since August 9, 2021, when Governor Inslee issued Proclamation 21-14,[1] mandating vaccination against COVID-19 for all health care providers in Washington (unless exempt) the questions keep coming. So we thought maybe a *Firehouse Lawyer* article on the subject was in order.

We subscribe to the weekly HIPAA Journal, which we recommend, and which had a good article recently about the Office of Civil Rights (OCR) guidance on this subject. The guidance[2] reminds us that HIPAA only applies to *covered entities,* which includes but is not limited to healthcare providers such as fire departments that provide emergency medical services to the public.

One might think that, therefore, such fire departments (local government entities) should be careful about the vaccination status

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[1] https://www.governor.wa.gov/sites/default/files/proclamations/21-14%20-%20COVID-19%20Vax%20Washington%20%28tmp%29.pdf

[2] https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html

information they obtain from their employees, in the same manner that they are careful with the health care information of patients. But that is not the case, really.

The OCR is the enforcement arm of the Department of Health and Human Services (a federal agency) when it comes to HIPAA. In this guidance, the OCR was quick to point out that HIPAA does not apply to an employer, when the records or information relates to their own employees. Employers are not per se *covered entities* and as such are not covered by the HIPAA Privacy Rule.

The OCR explained how HIPAA applies to COVID-19 vaccination information in their Q&A as follows:

> 1.The Privacy Rule does not prohibit businesses or individuals from asking whether customers or clients have received a vaccine, and this applies to their employees asking as well.
>
> 2. The Privacy Rule does not prevent customers or clients of a business from disclosing whether they are vaccinated.
>
> 3. The Privacy Rule does not prohibit an employer from requiring its employee to disclose whether they have been vaccinated.
>
> 4. The Privacy Rule does not prohibit a covered entity or business associate from requiring its employees to disclose to their employers or other parties whether they have been vaccinated.

OCR has confirmed that generally the Privacy Rule prohibits a doctor's office from disclosing any protected health information (PHI), including COVID-19 vaccination information, to the patient's employer or other parties. This is because a doctor's office is a *covered entity* under HIPAA.

Of course, there are a few exceptions under which an employer could get such information from a covered entity. For example, when there are questions relating to occupational disease (such as a Labor and Industries case) or workplace safety (such as a WISHA or OSHA case) the employer could possibly get such records, but these exceptions are beyond the scope of this article.

The bottom line is that the fire department (fire district or RFA) should be able to ask for such status information from their employees without facing any claim of a HIPAA violation. Having said that, we would recommend being as careful as you are with employee medical records, when you receive inquiries about those records of employees.

Despite the general non-applicability of the HIPAA Privacy Rule to the medical records of your employees, such records are entitled to a measure of privacy or confidentiality. We would recommend caution when disclosing such information. We recommend that when citizens have asked whether departments have unvaccinated health care providers with exemptions or reasonable accommodations, a truthful answer be provided, but not to identify any unvaccinated employees.

In applicable records, we recommend redaction of names and other personally identifying information of employees, as the public does not need that information to inform their decision making. Such information would be exempt under RCW 42.56.230 (3) in any case.

We would add that we do not view RCW 42.56.235 exempting religious exemption requests categorically, i.e. in their *entirety*, as being a per se bar to the non-disclosure of religious exemption requires. That law states as follows:

> All records that relate to or contain **personally identifying information** about an **individual's** religious beliefs, practices, or affiliation are exempt from disclosure under this chapter.

(emphasis added). If the person requesting the records cannot associate the request with a particular person, then we do not view the above law as categorically exempting exemption requests from public disclosure. Redact the name and other identifying information and disclose the rest because that information identifies no one—and because agencies are obligated to provide the *non-exempt* portions of records even if other portions are exempt, pursuant to RCW 42.56.210.

DOES THE LOUDERMILL RULE APPLY TO SEPARATIONS RESULTING FROM A REFUSAL TO GET VACCINATED?

There seems to be some difference of opinion among attorneys on the question discussed in this article. Many of our readers are familiar with the legal requirements first enunciated by the U.S. Supreme Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 546, 105 S.Ct. 1487, 1495 (1985). The *Loudermill* Court ruled that a public employee with a property right to continued employment and facing termination[3] "is entitled to oral or written notice of the **charges** against him, an explanation of the employer's evidence, and an opportunity to present his side of the story" (emphasis added).

But when an adverse employment action is "**not disciplinary** in nature, the finding of just cause and the procedural requirements set out in *Loudermill* need not be addressed." *Oregon School Employees Ass'n (OSEA) v. Jefferson School District* (In re Interest Arbitration Awards) (Oregon Employment Relations Board 2018 (emphasis added).[4] This is an important distinction and may appear in other fact patterns in which there is a refusal to vaccinate.

The purpose of a *Loudermill* conference is not to "definitively resolve the propriety of the proposed termination but only to give the employee the opportunity to respond to **allegations."** *Kistner v. State Civil Service Commission,* No 2659 C.D. (Pennsylvania Commonwealth Ct. 2003 (emphasis added), citing *Pavonarius v. City of Allentown*, 629 A.2d 204 (Pa. Cmwlth. 1993).

Since there are no charges, allegations or disciplinary action presented in a simple refusal to vaccinate,[5] then *Loudermill* is inapplicable to these situations. In most cases, the union and management have agreed to a Memorandum of Understanding, wherein the union agreed to the process of reasonable accommodation,

[3] *Loudermill* has been interpreted by many courts as being applicable to suspensions and demotions as well, but that is not the subject of this article.

[4] Copy and paste the following link to the *Oregon* case: https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:f96ef02f-c6f4-4841-92c5-8fe8e9b20e42

[5] A fire department in Ohio chose to terminate a firefighter for refusing reasonable accommodations to vaccination, on the basis of *insubordination,* in which case *Loudermill* would more arguably apply: https://casetext.com/case/horvath-v-city-of-leander

insofar as a person had a sincerely held religious belief or a medical reason (disability) that conflicted with the order to vaccinate.

These MOUs laid out all of the agreed options including exemption (if reasonable accommodation could be agreed to), retirement, resignation, leave of absence, etc. but the options did not include a *Loudermill* conference prior to separation. If the employee did not choose any of these options, it still is not a disciplinary action as there is no misconduct whatsoever. Besides, if they sought an exemption, that triggered an interactive process wherein the employee had a good deal of opportunity to tell the employer "their side of the story," complying with the spirt of *Loudermill* and the Fifth and Fourteenth Amendments.

In the recent past, this law firm has taken the position that a *Loudermill* conference is not required when the employee has not committed misconduct as we know it, but has simply not remained in compliance with the "conditions of employment" such as maintaining a valid driver's license or a certification as a paramedic with the State of Washington. We view the refusal to vaccinate as a similar circumstance.

Some attorneys have argued that the employer has "nothing to lose" by providing a pre-termination conference, much like an exit conference that might be done with all separating employees. But our concern with that is that it might be deemed an admission that the employee was therefore entitled to be terminated only for cause or just cause, and therefor the employer has the burden of proving the elements of cause. We think that process is totally unnecessary as there is really no question about the facts that underlie the separation. Without any charges, allegations or disciplinary facts to talk about at the conference, what is there really to discuss?

Another interesting case we found comes from the Wisconsin Supreme Court. In *Kraus v. City of Waukesha Police and Fire Commission,* 261 Wis.2d 485, 662 N.W. 2d 294 (2003)[6] the Court distinguished disciplinary actions from non-disciplinary actions. The employee in *Kraus* argued that despite his probationary status, he still had a *liberty* interest protected by the Due Process Clause of the Fifth and Fourteenth Amendments because of the U.S. Supreme Court case known as *Board of Regents v. Roth,* 408 U.S.564 (1972). He argued so on the basis that he was reduced in rank at or near the conclusion of his probationary[7] period. But the *Kraus* court found that his reduction in rank for "nondisciplinary reasons" did not implicate the sort of "liberty interest" protected under *Loudermill*—or in the *Kraus* case, a statute that is substantively identical to *Loudermill.*

Therefore, it seems pertinent to point out that the analysis in *Kraus* is strikingly similar to the cases or decisions noted above. The Wisconsin Court exhaustively discussed the difference between an employer action arising from misconduct or charges, as opposed to an action based on failure to successfully complete probation. The Wisconsin Court looked to the dictionary definition of the term *charge* to decide the case:

> The term "charges" commonly denotes an accusation of misconduct or of a violation of laws, rules, or policies. The contextually relevant

[6] https://casetext.com/case/kraus-v-waukesha-police-fire-comm

[7] *See* the Firehouse Lawyer on the applicability of procedural protections to probationary employees: https://www.firehouselawyer.com/Newsletters/March 2016.pdf

> dictionary definition of the term is "a claim of wrongdoing; an accusation." The American Heritage Dictionary of the English Language 322 (3d ed. 1992). Evaluating a person's job performance as unsatisfactory or not up to expectation, or otherwise determining that a person is not fully suited to a supervisory position, is quite different from "charging" a person with some breach of duty or violation of a rule or order…Whether a job action is "disciplinary" is not determined by the consequences of the action, such as suspension, reduction in rank, or removal. It is determined by whether a "charge" is filed by the chief to impose a penalty.

These cases illustrate that not all separations are based on "cause"; some separation decisions do not result in an invocation of due process.

Assuming that Proclamation 21-14 is constitutional and enforceable, it has placed the employers of health care providers in the uncomfortable position of deciding whether an accommodation that includes the provider continuing to see patients is a direct threat to the public health or presents an undue hardship to the employer and its efforts to serve the public. We can argue all day about the wisdom of the proclamation mandating vaccinations, but until it is declared unconstitutional or enjoined by the courts, we have to abide by it. No litigation yet has resulted in a positive result for the plaintiffs suing the state or the governor.

COURT RULES THURSTON COUNTY IS ONLY PROPER VENUE FOR CHALLENGING PROCLAMATION 21-14

A week ago, on October 22, 2021, the Supreme Court of the State of Washington[8] ruled that any action challenging the Governor's proclamation of August 9, 2021 in mandatory vaccinations of health care providers must be brought in Thurston County.

The Court noted that the cause of action "arose" in Thurston County because that is where Governor Inslee issued the proclamation. They cited court decisions from other states that have ruled similarly in situations like this. While this ruling is definitely not a ruling on the merits of the plaintiffs' challenges to the proclamation, we felt our readers might want to know about it. Stay tuned for further developments.

In the meantime, we are waiting anxiously for further guidance from relevant federal agencies with jurisdiction over regulations, as to the federal executive orders that relate to federal agencies and (more important to us) ….to federal contractors. We shall see if the orders apply…if you provide service at the VA or to the Soldiers Home…or if you simply accept GEMT money through the Medicaid system. Stay tuned.

[8] https://www.courts.wa.gov/opinions/pdf/1002556.pdf