Risk to the Anesthesiologist: The Aging Anesthesiologist

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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

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Statistics & Effects of Aging

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

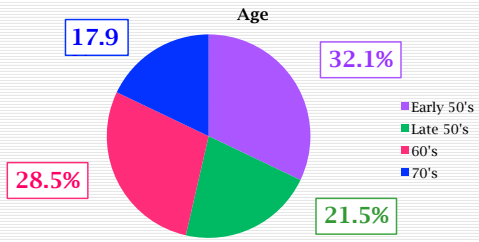
AMA: Screen Aging Physicians

- 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



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

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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

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

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

RFOA

- Example:
  - ➔ Police dep't 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

RFOA

- Actions would likely be based on RFOA if dep't reasonably believed that
  - ➔ Test measured speed/strength appropriate to job
  - ➔ 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

RFOA

- Individualized consideration of facts & circumstances
  - ➔ Is the factor related to employer's stated business purpose?
  - ➔ Extent to which employer
    - Defined factor accurately
    - Applied fairly & accurately

RFOA

- Extent to which ER limited supervisors' discretion to assess employees subjectively
  - ➔ Especially if criteria at issue are known to be subject to negative age-based stereotypes
- Extent to which employer assessed adverse impact of its employment practice on older workers

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

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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

Who's an Employee?

- Does the individual act independently & participate in managing the organization?
  - ➔ or
- Is the individual is subject to the organization's control?
  - ➔ *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003)

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

Tests for Who Is an Employee

- 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
    - *Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113 (2d. Cir. 2004)

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
    - http://www.alz.org/downloads/facts_figures_2012.pdf

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

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

Strategies

- 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

Strategies

- 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

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

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*
  - Available at https://cppphdotorg.files.wordpress.com/2011/02/assessing-late-career-practitioners-adopted-by-cppph-changes-6-10-151.pdf