



NATIONAL ASSOCIATION OF

Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: <https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf>

HR

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Note that in all Information Bulletins:

The term “health center” refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively “Health Center Program Grantees”); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant (“health center look-alikes”).

The term “Section 330-Related Requirements” refers to requirements set forth in:

- Health Center Program Statute: [Section 330 of the Public Health Service Act \(42 U.S.C. §254b\)](#),
- Program Regulations: [42 CFR Part 51c](#) and [42 CFR Parts 56.201-56.604](#)
- Health Center Program Requirements: <http://www.bphc.hrsa.gov/programrequirements/index.html>

The term “Grant Requirements” refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

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The Graying of the Workforce and Implications for Health Centers

The leading edge of the baby boom generation began retiring in 2011, raising not only the well-known fiscal challenges to Social Security and Medicare, but also challenges for employers (including health centers). In 1950, there were seven working people for every person age 65 and older in the U.S. By 2030, there will be fewer than three working people for every person age 65 and older in the U.S.¹ At the same time, a larger number of workers are likely to remain in the work force for economic reasons. In particular, certain disincentives for continuing to work have been eliminated² and the retirement age for receiving Social Security has increased. There has also been a decrease in the benefit amount for each month a recipient retires at a younger than normal retirement age.³ In fact, the projected median age of the workforce is projected to be 42.6 years in 2022, as compared to 41.9 years in 2012.⁴

Given the aforementioned, health centers are likely to find themselves challenged to find qualified workers as baby boomers retire and having to accommodate varying work schedules and levels of productivity for

1 Nancy R. Lockwood, “The Aging Workforce,” Society for Human Resource Management, quoting Committee for Economic Development, *New Opportunities for Older Workers*, p. 2 (1999), www.ced.org/projects/older.html, (accessed 4/25/07).

2 The American Association of Retired Persons (AARP) projects that 68% of the workers between ages 50 and 70 plan to work during retirement or forego retirement altogether. The Senior Citizens Freedom to Work Act did away with the earnings penalty which reduced Social Security benefits for workers aged 65-70 who earned wages, thereby eliminating a major disincentive to work.

3 For those born 1943-1954, the retirement age for Social Security is 66. For those born after 1960, the retirement age is 67. Id., p. 46.

4 Bureau of Labor Statistics, Employment Projections, December 2013, at http://www.bls.gov/emp/ep_table_306.htm (Accessed 4/15/15)

older workers who remain on the job. Further, health centers may find themselves having to ensure that older workers are not subject to illegal age-related discrimination in the terms and conditions of their employment.

This Information Bulletin:

- ◆ Examines some of the legal and practical challenges presented by the aging of the health center workforce and provides tips on how to address each of these challenges
- ◆ Explores the following issues that could arise in the context of an aging workforce:
 - Managing the impact of the impending labor shortage on health center capacity
 - Establishing employment practices and policies that minimize age discrimination-related liability
 - Accommodating leave requests and absences from work
 - Avoiding discrimination against employees functioning as caregivers

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MANAGING THE IMPACT OF THE IMPENDING LABOR SHORTAGE ON HEALTH CENTER CAPACITY

Health center boards of directors and senior management must take the retirement of baby boomers and fewer numbers of workers in the next generation into account as they consider how to fill key positions in the health center currently occupied by persons nearing retirement.

Health center managers are likely aware of the current labor shortages in certain segments of the health care industry, such as nursing. Moreover, the impending labor shortage is likely to place a premium on recruiting and retaining physicians, nurse practitioners, and physician assistants with knowledge and training in geriatrics, who will be in even greater demand as the population as a whole ages.⁵

A health center should have a succession plan in place for identifying potential replacements, including utilizing appropriate external recruitment strategies, for managers who are approaching retirement. Without regard to the overall age of its workforce, a health center should, as part of its strategic planning process, assess the number and specific qualifications of the leaders that will be required for the next five years and adopt a plan to review skill sets against perceived needs, promote and/or recruit employees, and train successors.

⁵ According to a 2002 study by the Alliance for Aging Research, less than 3% of health care providers are formally trained in geriatrics. Of 650,000 practicing doctors, only 9,000 are geriatricians and less than 1% have advanced certification in geriatrics.

Establishing a Phased-In Retirement Program

Some employers, notably colleges and universities, have addressed the shortage of experienced workers by implementing phased-in retirement programs. These arrangements allow employees to tap into their pension plans while continuing to work part time. The purpose of phased-in retirement is to retain older workers who may be interested in working part time, while at the same time permitting them to access pension funds to make up the difference in compensation. This type of employment arrangement could be an excellent way for a health center to take advantage of the expertise that someone nearing retirement age might be able to provide, such as mentoring less experienced employees or strategic planning.

Historically, pension benefits could not be paid until an employee stopped working altogether. However, with economic pressures on retirees and potential labor shortages faced by employers, it has become increasingly desirable to make it economically feasible for older workers to work on a reduced schedule while supplementing their incomes from their employer-sponsored retirement plan.

Beginning in 2007, the Pension Protection Act of 2006 allowed distribution of pension benefits from a qualified pension plan while an employee is still employed. The applicable Internal Revenue Service (“IRS”) regulations⁶ define what the “normal retirement age” is for the purpose of allowing the early payments.

- ◆ There is a “safe harbor” for plans in which the normal retirement age is 62 or older.
- ◆ The rules also allow early withdrawal from retirement plans in which the normal retirement age is 55, under certain conditions.

While a phased-in retirement plan can be beneficial both to the health center and employees, the Age Discrimination in Employment Act (“ADEA”),⁷ which is discussed later in this Bulletin, may affect how these plans are implemented. It is critical that health centers considering a phased-in retirement plan obtain the assistance of competent employee benefits counsel.

Additionally, the cost implications of part time employees must be considered. For example, employees who work part time may no longer be eligible for coverage under the health center’s health benefits plan (depending on how the plan is structured) and, if under age 65, will not be eligible for Medicare. Obviously, health insurance will be an important consideration in retaining older workers on a part time basis, but the health center’s cost of providing health insurance to older, part time employees could be high. Thus, it is important that a health center explore all options for continuing benefits to this group of employees.

Hiring “Retired” Employees as Consultants

Employers sometimes continue to use the services of “retired” employees by bringing them back as “consultants.” This can save the employer money because, among other things, if a worker is an independent contractor as opposed to an employee, the employer does not have to pay federal and state employment taxes on the worker’s wages and does not have to withhold income tax from wages paid.

Health centers should be very cautious if they retain a former employee as a “consultant.” The legal test for whether a worker is an “employee,” as opposed

6 26 C.F.R. §1.401(a)-1

7 29 U.S.C. § 621 et seq. See also EEOC ADEA *Compliance Manual* Chapter 3: Employee Benefits at <http://www.eeoc.gov/policy/docs/benefits.html>

to an independent contractor depends essentially on whether the employer has the right to control how the worker does his or her job, not just what the worker does.⁸ In short, the IRS will treat a worker as an employee – with adverse consequences for an employer who does not pay the requisite employment taxes and does not withhold income tax – based on how the worker performs the assigned tasks without regard to the label that a health center assigns to the worker. Moreover, retaining a retired employee as a “consultant” to perform essentially the same duties as the person did as an employee is a “red flag” to the IRS. Those arrangements should be avoided entirely.

On the other hand, a former employee is likely to be considered a contractor if he/she:

- ◆ Establishes his or her own business to provide services such as auditing or bookkeeping to several clients
- ◆ Contracts with the health center
- ◆ Performs the work a few hours a month, but at no set time or day
- ◆ Purchases insurance for the business
- ◆ Bills the health center monthly for the services
- ◆ Is not reimbursed for business-related expenses
- ◆ Pays his or her own self-employment taxes

8 See IRS Publication 15-A, Employer’s Supplemental Tax Guide, for a summary of the relevant factors in classifying a worker as an employee versus independent contractor. Also see *HR Information Bulletin 2: Classifying Workers as Employees or as Independent Contractors: Why It Matters and how to do It Correctly*.

Useful Tips on Managing the Impact of the Impending Labor Shortage on Health Center Capacity

- ✓ Take steps to implement a succession plan as part of the strategic planning process.
- ✓ Analyze, with the assistance of appropriate advisors, whether a phased-in retirement program might be feasible under the health center’s retirement plan.
- ✓ Consider allowing flexible scheduling for older workers who want to continue in the work force but want to work fewer hours.
- ✓ Consider providing opportunities for older workers to serve as mentors for less experienced employees.

ESTABLISHING EMPLOYMENT PRACTICES AND POLICIES THAT MINIMIZE AGE DISCRIMINATION-RELATED LIABILITY

The ADEA prohibits employers from discriminating against workers over age 40 with regard to recruitment, hiring, firing, promotion, and compensation. This includes limiting or segregating employees in any way that would deprive them of employment status, including with limited exceptions, enforcing a mandatory retirement age. Thus, as a health center’s workforce ages, it is increasingly important to uncover and correct employment policies and practices that might be viewed as discriminating against older workers.

Bias against hiring older workers could be manifested in advertisements for job openings that contain phrases such as “recent graduates” or “young, energetic applicants” desired or in job descriptions that set forth significant physical requirements that are not necessary to the performance of the job. For example, a job description for a nursing assistant that includes the task of lifting patients onto an examining table could operate to exclude older workers who may not have the requisite strength if, in reality, it rarely is necessary for the employee to do so.

Discrimination against older workers also could be manifested in other, more subtle, ways. For example, no one in health center management should suggest that a worker over 40 “slow down”, “think about retirement”, or “take a break from the stress of the workplace,” nor should comments such as “it is hard to keep up with technology at your age” be tolerated. These comments, however well intended, imply assumptions about the abilities of the worker that could be construed as a discriminatory bias against older workers.

Most health centers are understandably concerned about employee productivity, however, they should not let such concerns cloud managers’ views of older workers’ performance potential. In particular, stereotypes of older workers that suggest that they are not willing or able to work long hours, be productive during the hours they work, adapt to change, or remain creative and forward thinking, must be avoided. Indeed, not doing so could subject a health center to legal liability.

Moreover, the Supreme Court has held that the ADEA protects older workers not only from disparate treatment on account of age (e.g. promoting a younger worker over an older worker solely because of his or her age), but also protects workers against policies that have the effect of discriminating against older workers. An example of the latter might be a pay scale that provides smaller step increases for employees with

greater tenure at the health center, who also are likely to be older employees.

On the other hand, the ADEA does not require employers to treat older workers differently solely on account of their age. For example:

- ◆ An older worker may be expected to fulfill the requirements of his or her job and may be counseled or disciplined just as any other health center employee would be, in accordance with health center policies.
- ◆ If an older employee has difficulty taking instructions from a younger supervisor, then the older worker should be counseled or disciplined, as appropriate (just as a younger supervisor who overlooks older workers when it comes to promotions should be counseled).

Useful Tips on Establishing Employment Practices and Policies that Minimize Age Discrimination-Related Liability

- ✓ Review job opening announcements and advertisements to make sure that they contain objective wording that does not imply ageism.
- ✓ Periodically audit job descriptions to make sure they accurately reflect the requirements of the job.
- ✓ Incorporate training on how to avoid age stereotyping in diversity training for health center employees.
- ✓ Reward employees for performance and recognize older worker achievements on a par with other workers.
- ✓ Provide training opportunities for older workers.

ACCOMMODATING LEAVE REQUESTS AND ABSENCES FROM WORK

Leave Policies – In General

Health centers should have understandable and comprehensive leave policies. Published policies, that the health center consistently adheres to, are important to give the health center some ability to predict and plan for when employees will not be available for work and to help ensure that leave is provided equitably. Leave policy is likely to become increasingly important in an aging workforce as workers request time off not only to take care of their own or a spouse's medical needs, but also to care for aging parents. As is the case with productivity and performance issues, leave policies and, importantly, the application of those policies, should be reviewed periodically to ensure that they do not discriminate against older workers (directly or indirectly) and otherwise are consistent with applicable federal and state laws.

Leave Under the Federal Family and Medical Leave Act

Health centers with 50 or more employees must comply with the Federal Family and Medical Leave Act ("FMLA"), which requires employers to provide up to 12 weeks of unpaid leave to an employee who has been employed for at least 12 months and has worked a minimum of 1250 hours in the previous 12 months (not necessarily consecutive months) for the employee's own serious medical condition and to care for the serious medical condition of a close relative.⁹ However, many states have similar laws and, typically, the employer must provide leave under the law that provides the greater benefit to the employee. Accordingly, both FMLA and applicable state laws must be considered when crafting a leave policy.¹⁰

FMLA leave policies should address the following questions:

- ◆ **Concurrent leave** — Whether unpaid FMLA leave runs concurrently with available paid leave if permissible under state law.
- ◆ **Serious health condition** — The FMLA leave policy should stress that such leave is available only for a serious health condition of the employee or the employee's close family member. Under FMLA, a serious health condition involves overnight inpatient care at a hospital, hospice, residential medical care facility and subsequent recovery and treatment from the inpatient care, or care involving continuing treatment by a health care provider. Moreover, as "caring for" a person implies presence with the person who needs care, an employee who requests FMLA leave to care for a seriously ill parent cannot use the leave, for example, to clean out and sell the parent's house.
- ◆ **Documentation of serious medical condition** — Employers may require the employee to provide medical documentation of the underlying serious health condition. FMLA leave policies should include a statement of the documentation required and, ideally, a form for the employee to use to provide the required information.

9 15-25% of the workforce now cares for older or disabled loved ones and by 2010, the percentage is expected to double. Leah Dobkin, "How to Confront the Elder Care Challenge", *Workforce Management Online*, <http://www.workforce.com/section/09/feature/24/85/10/index.html> (accessed 5/24/07).

10 FMLA and similar state laws also typically provide unpaid leave for the birth or adoption of a child. For a more extensive discussion of FMLA, see NACHC Human Resources Series Information Bulletin #7, *Accommodating Employee Leave for Parenting*

Leave Under the Americans with Disabilities Act

An older employee who has a serious health condition (physical or mental) also may be protected under the Americans with Disabilities Act (ADA).¹¹ If an employee has a physical or mental impairment that substantially limits the employee's ability to perform a major life activity, such as working, the employer must provide a "reasonable accommodation" to the employee's disability, unless doing so would be an undue hardship to the employer. Importantly, the employee must be able to perform the essential duties of the job with or without the accommodation.¹²

A health center's leave policies should consider ADA requirements, as the "reasonable accommodation" that an employer has to make to an employee's disability may include, under appropriate circumstances, modifying the employee's work schedule, and providing intermittent breaks from work. The key to an employer's accommodation being deemed reasonable is to engage in an interactive, good faith discussion with the employee about:

- ◆ The cost of the requested accommodation
- ◆ The impact on patient care and safety
- ◆ Whether there are less expensive alternatives

For example, providing a worker with diabetes several breaks throughout the day as needed to check blood sugar or to have a snack, instead of the regularly scheduled breaks provided to other employees, may be reasonable accommodation to the diabetic employees.

Useful Tips on Establishing Appropriate Leave Policies

A written absence from work or leave policy should be part of the health center's employee handbook/written personnel policies and should, at a minimum, address the following issues consistent with applicable law:

- ✓ Pay status during the leave
- ✓ Amount of leave available (paid and unpaid).
- ✓ Availability of health and other benefits during leave, and any conditions on continuing benefits (e.g., employee contributions)
- ✓ Accrual of leave (paid and unpaid) while on leave
- ✓ Employee notice requirements for taking leave
- ✓ Employer approval requirements (including person authorized to approve leave)

It is very important that a health center maintain, for all types of leave, complete and accurate records of employee leave. Documentation should include start date, type of leave, date of return, notation of formal approval, and the presence or absence of medical certification.

¹¹ 42 U.S.C. 12101 et seq

¹² For a detailed discussion of the ADA, see NACHC's Risk Management Series Information Bulletin #5, *The Americans with Disabilities Act*.

AVOIDING DISCRIMINATION AGAINST EMPLOYEES FUNCTIONING AS CAREGIVERS

Health centers, like other employers, must be careful that their employment policies and practices do not discriminate against caregivers. Litigation involving workers who claim they were treated differently on account of their having care giving responsibilities for a family member (e.g., being passed over for promotion, being the object of disparaging remarks, terminated) has increased dramatically, as have the recoveries awarded to employees subjected to discriminatory treatment.¹³

Although equal employment opportunity laws do not prohibit discrimination against caregivers per se, the U. S. Equal Employment Opportunity Commission (EEOC) believes that there are circumstances under which discrimination against caregivers might constitute unlawful disparate treatment under Title VII of the Civil Rights Act of 1964 (with regard to discrimination based on sex) or the ADA (with regard to discrimination based on a worker's association with a person with a disability).

According to the EEOC, common circumstances under which discrimination against a worker with caregiving responsibilities might constitute unlawful disparate treatment under federal law include:¹⁴

- ◆ Treating male caregivers more favorably than female caregivers
- ◆ Subjecting a worker to severe or pervasive harassment because his or her spouse has a disability

- ◆ Lowering subjective evaluations of work performance of a female employee because she became the primary caretaker of grandchildren, even though there has been no actual decline in performance

In particular, the EEOC warns against sex-based stereotyping about caregiving responsibilities. For example, women with care giving responsibilities may be perceived as being more committed to caregiving than to their jobs. Men may be subject to the opposite stereotype – namely, that they are poorly suited to caregiving, causing them to be denied leave or other considerations routinely afforded to their female counterparts.

Accordingly, supervisors should not make assumptions about where an employee's desires or loyalties lie merely because the employee also has family responsibilities. Likewise, caregivers should not be given poor performance evaluations, passed over for promotion, or denied participation in a high visibility project because of caregiving responsibilities. However, it also is important to keep in mind that caregiving responsibilities do not excuse unsatisfactory work. According to the EEOC, employment decisions that are based on an employee's actual work performance, rather than on assumptions and stereotypes, do not generally violate Title VII, even if the unsatisfactory work performance is attributable to caregiving.

13 According to the Center for Work Life Law at Hastings College of the Law, the cases involving discrimination against workers for caregiving responsibilities have gone from eight cases in the 1970s to 358 in the early 2000s with an average award of over \$100,000. See <http://www.uchastings.edu/?pid=3630> (accessed 5/30/07).

14 EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, May, 2007.

In that regard, EEOC has identified certain employer “best practices” when dealing with employee-caregivers. These include, among others:

- ◆ Review workplace policies that limit employee flexibility in scheduling work, including posting work schedules as early as possible
- ◆ Provide reasonable personal or sick leave to allow employees to engage in caregiving
- ◆ Ensure that managers at all levels are aware of, and comply with, the organization’s work-life policies
- ◆ Reassign job duties that employees are unable to perform on account of caregiving responsibilities

Useful Tips on Avoiding Discrimination Claims Based on an Employee’s Role as Caregiver

To minimize discrimination claims based on an employee functioning as a caregiver, the health centers should:

- ✓ Add “family responsibility or caregiving” to the forms of discrimination prohibited in the health center’s employee handbook or personnel policies and include the statement in notices and other places where nondiscrimination policies are posted
- ✓ Make sure that there is no bias in policy or in practice with respect to personnel granted leave to be caregivers, disciplined for attendance problems, or promoted
- ✓ Train supervisors not to make assumptions about workers with caregiving responsibilities
- ✓ Monitor the work assignments of employees who are working on alternative schedules because of caregiver responsibilities to be sure that they are receiving the assignments merited by their position as full time employees
- ✓ Audit employee files to make sure that capable, high performing workers are being given training and other opportunities for advancement, bonuses, and good performance reviews, regardless of care-giving responsibilities
- ✓ Provide information to employees about emergency and/or temporary resources for caregivers. For example, if your community has an elder care program or respite care, you could make brochures available or list caregivers in the employee handbook.

CONCLUSION

The number of Americans age 65 and older is expected to reach 74 million by 2030. This phenomenon will significantly affect not only the services that health centers provide (individuals who are over 65 currently make up 13% of the U.S. population, but they account for half of all doctor visits and hospital stays.¹⁵), but the makeup of the work force that provides those services.

To be able to continue providing needed services to their communities, health centers must be able to retain valued older employees. That will be possible only if health centers begin now to address the challenges of the rapidly graying workforce, whether by developing approaches to manage the impact of impending labor shortages, establishing policies to minimize age-related discrimination (including discrimination based on an employee's responsibilities as a caregiver), establishing policies to accommodate employee leave requests, or, more than likely, a combination of all of these strategies.

To be able to continue providing needed services to their communities, health centers must be able to retain valued older employees.

Summary of Action Steps

- 1. Implement a succession plan while embracing the older worker who wishes to continue to work, as long as he or she is performing the essential functions of the position.**
 - a. In consultation with local employee benefits counsel, consider a phased-in retirement program.
 - b. Classify employees and independent contractors correctly, applying IRS criteria and act accordingly.
- 2. Establish employment practice and policies that minimize age-related discrimination, including discrimination against employees who function as caregivers.**
 - a. Review job announcements for discriminatory language.
 - b. Review job descriptions to make sure they accurately describe the job's essential functions.
 - c. Incorporate ageism training into diversity training – do not simply make assumptions about what workers can or cannot do, nor what they would prefer to do.
 - d. Incorporate “family responsibility or caregiving” into anti-discrimination statements and policies.
 - e. Audit files and employee complaints to make sure employees are given equal opportunity to receive interesting assignments and equal benefits.

15 Nancy Giguere, “Graying of America Drives Work Force Needs”, January 22, 2007, <http://www.startribune.com/1758/story/957146.html>

- f. Recognize and reward all workers for their achievements and performance, not just tenure.
- g. Provide training opportunities for older employees.
- h. Do not be afraid to discipline a worker who is not performing or who is using leave excessively, regardless of age.

3. Establish policies to accommodate employee leave requests.

- a. Review employee leave policies to ensure consistency with applicable law, especially FMLA and similar state laws as well as ADA.
- b. Keep accurate records of employee leave.
- c. Don't be afraid to discuss a reasonable accommodation for an employee with a disability by engaging in an interactive discussion with him or her.

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