

May 24, 2022

Douglas L. Parker  
Assistant Secretary of Labor for Occupational Safety and Health  
Occupational Safety and Health Administration  
Department of Labor  
200 Constitution Avenue, NW  
Washington, D.C. 20210

OSHA-2018-0005

**Re: Healthcare Worker Whistleblower Stakeholder Meeting**

Dear Assistant Secretary Parker:

On behalf of our 40,000 members, the American College of Emergency Physicians (ACEP) appreciates the opportunity to comment on the Occupational Safety and Health Administration's (OSHA's) Healthcare Worker Whistleblower Stakeholder Meeting. An ACEP member, Dr. Kelly Gray-Eurom, represented ACEP during the meeting on May 18, and we wish to follow up in writing on her oral comments.

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Emergency physicians have been and continue to serve on the front lines combating the COVID-19 pandemic since it first arrived in the United States two years ago. We have witnessed firsthand many safety hazards that have occurred in emergency departments (EDs) as our nation has responded to the crisis. Unfortunately, while it is our moral and ethical responsibility to protect our patients, many emergency physicians and other healthcare workers have been threatened, silenced, or terminated for speaking out about these safety concerns. This practice of retaliation is not a new issue, and the COVID-19 pandemic only highlighted how healthcare workers face consequences for raising their valid concerns about patient safety and care delivery. The stories of physicians losing their jobs when they are needed most should trouble all of us. The pandemic has shown us that we cannot afford to remove physicians from the frontlines during a public health crisis or any other time.

ACEP strongly believes that all healthcare workers, including hospital medical staff, should be covered by **due process protections**. However, due to some employment structures, many emergency physicians are explicitly deprived of these rights for reasons they do not control. While some emergency physicians are employed directly by hospitals, many are employed under an employment model of independent entities that contract with the hospital to provide 24/7 emergency department coverage, a trend which has increased as the healthcare system has consolidated. Unfortunately, there are contracts offered to emergency physicians under these arrangements that do not include due process protections. In many cases, hospitals, health systems, or physician groups can require the physician to waive their rights to due process entirely and be fired for any reason. **It should not matter how an emergency physician is employed – we deserve the same due process protections as everyone else in the hospital.**

The lack of due process can deprive emergency physicians of autonomy to make medical decisions, limit their ability to raise patient safety concerns, and leave them vulnerable to retaliation for speaking out. The best interests of patients are undeniably served when emergency physicians practice in a fair and supportive environment. The termination, or even the threat of termination, without a fair hearing, prevents emergency physicians from fully advocating for their patients because they rightfully fear retribution.

ACEP has made advocating for more due process rights a top priority. We have worked to educate our members about OSHA's whistleblower policies and have provided resources to help emergency physicians navigate employment contract issues. These resources include webinars, a [checklist](#) to help physicians with contract negotiations, a [legal services directory](#), and an employer transparency roster. In addition, ACEP supports the "ER Hero and Patient Safety Act," legislation introduced by Sen. Roger Marshall (R-KS) and Rep. Raul Ruiz (D-CA) that requires HHS to issue a rule guaranteeing that emergency physician due process rights are protected, regardless of physicians' employment or contractual arrangement.

*All in all, ACEP is pleased by OSHA's commitment to protecting whistleblowers, but we are concerned that the current language in many emergency physician contracts circumvents these protections. We urge OSHA to release standards around what can and cannot be included in employee contracts to prevent employees from being fired without due process. We are eager to work with OSHA and other federal agencies, regulators, and lawmakers to ensure that emergency physicians are fully empowered to advocate for patient safety and deliver the highest quality emergency care, without worrying about losing their jobs.*

Another significant issue that has impacted emergency physicians and other practitioners working in the ED has been the lack of personal protective equipment (PPE). Insufficient PPE and other ancillary medical supplies resulted in a notable amount of contention and animosity between different hospital services (e.g., emergency department vs. inpatient ward vs. critical care units), healthcare staff, and hospital administrators, as well as healthcare personnel and the Centers for Disease Control and Prevention (CDC) during the initial phases of the COVID-19 pandemic. Multiple incidents occurred in which hospital administrators did not allow health care staff to utilize personally acquired PPE to supplant that which the hospital was conserving or could not supply. Therefore, healthcare workers were given the impossible choice of going without sufficient protection or reporting insufficient protection and potentially facing retaliation.

Current [OSHA standards around PPE](#) require employers to implement "PPE programs." These programs should "address the hazards present; the selection, maintenance, and use of PPE; the training of employees; and monitoring of the program to ensure its ongoing effectiveness." Unfortunately, some emergency physicians have found that the PPE programs instituted by hospitals during the pandemic have failed to protect them from the virus. First, many hospitals did not supply their employees with a sufficient level of PPE, requiring healthcare workers to reuse PPE beyond their intended use. While supply chain issues contributed to this practice initially, the reuse of PPE continued even after these supply issues were resolved. Second, as alluded to above, many of these PPE programs made it extremely difficult for healthcare workers to use their own PPE. Although it was technically allowed, hospitals would create numerous steps and hurdles before officially approving a healthcare worker's own PPE for use. Lastly, there were concerns over the PPE properly fitting healthcare workers. Hospitals often changed the brands of PPE that were used, and there has not been sufficient fit testing of supplies to ensure that the PPE have been properly worn. **Given these issues with PPE programs, ACEP requests that OSHA refine their requirements around PPE to ensure that health care workers have the flexibility they need to feel properly protected.**

We appreciate the opportunity to share our comments. If you have any questions, please contact Jeffrey Davis, ACEP's Director of Regulatory and External Affairs, at [jdavis@acep.org](mailto:jdavis@acep.org).

Sincerely,

*Gillian Schmitz, MD, FACEP*

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ACEP President