Health Care Beat | Episode 58:
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Amanda Genovese: Welcome to Health Care Beat, a health law podcast brought to you by Seyfarth Shaw's cross-disciplinary health care group. Each Health Care Beat episode focuses on key industry trends and legal developments while identifying practical takeaways for those dealing with these issues every day. I'm Amanda Genovese, a Seyfarth attorney in New York.

Chris DeMeo: And I'm Chris DeMeo, a Seyfarth attorney in Houston. Let's get started.

On this episode of Health Care Beat, we're joined by Matt Sloan, a Seyfarth colleague in our Chicago office and a senior associate in the firm's Labor and Employment Department. You know, I didn't know we had a Labor and Employment Department here at Seyfarth. Well, you learn something new. It focuses on labor relations, whistleblower investigations, and workplace safety matters. His practice focuses on the intersection of these three areas, which are unique at Seyfarth and among the country's management-side labor and employment bar. So Matt, welcome to Health Care Beat. Why don't you tell us a little more about yourself before we begin?

Matthew Sloan: Yeah. Thank you, Chris. I'm excited to be here. I'm in our firm's Chicago office. I'm a proud Chicagoan, born and raised in the area. I've been with the firm since 2019, and I appreciate the very generous introduction. That's all fair and accurate. I sit in both our Workplace Health and Safety practice group and our traditional labor, or labor-management relations practice group. I also spend part of my practice on whistleblower investigations and whistleblower litigation. When all three intersect, it makes my job a lot of fun, and I'm excited to speak with you all today and with our listeners.

Amanda Genovese: Well, welcome again, Matt. To kick things off, thinking about the area you work in: when health care employers hear "workplace violence," what should they understand from an OSHA perspective?

Matthew Sloan: That's a great question. The first thing I would tell an employer is that OSHA uses the term much more broadly than folks sometimes assume. We're not just talking about an active shooter situation or an employee being seriously assaulted. OSHA takes a much broader approach and describes workplace violence as acts or threats of physical violence, harassment, intimidation, and other threatening behavior, like bullying, occurring at the work site. So there's a pretty wide spectrum here.

The second point I would make, and this is the really important technical legal point, is that there is still no generally applicable federal OSHA workplace violence standard comparable to something like lockout/tagout or hazard communication. But that absolutely does not mean OSHA lacks the authority to cite an employer. At the federal level, at the very least, OSHA can proceed under Section 5(a)(1) of the OSH Act, also called the General Duty Clause. In very simple terms, OSHA looks at whether employees were exposed to a recognized serious hazard and whether there were

feasible and effective measures the employer could have taken to materially reduce that hazard. Health care is one of the industries in which OSHA has long recognized workplace violence as a significant hazard under the General Duty Clause. So even though there is no specific federal workplace violence standard, either generally or specific to health care, federal OSHA has health care-specific guidance and an enforcement directive addressing how its area offices evaluate workplace violence cases.

Finally, employers need to remember that federal OSHA is only half the picture. There are state plan jurisdictions, or state plan states, like California, Washington, Michigan, and Minnesota, and some of those states have their own workplace violence standards. California, in fact, has a specific violence prevention in health care standard. So a multi-state health system, and we have clients who are multi-state, cannot necessarily build an effective compliance program around the federal floor and assume that answers the question everywhere.

Chris DeMeo: That's really helpful. In many ways, what we're hearing is that there's some flexibility here, but some of our larger clients, the larger health care employers, are going to be working out exactly what their obligations are to protect health care workers from workplace violence. Could you drill down a little more? What are those obligations, if any?

Matthew Sloan: Sure thing. As I mentioned earlier, at the federal level I would start with the General Duty Clause, Section 5(a)(1) of the OSH Act. It bears repeating: it says an employer must furnish to each of its employees employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.

So under the General Duty Clause, OSHA's position is essentially that if workplace violence is a recognized serious hazard in your work environment, the employer needs to take feasible measures to materially reduce that hazard. But there's an important qualifier: OSHA does not require employers to guarantee that no violent incident will ever occur. That would be an impossible undertaking and an impossible standard, especially in health care. Hospitals treat patients experiencing psychiatric crises, dementia, delirium, substance abuse, and other conditions that can make patient behavior very unpredictable.

So the legal question OSHA is going to ask is not "Did something terrible happen?" The better question is: given what this employer knew about the hazard, and about this patient, were there reasonable and feasible precautions available that could have materially reduced the risk? Under that framework, OSHA is going to focus on management's commitment to reducing violent episodes, worksite analyses, hazard prevention and control, safety and health training, and recordkeeping.

To put it more practically, since I've thrown a lot of legal mumbo jumbo out there about Section 5(a)(1) of the OSH Act, I would expect a sophisticated health care employer to be asking: Are we analyzing our own incident history? Are employees actually reporting

near misses and threats? Do we understand which units and jobs present the greatest risk of exposure to violence? Are employees being properly trained? Are alarm and communication systems effective? Is security appropriate for the risk? And when something happens, are we investigating it and deciding whether the event exposes a weakness in our program?

At the end of the day, I think a really good prevention program has to be built on a risk-based approach, not a check-the-box or checklist approach. A behavioral health hospital, an emergency department, a home health operation, and an outpatient physician practice do not necessarily require identical controls. The controls really ought to fit the relevant environment.

Amanda Genovese: All right, thanks, Matt. That's good to know. To build on that concept a little, what kinds of circumstances could put a health care employer at greater risk of OSHA scrutiny if, in the worst case, a violent incident occurs?

Matthew Sloan: Absolutely. In a similar vein to everything I just discussed, as a workplace safety lawyer, what usually concerns me most in an investigation into a workplace violence incident is not simply that an assault occurred. It's facts and circumstances suggesting that the employer had advance warning that the hazard existed and didn't do anything about it.

As the lawyer, I wonder: Have similar incidents occurred before? Are there repeated reports of threats, assaults, or near misses in the same unit? Have employees complained about the adequacy of security or other controls? Did the employer's own hazard assessment identify an issue? And was there a policy on paper that was not actually being followed?

That distinction matters because a serious incident occurring completely out of the blue is very different, in OSHA's eyes and in mine, from the fifth or tenth or fifteenth similar incident in a unit or work area where employees have repeatedly raised concerns.

I would also pay very close attention to the employer's own documentation. As outside counsel, I pay attention to documentation, and so does OSHA. OSHA is going to look at what the employer knew, not simply what management remembers after the incident, and one of the data points in that analysis will be the documentation from before the incident. If the documentation tracks an ongoing issue but shows no action, that could really put an employer at risk. Or if the employer is supposed to document issues, and there were issues, but there's no documentation and no post-incident investigation report, that can also be damaging in an OSHA investigation.

Amanda Genovese: To follow up on that, where do you see gaps in employers' workplace violence prevention efforts?

Matthew Sloan: One of the biggest gaps is what you might call the "paper program" problem. The employer has a great policy. It's been vetted multiple times over, through multiple levels of review. There are training slides that go with the policy. There might be

an incident reporting mechanism too. But the day-to-day experience on the floor and in the patient rooms doesn't match the program on paper, so you get a disconnect.

The second problem is underreporting. If employees believe that being hit, kicked, threatened, or verbally abused is simply part of working in that environment, the organization may not be seeing the true risk profile. OSHA itself recognizes that many workplace violence incidents go unreported. So a reporting mechanism that encourages reports is the best way to stay on top of the full risk profile.

Chris DeMeo: On that point, what happens if you have a series of unreported incidents, and then an employee reports one and says this has been happening for months, or years? How do you handle that?

Matthew Sloan: It cuts both ways. To take corrective action, we obviously need to know what's happening on the floor. If incidents aren't being reported to us, there's going to be a gap, and there's not a whole lot we can do about it. But if supervisors learned about incidents and did not report them to upper management, then we get into that employer knowledge danger zone. OSHA will appreciate it if things were happening that we had no idea about. But if we did know, or had reason to believe that incidents were occurring, then there's potential liability. I hope that answers the question.

Chris DeMeo: Yeah, I can see that happening. It's human nature, right? You don't report something until you do, and then you bring up all the other times you didn't report it. To put a finer point on this, this conversation was inspired by a Wall Street Journal article about health care workplace violence, and the main story was about a nurse being strangled. That's an extreme situation. Is that par for the course, or are incidents like that something you only hear about in the Wall Street Journal?

Matthew Sloan: I hope they're not par for the course. Under the General Duty Clause, based on the cases the Review Commission has decided over time, if that patient had been showing dangerous, violent tendencies, then it's a different story. That's the point I was making earlier. One isolated incident, as horrible as it may be, is a far different story from a horribly violent incident preceded by smaller episodes that put us, or any of our clients, or any employer, on notice of a potentially problematic patient.

Amanda Genovese: Matt, can staffing levels become relevant when OSHA evaluates workplace violence hazards or whether an employer's precautions were adequate?

Matthew Sloan: I think so, but some nuance is needed, because OSHA generally doesn't regulate health care staffing. I would be careful not to suggest that OSHA can simply impose a preferred nurse-to-patient ratio through the General Duty Clause. It can't. What OSHA can examine is whether staffing is relevant to a recognized workplace hazard and to feasible ways of reducing that hazard.

Imagine, for example, an employee who is regularly required to work alone with patients who have a documented history of violent behavior. Or response to an assault is delayed because too few employees are available. Or the employer's own workplace violence assessment identifies two-person staffing or additional security coverage as a

needed control. In circumstances like those, staffing can become part of the workplace violence analysis and the OSHA liability analysis.

So the careful answer, the lawyer's answer, the diplomatic answer, is that OSHA can't regulate staffing ratios generally, but staffing becomes a data point in the overall analysis. It can become evidence in a workplace violence case when the relationship between staffing and employee exposure to violence is concrete enough.

This is where the two hats I wear in my practice come together. This is where OSHA and labor relations begin to overlap in an especially interesting way. Staffing is already one of the central labor relations issues in health care, and workplace violence gives staffing concerns extra weight because it adds a safety dimension. The employees' argument becomes: "We aren't simply asking for more staffing because our workload is unpleasant. We believe the current staffing model is making us unsafe." Once the conversation moves there, it can resonate very differently with employees.

Chris DeMeo: Matt, that's a great point. I hadn't thought of it from that perspective, but it's really helpful, and it makes sense to me where you'd see that intersection. Okay, we always like to look ahead. Where do you see OSHA's workplace violence enforcement priorities heading? What's next?

Matthew Sloan: That's a great question. I wish I could see into the future, but I'll do my best to guess where things might go. I would separate enforcement from formal rulemaking, because those are two different questions and two different arenas.

On enforcement, I don't think employers can assume that the absence of a specific federal standard gives them any safe harbor. OSHA's workplace violence enforcement directive remains current. OSHA continues to identify workplace violence as a recognized hazard in health care, and federal courts are upholding those determinations, as recently as February of this past year in the Cedar Springs case.

On rulemaking and in Congress, the picture is less certain. Actually, it's much less certain. OSHA has spent years considering a specific workplace violence standard for health care and social assistance. In fact, it completed the Small Business Advocacy Review, or SBAR, panel process in 2023, including work on a draft regulatory framework. But as I said earlier, employers should distinguish that rulemaking effort from currently enforceable law. At the federal level, there is none other than the General Duty Clause. Again, we have to keep in mind what's happening at the state level, which can be very different, like in California.

So I would not advise an employer to wait for Washington, D.C. to tell it exactly what to do. OSHA already has an enforcement mechanism under the General Duty Clause. As I just mentioned, states can impose additional requirements. And critically, an employer's own incident history may tell it that action is warranted regardless of whether a federal rule ever appears.

I also think employers should expect more attention to whether programs are effective rather than whether they merely exist. That's the paper program problem I was talking

about earlier. It means effective incident reporting, and it means asking whether reported events are being investigated, whether recurring hazards are identified, whether employees are meaningfully involved, and whether employers actually implement the controls their own programs call for.

If there's one takeaway I would leave health care employers with, it's that the response to workplace violence carries consequences well beyond the OSHA context. Employees are going to remember a violent event, but they're also going to remember what happened before and what happened after. Did management listen when concerns were raised? Did the organization investigate? Did anything change? Were people encouraged to report incidents, or did they feel that assault was simply being treated as a normal part of the workplace or the profession?

Those questions matter for OSHA, but they also matter profoundly for labor relations. A union organizing message is much stronger when employees believe they need a collective voice to get management to address something as basic as their physical safety. So the best labor relations strategy here is not some clever response to an organizing campaign after it begins. It's much more fundamental and much more basic: identify the risk, listen to employees, take credible precautions, investigate incidents, and show that employees don't need a third party for their safety concerns to be taken seriously.

A strong prevention program protects employees, improves the employer's position with OSHA, and addresses exactly the kind of workplace concern that can otherwise become a rallying cry for collective action.

Amanda Genovese: Thanks, Matt. My takeaway is that health care employers should get to know Matt and his colleagues and start thinking critically about these issues. There are real implications, but there are ways to get ahead of them. I think that's what you're signaling here too, Matt: try to do the right thing up front and work through these issues, and you'll be in a better position if you ever face one of these incidents.

Matthew Sloan: That's absolutely right. Spot on.

Chris DeMeo: Unfortunately, that's all the time we have for today's episode. Matt, on behalf of the podcast and our listeners, thank you for sharing your expertise and insights on these matters.

Matthew Sloan: Thank you again for having me. I've really enjoyed speaking with you all.

Amanda Genovese: And thank you for joining us for another edition of Seyfarth's Health Care Beat podcast, bringing you the latest developments and pressing issues in health law. So you never miss an episode, be sure to visit us at Seyfarth.com or follow us on SoundCloud or Apple Podcasts. If you enjoyed this episode, please share it with your friends and colleagues. We look forward to having you with us again soon.