The Growing Risk of Disability Litigation

Health Care

Federal agencies and private plaintiffs are increasingly focused on disability issues with businesses—and that could have a broader ripple effect across health care and other industries.

"As cultural attitudes and norms have evolved to more accurately, and rightfully, view individuals with disabilities as fully enfranchised members of society, the litigation landscape has evolved as well," says Brian McGovern, a partner at Crowell & Moring. "Increasingly, individuals with disabilities and the government agencies charged with enforcement of disability laws have sued in federal courts to vindicate alleged violations."

The number of disability lawsuits against businesses has been growing for a decade or more. Plaintiffs have brought Americans with Disabilities Act suits on many fronts, from inadequate wheelchair access at offices to a lack of sign-language interpreters for hearing-impaired children. Some suits have claimed that websites are essentially places of business that fail to accommodate those with hearing or vision problems—an argument that is likely to continue, since the Supreme Court in June 2019 declined to hear a case that could have clarified requirements for online access. And in many cases, plaintiffs have employed "drive-by lawsuits," a dubious tactic in which plaintiffs' attorneys look at photographs and aerial views of businesses—often small local operations—to find ADA violations.

These trends are now playing out in segments of the health care industry. Recently, there has been increased discrimination litigation targeting medical and senior living communities for allegedly failing to accommodate a resident's or a patient's disability. There are various laws against discriminating against the disabled, but "chief among the arsenal of statutes invoked by disabled and government litigants is the ADA," says McGovern. He notes that the ADA's reach extends beyond employment discrimination to the provision of services and amenities offered by "public accommodations," which can include such living facilities.

The ADA also covers a broad range of disabilities, including physical disabilities such as sight and hearing problems and behavioral or mental health disabilities. In 2019, the Department of Justice settled ADA actions against a Massachusetts operator of a chain of nursing homes and a Virginia care facility that had denied admission to patients who were being treated for opioid-use disorders.

Ties Tighten Between Federal and State Investigations

The DOJ has been increasing its collaboration with state enforcement agencies on various fronts—and that now includes a more formal approach to cooperating in Medicaid fraud investigations.

At the federal level, the DOJ is the chief enforcement agency for Medicaid fraud, aided by the Office of Inspector General in the Department of Health and Human Services. At the state level, the Medicaid Fraud Control Unit is the primary enforcer. These agencies are charged with the prosecution of providers that claim improper Medicaid payments involving federal and state dollars. "It has become increasingly common for the two groups to work in tandem on investigations and prosecutions, as they have taken advantage of technology to share claims data and pursue their common goals," says Crowell & Moring's Brian McGovern.

In 2019, the OIG and the Centers for Medicare and Medicaid Services strengthened the required level of cooperation between federal and state authorities with new rules. For example, these rules direct Medicaid Fraud Control Units to share information on investigations and prosecutions with federal investigators, to set up regular communication with OIG investigators and federal prosecutors, and to coordinate with federal agencies on similar investigations or prosecutions that involve the same suspects or allegations.

"This cooperation can increase the risk of a provider's exposure, particularly when the billing practice implicates both Medicare and Medicaid," McGovern says. "And any individual or entity that is the subject or target of a Medicaid and/or Medicare fraud investigation by either state or federal enforcement authorities should be prepared to interface with both authorities. Being able to deal with both sets of prosecutors may be crucial to minimizing legal jeopardy for a Medicaid health care provider caught up in such an investigation."

"The reach of some statutes goes beyond the health care and senior care sectors and extends to hotels and other public accommodations." **Brian McGovern**

Care facilities are also seeing enforcement actions taken under the Fair Housing Act, which prohibits discrimination in housing against the disabled. The FHA broadly applies to "any building, structure, or any portion thereat which is occupied as, or designed or intended for occupancy as a residence"—which can include various forms of senior housing, such as nursing homes, long-term care and assisted living facilities, and continuing care retirement communities (CCRC). "In the CCRC context, a complaint that is often raised is the denial of access to the dining room and other amenities to residents in the assisted living level of care, or who are in need of assistance with ambulation, such as the wheelchair-bound," says McGovern.

New Approaches to Investigations

Private litigation against such senior and group living facilities has become common, and "some public interest groups have brought class actions, particularly against larger systems, to change their policies and practices," says McGovern. In terms of government actions, the ADA can be enforced by the Department of Justice, while both the DOJ and the Department of Housing and Urban Development have the authority to enforce compliance with the FHA. Traditionally, these agencies have worked by receiving complaints or identifying residents of those facilities who feel they have experienced discrimination and then taking action on their behalf. But now agencies are not waiting for issues to be reported and are instead employing a relatively new tactic: proactively looking for problems using cold-calling techniques.

"One of the tools utilized by DOJ, HUD, and other enforcement agencies is deploying a 'tester' who contacts the facility and acts as an individual with a disability to inquire about the availability of services and accommodations for a disabled person," says McGovern. "If the senior housing or congregate-living provider doesn't offer or explain the available services, the agency may take action." From the agency's perspective, these mock calls are highly efficient. "It's a low-cost investigative tool," he says. "It doesn't take much staff time and effort to make a call, record it, and then fashion a case around that."

The repercussions of noncompliance can be significant. Enforcement actions can lead to penalties. These are usually not especially high—very often well below six figures—and in some cases, damages are awarded to individuals who have been affected. But beyond such penalties, the costs of litigating a claim can add up. In addition, many cases are resolved through consent decrees that stipulate the requirements for avoiding liability going forward, such as changing policies and procedures or building or modifying physical structures to accommodate the disabled. On top of that, says McGovern, "there is often the potential for ongoing oversight of a facility's operations." But the biggest potential cost, he says, is harm to a company's reputation. "When a health care provider is accused by a government agency of discriminating against the disabled, it can have a materially adverse impact on the company. The case will be publicized, and it will put the facility in a harsh light," he says.

For senior and long-term care providers, the heightened focus on compliance with disability laws will likely continue, says McGovern. What's more, this scrutiny—and agencies' more aggressive tactics—may be expanded to industries outside of health care. "The reach of some statutes goes beyond the highly regulated health and senior care sectors and extends to hotels and other public accommodations," he says. For example, the ADA's coverage of public accommodations includes hotels, while the FHA applies to a wide range of housing. Section 504 of the federal Rehabilitation Act prohibits disability discrimination by any entity receiving federal funding. And Section 1557 of the Affordable Care Act extends those protections to people participating in the act's health insurance market plans.

With those laws, private plaintiffs and government agencies alike have a lot to work with. To mitigate the risk of litigation or enforcement action, companies should begin by evaluating their physical plant and operations, and assess whether, and how, they can make their offerings accessible to individuals with disabilities. They should also consider proactively revising their policies and practices to help ensure that they are meeting the needs of the disabled. "Equally important, the company—from the governing board to the executive suite to middle management and down to operations staff—must adopt and embrace the company's commitment to nondiscrimination as a corporate value," says McGovern.

Companies also need to pay particular attention to the front lines of the business—the employees who are the face of the company to patients and agencies. "You should educate staff to make sure they know exactly how the company accommodates individuals with disabilities," says McGovern. "That way, when the test caller—or an actual disabled person—comes calling, the marketing or admissions staff will know that information and be able to effectively communicate it, and in doing so, possibly stave off an enforcement action."