Risk to the Anesthesiologist: The Aging Anesthesiologist

Wisconsin Society of Anesthesiologists 2015 Annual Meeting

September 12, 2015

Judith Jurin Semo | Judith Jurin Semo, PLLC
6021 331-7366 | jsemo@jsemo.com

© 2015 Judith Jurin Semo

Disclosure Information

◆ I have the following financial relationships to disclose:
  ➔ Owner of Judith Jurin Semo, PLLC
  ➔ Private law practice

◆ I will not discuss off-label use and/or investigational use in my presentation

Objectives

◆ Articulate need for policies dealing with aging staff & fitness for duty
◆ Implement strategies to protect group while ensuring fitness of group physicians
◆ Recognize risks for legal exposure relating to aging anesthesiologists

© Judith Jurin Semo 2015
Growing Numbers

- According to AMA:
  - ~42% of physicians are > 55
  - About 25% older than 65
    - Number has quadrupled since 1975
- Stats projected to increase
  - Financial reasons
  - Personal reasons

AMA: Screen Aging Physicians

- AMA June 2015 Annual Meeting
  - Delegates voted to approve report
    - Need to screen aging physicians for competency
    - Evaluate physical & mental health
    - Review treatment of patients
  - Controversial
Growing Numbers

- Anesthesiologists
  - 39.5% are age 55 & older
- Academic setting
  - Tremper Perfect Storm data
    - 9% of faculty between 60-65 yrs
    - 5% of faculty of >65 years
    - To increase

Distribution of Anesthesiologists Age ≥ 50

<table>
<thead>
<tr>
<th>Age</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Early 50's</td>
<td>17.9%</td>
</tr>
<tr>
<td>Late 50's</td>
<td>32.1%</td>
</tr>
<tr>
<td>60's</td>
<td>28.5%</td>
</tr>
<tr>
<td>70's</td>
<td>21.5%</td>
</tr>
</tbody>
</table>

Anesthesiologists Over 50

- Study published Fall 2012 (Anesthesiology)
  of anesthesiologists over 50
- Long workweeks (49.4 hrs/wk)
- 81% time – clinical care
- Participation in clinical care into 60s
- Forecasts:
  - 30% expected to work past age 65
  - ~18% past 70 years
Effects of Aging
- Physical & cognitive effects
  - Changes in physical capacity
  - Changes in
    - Psychological function
    - Cognitive function
  - Psychomotor processes
  - Perceptual processes

Effects of Aging
- To what extent are changes in physical & cognitive abilities
  - Offset, or counterbalanced by
    - Experience &
    - Judgment?

Aging & Medical Practice
- Potential for age-related decrements in
  - Sight
  - Hearing
    - OR noise
    - Need to hear monitors
  - Fatigue
    - Long hours
    - Call obligations
Challenge

- How to
  - Assure continued clinical competence
  - Assess health/well-being
     - Consistent with legal restrictions?
- Our focus today
- Caution: No easy answers

Compare w/ Other Professions

- Commercial airline pilots
  - Must undergo health screenings starting at age 40
  - Must retire at 65
- FBI agents
  - Mandatory retirement at 57
- Medicine: no such rules

Legal Considerations
Legal Issues

- Prohibitions against discrimination in employment on the basis of
  1. Age
     - Age Discrimination in Employment Act
     - State law
  2. Disability
     - American with Disabilities Act
     - State law

Americans w/Disabilities Act

- Prohibits discrimination on basis of disability in employment
- Protects "qualified individuals with disabilities"
  - Physical or mental impairment that substantially limits one or more major life activities
  - Record of such an impairment, or
  - Is regarded as having such an impairment

Americans w/Disabilities Act

- Age-related changes unlikely to constitute a "disability"
  - Physical/mental impairment that substantially limits one or more major life activities
- But worth noting
  - Especially since ADA is triggered if the individual is “regarded” as having such an impairment

© Judith Jurin Semo 2015
Age Discrimination

*Age Discrimination in Employment Act (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age*

- ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older

ADEA

*Applies to employers w/20 or more employees*

*Enforcement: EEOC*

*Applies to*

- Applicants for employment
- Current employees
- Discharged former employees

Bans on Discrimination

*All actions covered:*

- Hiring & firing
- Compensation, assignment, & leave
- Transfer, promotion, layoff, or recall
- Recruitment
- Training
- Fringe benefits
- Other terms & conditions

© Judith Jurin Semo 2015
Age Discrimination

✦ Are actions to deal with increasingly incompetent anesthesiologist
  ➔ Based upon a documented record of inability to perform, or
  ➔ Seemingly sudden decision to change work assignment or take other action
    ➦ Without documentation
    ➦ Without fair process

Age-Based Requirements

✦ Requirements to pass annual medical exams at a given age (e.g., 70 yrs) as a condition of continued employment found to violate ADEA
  ➔ Courts: Fitness for a job is based on many factors
    ➦ Age is only one factor

Age-Based Requirements

✦ Even seemingly age-neutral req’ts can violate the ADEA based upon
  ➔ Disparate impact on older workers
    ➦ Physicians/other clinical staff over a certain age probably more likely to fail physical & mental fitness assessments
Age-Based Requirements

- ADEA prohibits policies & practices that have effect of harming older individuals more than younger individuals
- Unless employer can demonstrate policy/practice based on “reasonable factor other than age” (“RFOA”)

RFOA

- An employment practice is based on RFOA when
  - It was reasonably designed & administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older worker

Example:
- Police dept requires applicants for patrol positions to pass a physical fitness test
  - Goal: ensure officers physically able to pursue & apprehend suspects
  - Should know test might exclude older workers more than younger ones

© Judith Jurin Semo 2015
<table>
<thead>
<tr>
<th>RFOA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Actions would likely be based on</strong> RFOA if dep’t reasonably believed that</td>
</tr>
<tr>
<td>➔ Test measured speed/strength appropriate to job</td>
</tr>
<tr>
<td>➔ It did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening dep’t</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RFOA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Individualized consideration of facts &amp; circumstances</strong></td>
</tr>
<tr>
<td>➔ Is the factor related to employer’s stated business purpose?</td>
</tr>
<tr>
<td>➔ Extent to which employer</td>
</tr>
<tr>
<td>➔ Defined factor accurately</td>
</tr>
<tr>
<td>➔ Applied fairly &amp; accurately</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>RFOA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Extent to which ER limited supervisors’ discretion to assess employees subjectively</strong></td>
</tr>
<tr>
<td>➔ Especially if criteria at issue are known to be subject to negative age-based stereotypes</td>
</tr>
<tr>
<td>➔ Extent to which employer assessed adverse impact of its employment practice on older workers</td>
</tr>
</tbody>
</table>
RFOA

- Degree of harm to individuals within the protected age group
  - Both extent of injury,
  - Numbers of persons adversely affected, and
  - Extent to which employer took steps to reduce the harm, in light of the burden of undertaking such steps

Disparate Impact

- No intent needed to find disparate impact
  - Employer's lack of intent to discriminate is not relevant for disparate impact case
  - Only overall impact on older workers is relevant
    - Regardless of employer's intention

Age-Based Requirements

- Defenses:
  - Bona fide occupational qualification ("BFOQ") reasonably necessary to the particular business
    - Age-based req't must be reasonably necessary to essence of business
    - Individualized approach would be pointless or impractical
Age-Based Requirements

- Defenses to claim of discrimination:
  - RFOA: reasonable factors other than age
  - Good cause - disciplining or discharging employee for good cause
  - Other non-age-based factors
    - Job performance
    - Business cutbacks
    - Lack of qualifications

Does the ADEA Apply?

- Does not apply to small groups
  - Applies to employers w/ ≥ 20 employees
- Do the physician owners count as employees?
  - Will address
- Still need to consider applicability of possible state & local law

Who's an Employee?

- Test for whether a shareholder/owner of a physician practice is considered an "employee" for ADEA purposes
  - Extent of shareholder's involvement in the management of the practice

© Judith Jurin Semo 2015
Who’s an Employee?

- Does the individual act independently & participate in managing the organization?
  ➔ or
- Is the individual subject to the organization’s control?

Who’s an Employee?

- Mere existence of an “employment agreement” is not conclusive
- Facts & circumstances – look at entire relationship
  ➔ No one factor decisive

Tests for Who Is an Employee

- Can Group hire/fire the physician or set rules of work?
- Does Group supervise physician’s work?
- Does physician report to someone higher?
- Whether and, if so, to what extent is physician able to influence the Group?
- Intention of parties as expressed in contracts?
- Does physician share in Group’s profits, losses, & liabilities?
Tests for Who Is an Employee

- One anesthesia case
  - Concluded Group's owner/physicians managed & controlled their practice
  - Compensated based on profits
  - Shared responsibility for expenses & liabilities
  - Participated in management decisions and set policy

These indicia of control & ownership led to shareholder/directors not being counted as employees

- Even though called "employees" in their employment agreements
- Despite claim that he reported to Board & OR Coordinator

Related Developments
Stanford Hospital Policy

◆ Physical examination, cognitive screening, & peer assessment of clinical performance
  ➢ Practitioners age 74.5 or older
    ➢ Applying for medical privileges
  ➢ Current medical staff members ≥75
  ➢ Completed every two years
  ➢ Announced in 2012

Stanford Policy

◆ Policy based on data showing steep increase in Alzheimer’s at 75 yrs. of age
  ➢ Only 10% are ≤74
  ➢ 44% ages 75-84
  ➢ 46% are 85 or older
    ➢ Source: Alzheimer’s Association

UVA Medical Center Policy

◆ Univ. of Virginia medical Center
◆ Adopted screening policy in 2011
  ➢ Screens physicians at age 70
    ➢ Neurocognitive & physical testing
    ➢ Undergo testing again at age 75
    ➢ Every two years thereafter
TJC OPPE

- Ongoing professional practice evaluation ("OPPE")
  - Routine monitoring of current competency for current med. staff members
  - Identify professional practice trends that affect quality of care & patient safety

TJC FPPE

- Focused professional practice evaluation ("FPPE")
  - Process by which organization evaluates privilege-specific competence of practitioner who does not have documented evidence of competently performing requested privilege at the organization

TJC FPPE

- FPPE can provide an evaluation tool
  - Monitor physician performance & outcomes if there is concern about a physician's practice patterns
- Effective 1.1.08
  - FPPE performed for all new privileges
  - Also to evaluate performance when issues affecting care are identified

© Judith Jurin Sem 2015
Strategies: Dealing With Aging Anesthesiologists

Basic Premise

- Focus of any efforts to deal with an aging workforce should be on performance, not age.

What’s Permissible?

- What’s permissible depends on:
  - Size of group – does ADEA apply?
  - Are physicians employees or owners? Are they entitled to ADEA or ADA protection?
- Safest course: Assume federal anti-discrimination laws apply.
Strategies

- Develop an inventory of physical & mental attributes needed to provide anesthesiology services
  - Provides a baseline against which to measure all Group members

Strategies

- Perform 360 evaluations of all Group members
  - Assist to flag concerns
  - Can provide documentation
  - Peer comments are important

Evaluations

- Considerations in implementing:
  - What aspects of performance to be evaluated?
  - Who selects those criteria?
  - How often conducted?
  - Who will conduct?
  - To whom reports distributed?
  - Will physicians be held accountable?
### Strategies

- Use practice data to identify trends & outliers
  - Identify complications
    - E.g., failed blocks
  - Benchmark against
    - Practice data – other Group physicians
    - National data
    - Consider using AQI/other registry data

---

### Strategies

- Monitor surgeon/patient satisfaction surveys
  - What are others saying
  - Are there trends – common concerns?
  - How do those surveys correspond to group's own observations?

---

### Strategies

- Implement policies to monitor physical & mental acuity of all Group anesthesiologists
  - Involve legal advisors in advance
  - Policies should promote consistency
    - Important to minimize risk of discrimination claims
Strategies

- In monitoring physical & mental acuity of all Group anesthesiologists
  - To promote consistency across all Group anesthesiologists
    - Consider based on reasonable cause
  - Can require assessments of all physicians
    - Greater expense

Strategies

- Consider how Medical Staff policies on older physicians may assist – *e.g.*, some hospitals have age-based requirements for physicians to undergo physical & cognitive tests
  - As condition of reappointment
  - FPPE

Strategies

- Consider requiring fitness for duty exams for all physicians
  - Frequency – in Group’s discretion – *e.g.*, every two or five years from date of hire
  - As needed, based upon trends or complaints suggesting a basis for review
Strategies

Fitness for duty exams
- Need to identify physicians to perform
- Need to develop list of metrics for assessment
  - Who decides?
  - Who receives results?
  - Processes for disagreement over assessment

Consider use of simulators to evaluate & assess Group physicians
- Two advantages
  - Assessment separated from actual patients
  - Independent, objective process
    - Not involving peers who may be biased by other experiences

May also need mental health resources for some issues
- Those, regardless of age, who
  - Do not get along with others
  - Refuse to abide by Group policies
  - Otherwise cause concern
  - Achieve low scores on surgeon & patient satisfaction surveys

© Judith Jurin Semò 2015
Resources

- State medical association may have resources
  - *E.g.*, Committee on Physician Health

Documentation

- If implementing a policy based upon "reasonable cause"
  - Important to document basis for concern
  - Documentation cuts both ways
    - Consider professional liability concerns

Other Group Policies

- Can Group implement policies:
  - Going off call at a designated age?
  - Mandatory retirement?
  - Regular physical/cognitive exams?
- Are Group physicians employees or owners?
- Consult counsel – proceed cautiously

© Judith Jurin Semo 2015
Conclusion

- Older physicians
  - Age is just one factor to consider
    - Not by itself an issue
  - Consistency in dealing w/all employees
  - Case-by-case assessment
- Documentation

Additional Resources

- CA Public Protection and Physicians Health, Inc., *Assessing Late Career Practitioners: Policies and Procedures for Age-based Screening*

© Judith Jurin Semo 2015