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Pitfalls and Best Practices When Dealing with Aging and/or Impaired Physicians

ILLINOIS RISK MANAGEMENT SERVICES

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Medical Staff Services • Credentialing • Provider Enrollment • Peer Review • Quality • Risk Management

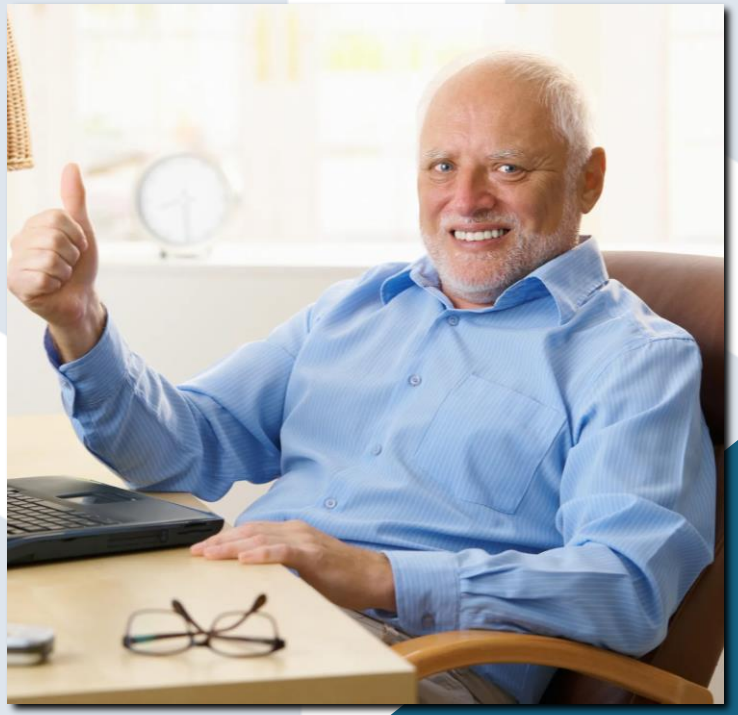
Objectives

1. Review aspects of normal aging
2. Discuss the impact of an aging physician population
3. Identify warning signs of cognitive impairment
4. Discuss cognitive screening controversies
5. Discuss controversies about age-based physician screening

The Late Career Physician

Do any of these scenarios sound familiar?

- A late-career primary care physician still wants to manage ICU patients but fails to utilize the resources of critical care physicians and underestimates the severity of his patient's illness — and an avoidable poor outcome follows.
- An older urologist with waning dexterity perforates a patient's bladder during a routine cystoscopy – maybe more than once!
- A general surgeon with a pristine 40-year track record nicks a patient's common bile duct in 50% of his most recent laparoscopic cholecystectomies.



The Late Career Physician

Too early to retire? Too late?


The New York Times

THE NEW OLD AGE

When Is the Surgeon Too Old to Operate?

A handful of hospitals have instituted mandatory screening procedures for medical professionals over 70. Many have been unenthusiastic about the idea.

In the fall of 2015, Dr. Herbert Dardik, chief of vascular surgery at Englewood Hospital and Medical Center in New Jersey, nodded off in the operating room.

Dr. Dardik, then 80, was not performing the operation. He'd undergone a minor medical procedure himself a few days earlier, so he'd told his patient that another surgeon would handle her carotid endarterectomy.

But when she begged Dr. Dardik at least to be present during the operation, he agreed to sit in. ***"I was really an accessory," he recalled. "It was so boring, I kind of dozed off"*** — whereupon an alarmed nurse-anesthetist reported the incident to administrators.

The Late Career Physician

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Within days, the hospital's chief of anesthesiology and CMO were in Dr. Dardik's office, praising his surgical skill while urging him to reduce his workload.

"I got so annoyed, I stood up and opened the door and said,'Get out,'" Dr. Dardik said. "Who knows better what I can do but myself?"

He also resisted the suggestion that he undergo testing at Sinai Hospital in Baltimore, which had established a two-day program to evaluate whether older surgeons could safely continue practicing.

Not long afterward, Dr. Dardik was on a plane when its older-looking captain came aboard (FAA regulations mandate a retirement age of 65).

"I hope this guy's still ok," Dr. Dardik remembered thinking. At which point, "it hit me like a hammer – **this is what other people think when they look at me."**

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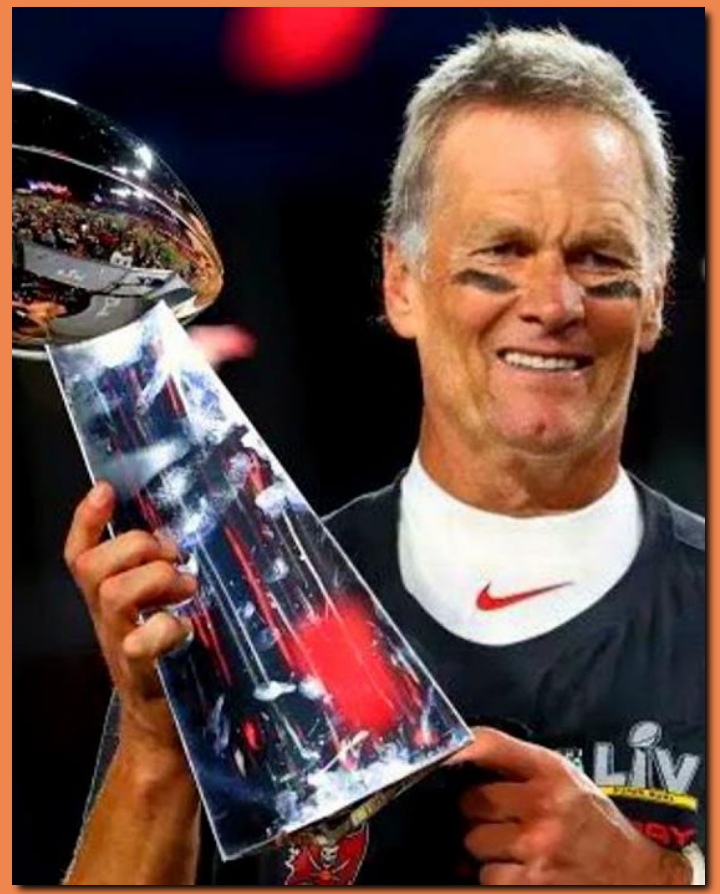
The Late Career Physician

Consideration of Competency Testing

Competency testing of late career physicians – *mandatory or voluntary* – is being considered in the larger context of:

- Rising life expectancies
- Delayed retirement for financial reasons
- Changing societal norms regarding contributions that late-career professionals can make to their professions



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Ensuring Clinician Competency

A Medical Staff Responsibility

- ***All*** Medical Staff applicants should be asked to document their ability to exercise the privileges requested safely with or without reasonable accommodation.
- The Joint Commission standards require that the hospital evaluate the health status of physicians who exercise or seek to exercise clinical privileges or other health care services.
- The Americans with Disabilities Act (ADA) prohibits discrimination based on disability and bars discrimination against a qualified individual due to the disability.
- When discussing the issue of the aging provider, it is essential to maintain compliance with state and federal law related to age discrimination.

Ensuring Clinician Competency

A Medical Staff Responsibility

A Review of Current Processes

- Bi- or Tri-annual recredentialing
- Primary source verification
- Peer references
- OPPE / FPPE data and ongoing internal Peer Review
- Patient satisfaction surveys
- Maintenance of Board Certification
- NPDB entries / continuous query
- State Licensing Board sanction & citations
- Criminal background checks

Ensuring Clinician Competency

A Medical Staff Responsibility

Negligent Credentialing

- Knew or should have known about a provider's lack of competency
- Ignored series of unexpected adverse outcomes
- Lack of follow through on reports of health concerns raised by staff
- Growing body of evidence that late-career practitioners can be a potential problem
  - Clinical care
  - Behavioral concerns

EFFECTIVE AND UNIFORMLY APPLIED STANDARDS FOR GRANTING OF PRIVILEGES HELPS AVOID CLAIMS FOR NEGLIGENT CREDENTIALING

Safety Sensitive Employment

The underlying principle for fitness-for-duty assessment is the protection of the public

- Health professions
- Legal profession
- Transportation industry
- Law enforcement

The Late Career Physician

Disincentives for Retirement

- Baby boomers face financial pressures & may wish to work past traditional retirement age
- In some specialties, the financial reward for working longer will be boosted due to shortages
  - Physician supply < Demand
- Generation X, Generation Y, and Millennials prefer a work-life balance --- will tend to decrease overall physician workforce productivity

Normal Aging – Neuropsychological Changes

- Decision making
  - Differences in how decisions are reached
  - More reliance on prior knowledge
- Changes in memory
  - Recall worse than recognition
  - Slower pace of learning
  - Increased need for repetition
- Decreased speed
  - Processing speed
  - Reaction time
  - Psychomotor speed
  - Fine motor skills/dexterity

The Effects of Aging on Cognitive Function

- Diminished memory
  - Episodic memory (personally experienced events)
  - Semantic memory (acquired knowledge)
  - Working memory (ability to maintain, manipulate, and reorganize information in short-term memory)
- Diminished complex attention (processing 2 or more sources of information at the same time; ability to disregard less relevant stimuli in order to focus on a specific task)
- Crystallized intelligence, the ability to problem-solve based on *prior* learning and experience, is better preserved with aging than fluid intelligence, which is problem-solving requiring *novel* information or approaches.

Normal Aging Risks for Impairment

These are often treatable conditions

Exacerbated By On Call Burden

Sleep deprivation

- Earlier waking time
- Difficulty initiating sleep
- More nighttime awakenings
- Lighter sleep
- More difficulty adjusting to shift changes

Sensory loss

- Vision
- Hearing

Identifying Cognitive Impairment

Potential clues to cognitive deficits

- Poor business decisions
- Loss of skill (bad outcomes, medical errors, prescription errors)
- A failure to remediate skills following competency assessment
- Clinic staff concerns (or turnover)
- Lawsuits or complaints to regulatory agencies
- Dissatisfied patients
- Professional boundary problems (judgement)
- Irritability, impatience, mood swings
- ***Skill deficit vs Knowledge deficit vs Cognitive deficit?***

Identifying Cognitive Impairment

Who can, or will, help?

Family members, institutions, and colleagues may contribute to hiding problems with an impaired physician

- Power differential
- Fear of loss
  - Practice
  - License
  - Prestige
- Hesitancy to “betray” a colleague
- Social stigma of dementia / other illness

The Impaired Physician

Not my brother's keeper?

- **A 2005 STUDY** found physicians would be more likely to report a colleague impaired due to substance abuse rather than cognitive decline or psychological impairment

- **A 2010 STUDY** showed 20% of physicians had encountered an impaired colleague in their previous three years of practice but more than 30% had taken no action

Cui malo?

Farber NJ, et al. Physicians' willingness to report impaired colleagues. Soc Sci Med. 2005 Oct;61(8):1772-5.

DesRoches CM, et al. Physicians' Perceptions, Preparedness for Reporting, and Experiences Related to Impaired and Incompetent Colleagues. JAMA. 2010;304(2):187–193.

Assessing/Maintaining Physician Current Competency

- Medical professionals can – ***and do*** -- experience physical/cognitive decline with aging
- Existing credentialing/peer review/privileging may not identify decline timely enough to ensure patient safety
- *Mandatory retirement age is not a fair or reasonable solution*
- Mandatory, practical screening at a specific age strikes a fair balance between patient safety, organizational liability, and provider autonomy and dignity….but is it legal ?

Background

Mandatory Retirement Ages

- 56 – Air Traffic Controller
- 57 – Federal Firefighter
- 57 – Federal Law Enforcement
- 65 – Airline Pilot
- Judiciary, Military, Foreign Service, etc.

- 1 in 4 US physicians is over 65
- Represent 15% of the active workforce
- Those aged 55 – 64 make up 27% of the workforce
- Life expectancies increasing
- Financial disincentives to retirement
- Looming physician shortages

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Is Mandatory Screening of Aging Providers Legal?

?

EEOC Sues Yale New Haven Hospital for Age and Disability Discrimination

Hospital Unlawfully Subjected Only Physicians Over 70 to Neuropsychological and Eye Exams, Federal Agency Charges

NEW HAVEN - Yale New Haven Hospital, the teaching hospital of the Yale School of Medicine, violated federal law by adopting and implementing a discriminatory "Late Career Practitioner Policy," the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit filed today.

According to the EEOC's lawsuit, the policy requires any individual aged 70 and older who applies for or seeks to renew staff privileges at the hospital to take both neuropsychological and eye medical examinations. Individuals and employees younger than age 70 are not subject to these requirements.

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Cognitive Impairment Concerns

It's not just an age issue

522 lawsuits filed against retired orthopedic surgeon, Ascension St. Vincent's

Dr. David Heekin is accused of operating on patients while

impaired judgment and mood," according to court documents.

I-TEAM: Appeals court rules more than 2,700 texts and images regarding doctor at the center of malpractice lawsuits be released

litigated has been disclosed by the plaintiffs in public legal filings. It says, we "are going to both report him to the state I think. He is out of his mind today. He's so confused... "not making any sense," and "can't form a full sentence."

If the organization knew or ***should have known*** that a practitioner is not qualified (due to training, quality, *or* cognitive deficits) and the practitioner injures a patient through an act of negligence, the organization can be found separately liable for the ***negligent credentialing*** of this practitioner.

License surrendered 2021

The suits claim the hospital allowed Dr. David Heekin to operate on patients for years even as he was allegedly suffering a progressive neurological condition that caused him to lose his balance and slur his speech. The suits allege he caused devastating injuries and even the death of one patient.

I-TEAM: Former Ascension CEO compelled to testify at deposition in negligence lawsuits

A former orthopedic surgeon at Ascension St. Vincent's accused of operating while impaired in hundreds of lawsuits

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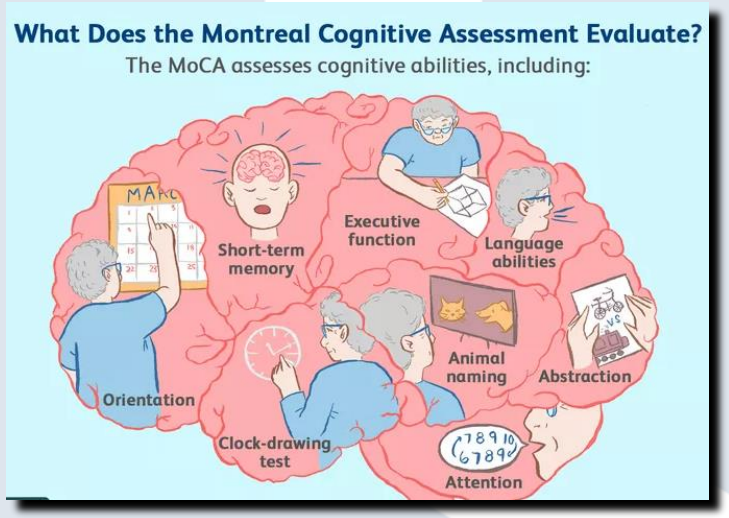
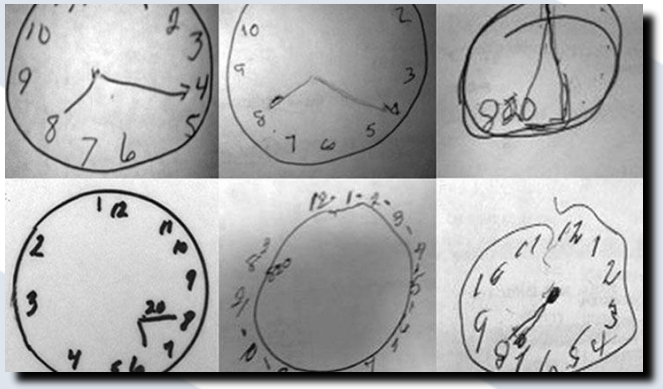
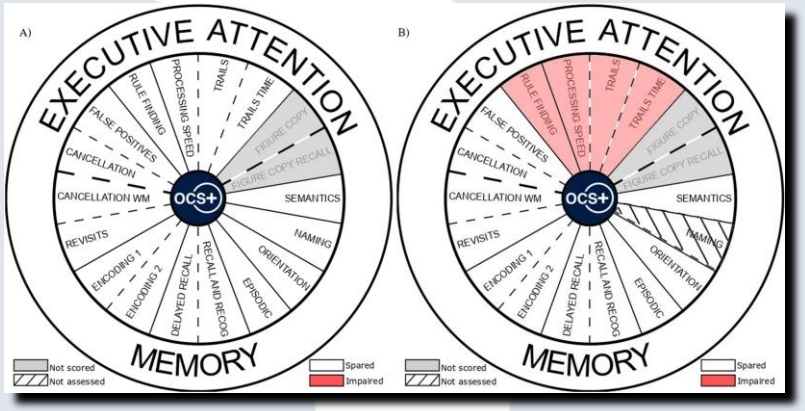
Cognitive Screening

The Challenges

- There is no single universally accepted screen that satisfies all requirements in the detection of cognitive impairment
- There are many screening tests, but few have been well validated
- Many have low accuracy for mild levels of impairment
- Many have demographic biases in score distribution
- Many over-emphasize memory dysfunction
- Cannot be used to create a differential diagnosis because they are designed to identify specific dementia subtypes







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Cognitive Impairment Concerns

What to do?

- *Self referral for evaluation requires self-awareness.* Even cognitively normal adults have been shown to be poor judges of their own cognitive performance
  - Maintenance of certification process

Self Referral For Cognitive Evaluation

Relying upon complaints or "referral for cause" after concerns have already arisen may sacrifice opportunities to detect a physician's impaired performance at a stage when remediation might be more successful and future errors more effectively prevented.

  - Pennsylvania Medical Society's LifeGuard Assessment
  - Texas A&M University Rural and Community Health Institute KSTAR Program (Knowledge, Skills Training, Assessment, & Research)

https://www.fsmb.org/spex-plas/plas-information/
https://www.paceprogram.ucsd.edu/
https://www.cpepdoc.org/
https://architexas.org/programs/kstar-physician/index.html

Existing and Alternative Age Neutral Policies

- **Physician Wellness Committees**
  - Physician Wellness committees are designed to accept the referrals from medical staff leadership or committees when there is a reasonable suspicion that a physician may suffer from some form of physical, psychiatric or other impairment which could result in adverse patient consequences
  - This committee typically is multidisciplinary in nature, including a psychiatrist, which will then either conduct an initial evaluation which can take many forms or which may refer the physician to an outside agency for a more thorough evaluation including physicals, fitness for duty evaluation, or neuropsychological testing

Existing and Alternative Age Neutral Policies

- All of these policies are age neutral but rely on either self-reporting or the reporting of by peers and other individuals at the Hospital
  - Studies have demonstrated that there is significant under reporting even when suspected impairment, disruptive behavior and other forms of unacceptable conduct is observed.
- Factors Associated with Cognitive Decline
  - The various studies and publications which have observed certain quality of care, physical, psychological, cognitive and other deficits associated with aging have identified the following factors, some of which may already be tracked within an organization through one of the existing programs and policies identified above. These include but are not limited to the following:

Existing and Alternative Age Neutral Policies

- ✓ Disruptive behavior
- ✓ Fatigue, stress and burnout
- ✓ Decline in clinical performance
- ✓ Longer length of stays
- ✓ Incomplete medical records, inappropriate comments contained in medical records and documentation errors
- ✓ Prescription errors
- ✓ Billing mistakes
- ✓ Irrational business/patient care decisions
- ✓ Skill defects
- ✓ Patient complaints

Existing and Alternative Age Neutral Policies

- ✓ Office staff/peer observations of deficits
- ✓ Patient injuries
- ✓ Lawsuits
- ✓ Unsatisfactory peer review evaluations
- ✓ Failure to keep up with continuing medical education requirements
- ✓ Recertification failures
- ✓ Decreased processing speed
- ✓ Increased difficulty inhibiting irrelevant information
- ✓ Decreased hearing and visual acuity
- ✓ Decreased manual dexterity

Existing and Alternative Age Neutral Policies

- ✓ Decreased visuospatial ability
- ✓ Higher mortality rates
- ✓ Diagnostic errors
- ✓ Use of outdated medications and treatment forms and modalities

- **Alternative Approaches and Policies**
  - ➢ Incorporate all or some of the factors listed above into the routine appointment and reappointment application process in which these factors are investigated, identified and reflected in reports being sent to the Department Chair, the Credentials Committee, the MEC and eventually the Board of Directors

Existing and Alternative Age Neutral Policies

- Incorporate some or all of these factors into existing FPPE/OPPE policies which are then monitored on a continuous basis and reviewed, as appropriate, as part of collegial intervention and routine peer review processes
- Strongly recommend that physicians who reach a particular age or a certain number of years in practice that they voluntarily agree to take a physical, ophthalmologic, neuropsych evaluation or other evaluative process as deemed acceptable by the medical staff and Hospital
  - decision would be voluntary and refusal to do so should not result in any disciplinary action, reduction in staff category or other similar adverse outcome

Existing and Alternative Age Neutral Policies

- in the event that deficits are identified, the physician will be required to disclose the report so that it can be further reviewed and appropriate next steps taken
- If the practitioner does not agree to be voluntarily assessed, to the extent that the Hospital has not already incorporated the factors above into an FPPE/OPPE Policy, the Hospital could then do a concurrent or retrospective review of the practitioner's cases and other practices to determine whether there are any red flag factors which could result in further reviews or a requirement to undergo identified evaluations

Non-Disciplinary Remedial Measures

- As should be true with existing policies, the identification and confirmation of any problems relating to impairment or any form of deficit should not, absent extreme danger to patients, result in the imposition of disciplinary action.
- Hospitals and medical staffs should instead implement and apply its existing peer review policies and collegial intervention methods in order to identify the cause of any identified issues in order to allow the physician to address these issues and to attempt to identify other remedial steps short of disciplinary action

Non-Disciplinary Remedial Measures

- Depending on the results of this review, it may be appropriate to then work with a Physician Wellness Committee which would serve as an advocate for the physician but also require a physical examination, ophthalmological test as well as neuropsych evaluations in order to identify whether the physician suffers from such defects that require that some form of support or alternative practice options should be considered.
- These other remedial measures can include the following:
  - Changing/limiting practice
  - External support
  - Retraining/reeducation
  - Eliminate or reduce procedural work

Non-Disciplinary Remedial Measures

- Allow more time in taking care of and treating patients
- Provide memory aides
- Provide or require consultations with other physicians for second opinions
- Reduced or removal from ED on call schedule
- Mandatory consultations
- Proctoring

Questions & Answers

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Michael R. Callahan brings an unparalleled level of healthcare consulting experience. Formerly a healthcare attorney for over 40 years, he provides consultative services, educational programs and thought leadership in his role as Senior Consultant.

His areas of focus include hospital/physician relations, medical staff bylaws and policies, peer review policies and investigations, privileging and credentialing issues, National Practitioner Data Bank guidelines and reporting standards, EMTALA standards, accreditation compliance, medical staff integration and hospital/medical staff disputes.

In addition, he is recognized as a national expert involving all aspects of the federal Patient Safety and Quality Improvement Act of 2005.

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Thank You!

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Appendix
Physician Late Career Policies Under EEOC Attack

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Yale’s Late Career Practitioner Policy

- **Overview**
  - Since March 2016, as a condition of appointment, continued appointment and reappointment, MDs, DOs, dentists, podiatrists and certain advanced practice providers who require medical staff clinical privileges and who are 70 years or older must undergo a neuropsychological screening evaluation and a basic ophthalmologic exam.
  - The evaluation and exam are conducted thereafter at the time of reappointment.

Yale's Late Career Practitioner Policy

- The cognitive function evaluation includes 16 tests which are administered by a neuropsychologist and focus on the following areas:
  - information processing
  - visual scanning and psychomotor efficiency
  - processing speed and accuracy
  - working memory
  - concentration
  - verbal fluency
  - executive function

Yale's Late Career Practitioner Policy

- Results are reviewed by a medical staff committee which then makes recommendations to the Credentials Committee.
- The medical staff physicians at the Hospital are not Hospital employees.

- **Results**
  - As of April, 2019, the Policy was applied to 145 individuals.
  - The age range was 70 to 84 – average age was 74.
  - 86% were men and 89% were physicians.
  - 14 were listed as "Borderline deficient"
  - 1 was listed as "Deficient"
  - 7 "Failed"

Yale's Late Career Practitioner Policy

- 5 were "N/A" because they refused testing and either resigned or changed their status.
- 80 "Passed"
- 38 "Qualified Passed"
  - 21 have been retested a second time and all "Passed" or "Qualified Passed"
- 18 demonstrated cognitive deficits that were likely to impair their ability to practice medicine independently
  - None were independently identified as having performance problems
  - All opted to voluntarily discontinue their practice or move to a closely proctored setting

Interrelationship between Hospital and Yale Medical School (“YMS”)

- Hospital and YMS operate under a 100-page Affiliation Agreement.
- Agreement fully integrates the operations of both.
- YMS has a large say on who heads each clinical department.
- All YMS faculty with appointments in clinical departments must obtain and maintain medical staff privileges at the Hospital.
- Hospital has a comprehensive appointment/reappointment process and ongoing monitoring and peer review procedures including the imposition of an FPPE or similar plan when warranted.

EEOC Complaint

- Plaintiff is a pathologist who filed a charge with the EEOC 30 days prior to filing of the lawsuit alleging violations of the Age Discrimination in Employment Act, 29 USC Section 621, et. seq. (“ADEA”) and the Americans with Disabilities Act, 42 USC Section 12101, et. seq., as amended by the Americans with Disabilities Act Amendment Act of 2008 (“ADA”).

- EEOC issued a Letter of Determination finding reasonable cause that the Hospital violated the ADEA and ADA with respect to the Plaintiff and other aggrieved individuals because the Policy only applied to practitioners who were 70 or older rather than to all practitioners irrespective of age.

EEOC Complaint

- EEOC issued a Notice of Failure of Conciliation on October 11, 2019 when efforts to reach an acceptable agreement failed.
- The EEOC Complaint was filed on February 9, 2020, in the U.S. District Court in the District of Connecticut.

- **ADEA Claim**
  - ➢ The ADEA makes it unlawful, among other things, for an employer:
    - ✓ to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

EEOC Complaint

- ✓ To limit, segregate, or classify his employees in any way which would deprive or intend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

➢ Because the Policy applied only to those age 70 or above, the Plaintiff, who passed the examinations, and other employees were subjected to the stigma of being singled out because of their age and to unlawful discrimination and classification of applicants and employees in violation of the ADEA

EEOC Complaint

- The effect of the practices has been to deprive the Plaintiff and a class of applicants and employees age 70 and above of equal employment opportunities and otherwise to affect adversely their status as applicants or employees because of their age

- The unlawful employment practices complained of were willful within the meaning of the ADEA

EEOC Complaint

- **ADA Claims**
  - The ADA states that an employer “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee in an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity” (42 USC Section 12112(d)(4)(A))
  - The Policy’s ophthalmologic and neuropsychological exam are medical examinations under the ADA and their use on the Plaintiff and other employees solely on the basis of their age violates the ADA
- The unlawful employment practices complained of were intentional and done with malice or with reckless indifference to the federally protected rights of the Plaintiff

EEOC Complaint

- **Interference with Rights Protected by the ADA**
  - The ADA makes it unlawful to “interfere with any individual in the exercise or enjoyment of any right granted or protected by [the ADA].”
  - Under the ADA, an employee has a right to enjoy employment free from unlawful medical examinations
  - By subjecting the Plaintiff and other YSM employees (and employees of other employers) whose employment with YSM (and other employers) requires the receipt and maintenance of medical staff privileges at the Hospital to medical examinations under the Policy, the Hospital has unlawfully interfered with these employer’s rights under the ADA

EEOC Complaint

- **Comment**
  - The EEOC in its EEOC Compliance Manual, Section 2 – Threshold Issues, has a Section entitled “Third-Party Interference with Employment Opportunities.” This Section provides as follows:
    - ✓ In addition to prohibiting employers from discriminating against their employees, Title VII, the ADEA, and the ADA prohibit a covered third-party employer from discriminatorily interfering with an individual’s employment opportunities with another employer.
    - ✓ While the third-party employer might, in some cases, be a joint employer, the principle described here applies even where an employment relationship has never existed between a third-party employer and the individual. This kind of liability is commonly known as “third-party interference.”

EEOC Complaint

- ✓ The ADA specifically prohibits interference with rights protected under the statute. While Title VII and the ADEA do not include comparable provisions, they prohibit discrimination against “individuals”. Therefore, a charging party need not necessarily be an employee of the employer that is accused of discriminatory interference.

- ➢ The EEOC gives an example of how this third-party interference principle applies in the context of a hospital/physician relationship very similar to its arguments against Hospital.

EEOC Complaint

- ✓ Respondent is a hospital that receives emergency room services from ABC Medical Corp. CP is employed by ABC as the director of Respondent's emergency room. CP files a charge alleging that Respondent discriminated against her on the basis of age and sex by asking ABC to replace her with a younger male director. Respondent is a covered employer under Title VII and the ADEA. Under these circumstances, CP has a Title VII and ADEA claim against Respondent for interfering with her employment relationship with ABC. If Respondent exercises sufficient control over CP, it may also be a joint employer.

EEOC Complaint

- ✓ See Enforcement Guidance On Control By Third Parties Over The Employment Relationship Between An Individual And His/Her Direct Employer, EEOC Compliance Manual, Volume II, Appendix 605-F.
- ✓ See Sibley Memorial Hospital v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. ✓ 1973).

EEOC Complaint

- **But**
  - Plaintiff and most of the physicians are not employed by the Hospital – they are employed by the University
  - EEOC has alleged in its their complaint that all Physicians affected by the Policy are employees
  - EEOC, at this stage at the pleadings, is not required to set forth the basis of it's claim that the independent physicians are employees.
  - Independent contractors cannot seek protection under the ADEA or ADA

EEOC Complaint

- Absent a direct to employment relationship, a claimant must establish that, in this case, the Hospital has sufficient and direct control over the individual. Some factors include:
  - ✓ When, where, and how the individual performs the job
  - ✓ Does job require a high level of skill or expertise
  - ✓ Does the Hospital furnish the the tools, materials and equipment
  - ✓ Does the Hospital have a right to assign additional projects to the worker
  - ✓ Does the Hospital set the hours of work and duration of the job
  - ✓ Is the individual paid by the hour, week, or month rather than the agreed cost of performing a particular job

EEOC Complaint

- ✓ Does the individual hire and pay assistants
- ✓ Can the Hospital discharge the individual

- ➢ A Hospital which has an existing late career policy or which is considering such a policy should consult with legal counsel to determine whether there have been court decisions within its jurisdiction which have addressed these direct control factors to determine whether independent physicians will be treated as employees for purposes of Title VII, the ADEA or the ADA