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LEGAL MEMORANDUM

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

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Subject: COVID-19 & the Ability To Refuse Patients

Date: March 10, 2020

A. Overview

This memo summarizes the legal issues surrounding nurses requesting not to care for patients with COVID-19. As discussed below, patients who make such a request because of their own health condition are likely entitled to a reasonable accommodation in the form of a leave from work or a different patient assignment where possible. The law likely doesn't require that the employer provide such accommodations based on the health condition of a family member of the nurse, but employers may still agree to provide them. An employee who wishes to refuse a patient assignment based on general safety concerns may risk receiving discipline for insubordination, but can help avoid that possibility by establishing the basis for their belief that the employer has created unsafe working conditions (such as by failing to provide adequate training or PPE) and that accepting the patient assignment would put the nurse at risk of contracting COVID-19. This memorandum concludes with advice a Union may wish to give to its members addressing the question of refusing patient assignments.

B. Requests Based on the Employee's Own Condition

1. Most conditions that would cause a nurse to be particularly vulnerable to COVID-19 are probably considered "disabilities"

It is quite likely that respiratory condition or other health issue that leaves a nurse with a compromised immune system would be considered a "disability" for purposes of the Washington Law Against Discrimination (WLAD), because Washington law defines that term so broadly. The WLAD defines "disability" as a sensory, mental, or physical impairment that: is medically cognizable or diagnosable; exists as a record or history; or is perceived to exist, whether or not it actually exists. RCW 49.60.040. The scope of the law's definition is much broader than the federal Americans with Disabilities Act (ADA). Under the WLAD, a disability may be temporary or permanent, common or uncommon, or mitigated or unmitigated and can exist whether or not it limits the ability of an individual to work in general or to work at a particular

job. Most conditions that would cause a nurse to be particularly vulnerable to COVID-19 are likely to constitute a "disability" under the WLAD.

2. Employees may be entitled to a wide range of reasonable accommodations

Employers must provide employees with a disability with reasonable accommodations that allow the employee to perform his/her essential job functions. This almost certainly includes accommodations that allow an employee to perform his/her job without worsening their underlying disability. In *Goodman v. Boeing Co*., 75 Wn. App. 60, 74, 877 P.2d 703 (1994) *aff'd* 127 Wn.2d 401, 899 P.2d 1265 (1995), the Court of Appeals held that "therapeutic accommodations" were required by the WLAD. There was no allegation that the employee's performance was unsatisfactory, but the employee alleged that her work exacerbated her medical condition. The Court found if doing the job *without* reasonable accommodation seriously adversely affects the employee's health, that also constitutes not being able to perform the job and the duty to accommodate is triggered. Thus, even though a nurse's condition may not prevent him/her from doing her job, if the employee's condition will be worsened without an accommodation, the employer has a duty to accommodate.

At a minimum, employees would have a very strong case to take paid or unpaid leave from work as a reasonable accommodation for their disability. It is well-established that leaves from work can be a type of reasonable accommodation. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989) (leave of absence held to be a reasonable accommodation for employee who suffered from cluster migraines); *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 142-43, 362 P.3d 974 (2015). It is hard to imagine that an employer could show that a leave would impose an "undue burden."

A nurse may also request to continue working but to not have to take care of COVID-19 patients. If there are other nurses who are scheduled who are capable of taking care of COVID-19 patients, it could well be that it is a reasonable accommodation for management to ask those nurses to care for COVID-19 patients. However, if the nurse with the condition is the only scheduled nurse able to care for that patient, allowing the nurse to work but to take a different patient assignment would likely constitute an "undue burden" on the Employer.

3. Employers may have civil liability for failure to accommodate

Where an employer persists in conduct despite knowing that it will cause disabilities, the employer's actions are considered "deliberate" and thus civil claims by employees are not barred by the Industrial Insurance Act. Damages flowing from physical injury caused by intentional failure to accommodate are compensable, and are not barred by Industrial Insurance Act. *Goodman v. Boeing Co*., 127 Wn.2d 401, 899 P.2d 1265 (1995). So if a nurse contracted COVID-19 as a result of the employer's intentional failure to accommodate, the employer could be liable for resulting harm.

C. Requests Based on Employees' Family Members' Conditions

Nurses who do not wish to care for COVID-19 patients due to a family member having a condition are likely *not* protected under the ADA or the WLAD. The Washington Supreme Court has concluded that there is no prohibition on association disability discrimination, meaning it is not illegal to discriminate (including discrimination in the form of failure to accommodate) based on the fact that a family member is disabled. *Sedlacek v. Hillis*, 145 Wn.2d 379, 391–92, 36 P.3d 1014, 1020 (2001).

We recognize that it seems as though there *should* be the ability to at a minimum take paid or unpaid leave to avoid exposure that could compromise a family member. After all, the Family Care Act allows employees to use their own leave to care for a sick family member, and the Washington Paid Family and Medical Leave program now also provides the right to take paid leave to care for an ill family member. Surely, if there is the right to care for a sick family member, there should also be the ability to take time from work to keep a family member healthy. Unfortunately, we have yet to find authority so stating. However, that does not mean that an employer could not agree to accommodate an employee's request to either refrain from taking care of COVID-19 patients or to take a leave from work in order to protect their vulnerable family member.

D. Risk of Discipline for Insubordination

In addition to the issue of whether employees are statutorily entitled to refuse to care for certain patients due to the employee's own health condition or that of a family member, there is also the question about when employees can refuse an assignment because of their safety concerns more generally. Employees who refuse to accept certain patient assignments will have a strong argument that the employer lacked just cause or a lawful basis to impose discipline if the employee can show that they had a genuine and reasonably based belief that to perform those work duties would put them at risk of contracting COVID-19.

Any discipline imposed must meet the test of just cause. An employee's contemporaneous explanation of the basis of their concern and the reason for refusing an assignment (e.g. documentation of the employee's own health condition, or the lack of appropriate PPE) could be critical evidence to defend the nurse in the grievance-arbitration process in the event that the employer takes disciplinary action against the nurse. An employer that disciplines an employee based on the employee's refusal to care for COVID-19 patients does so at its own risk, as the employer must be able to establish that just cause existed to take that action. The more an employee can do to show that the refusal is reasonable and based on well-founded concerns, the more likely the Union will be to successfully grieve any discipline imposed.

As a practical matter, employees will have a stronger legal case for withholding their labor or refusing to take on a certain assignment if they do so on the condition that the employer take certain action to remove or reduce the dangerous working conditions. An arbitrator is unlikely to be sympathetic to an employee refusal to care for Corona patients, under *any* circumstances and regardless of the amount of safety precautions.

If an employee has not been provided with appropriate PPE, the employee should request it. If appropriate PPE is not provided upon request, the employer would have even less grounds to justify discipline for refusing to take on a patient assignment. The Washington Industrial Safety & Health Act requires employers to furnish employees a place of employment free from recognized hazards causing or likely to cause serious injury or death to employees, and to do "everything reasonably necessary to protect the life and safety of employees." RCW 49.17.060. WAC 296-155-040. An employer is required to provide and maintain, at the employer's expense, personal protective equipment whenever physical contact, absorption, or inhalation of a hazard could cause any injury or impairment to the function of any part of an employee's body.

OSHA has issued detailed guidance about the types of safety precautions employers should take for employees working in high risk occupations, including treating known or suspected COVID-19 patients. *See* https://www.osha.gov/Publications/OSHA3990.pdf at pp. 23-25. According to OSHA, "Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks." *Id.* at 25. Respirators should be used when coming within six feet of known or suspected COVID-19 patients.

E. Right to Refuse to Work or Patient Assignment Under OSHA

Another possible source of protection for refusing to work is OSHA. OSHA regulations allow employees to refuse to work where there is the possibility of serious injury or death arising from hazardous conditions at the workplace:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. **If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.** The condition causing the employee's apprehension of death or injury must be of such a nature that **a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury** and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. **In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.**

29 CFR 1977.12(b)(2). Thus, where employees have a good faith belief that taking on a particular patient assignment will cause imminent death or serious injury, they cannot be retaliated against if they refuse to expose themselves to the dangerous condition. This protection only applies, however, if the employee has asked the employer to correct the dangerous condition.

Where an employer is not providing adequate PPE, employees should request it. If the employer refuses to provide it, and employees reasonably believes they will contract COVID

without it, they are likely protected from retaliation if they refuse to come to work until the appropriate PPE has been provided.

F. The Right to Refuse to Work Under Section 501 of the LMRA & Section 7 of the NLRA

Employees choosing to withhold their labor will *not* be deemed to be engaging in an unlawful strike if the reason they refuse to work "in good faith because of abnormally dangerous conditions." Section 502 of the Labor Management Relations Act provides:

> Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

Id. (emphasis added). *See Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386, 94 S. Ct. 629, 641, 38 L. Ed. 2d 583 (1974) ("a work stoppage called solely to protect employees from immediate danger is authorized by s 502 and cannot be the basis for either a damages award or a Boys Markets injunction.")

While on its face, Section 502 merely provides rights derivative of Section 7, removing no strike clauses as a bar where the withholding of labor is motivated due to abnormally dangerous conditions, some courts have concluded that the Section provides affirmative protection and is considered protected activity for which discipline cannot be imposed. *See Clark Eng'g & Const. Co. v. United Bhd. of Carpenters & Joiners of Am., Four Rivers Dist. Council*, 510 F.2d 1075, 1079 (6th Cir. 1975) ("Section 502 authorizes the quitting of labor **by an employee or employees** in good faith because of abnormally dangerous conditions of work. The section does not mention a labor union; it is addressed solely to the rights of individuals….When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section protects him from employer retaliation. The employee cannot be discharged…") (emphasis added); *Nat'l Labor Relations Bd. v. Knight Morley Corp.*, 251 F.2d 753, 759 (6th Cir. 1957) ("[Section 502] expressly limits the right of management to require continuance of work under what the employees in good faith believe to be 'abnormally dangerous' conditions.").

Additionally, the belief must be based on conditions that actually exist. In *Gateway Coal Co.,* the Supreme Court disagreed that an honest belief, "no matter how unjustified" invokes the protection of Section 502. Instead, "a union seeking to justify a contractually prohibited work stoppage under S 502 must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.'" *Id.*

Thus, private sector employees who refuse to work are unlikely to be subjected to valid discipline if they act (1) in good faith (2) because of abnormally dangerous conditions that objectively exist. Employees who acted concertedly will be on stronger legal ground.

G. Ethical Considerations

We briefly looked at authorities related to nurses' ethical obligations to care for patients with communicable diseases, such as COVID-19. In a 2015 Position Statement entitled "Risk and Responsibility in Providing Nursing Care," the American Nurses Association[1] opined that while nurses generally "are obligated to care for patients in an nondiscriminatory manner, . . . [t]he ANA recognizes there may be limits to the personal risk of harm nurses can be expected to accept as an ethical duty."[2] "Accepting personal risk exceeding the limits of duty is not morally obligatory; it is a moral option." *Id.*

The ANA suggests that a moral obligation exists for a nurse to care for a patient where all four of the following criteria are met:

1. The patient is at significant risk of harm, loss, or damage if the nurse does not assist;
2. The nurse's intervention or care is directly relevant to preventing harm;
3. The nurse's care will probably prevent harm, loss, or damage to the patient;
4. The benefit the patient will gain outweighs any harm the nurse might incur and does not present more than an acceptable risk of harm.

Id. As the above factors illustrate, whether an obligation exists is a highly fact-specific inquiry.

With respect to COVID-19, the CDC has issued guidance to healthcare facilities advising that they take certain preventative and proactive measures such as providing training to healthcare staff, exploring alternatives to face-to-face triage and visits, designating areas in the facility for treatment of COVID-19 patients, and designating staff to care for those patients specifically.[3] If a nurse believes that the facility has not provided training or other safety measures in accordance with the CDC's guidelines, this, too, could be a potential basis to object to caring for a COVID-19 patient.

In her paper, *Beyond Ebola Ethics: Do Nurses have a Duty to Treat?*, Professor Miriam Walter suggests that when a nurse feels conflicted about their obligation to treat, they should "talk to their manager, the ethics committee at their facility, and perhaps their union. Nurses need to know the policy in their institution regarding refusal to care for a patient. Generally, once a patient assignment is accepted, refusal is considered abandonment."[4]

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[1] While the American Nurses Association's (ANA)'s ethical codes and guidance are not legally binding, they "function as guides to the highest ethical practice standards and aid in moral reasoning." Miriam Walter, *Beyond Ebola Ethics: Do Nurses have a Duty to Treat?* https://www.omicsonline.org/open-access/beyond-ebola-ethics-do-nurses-have-a-duty-to-treat-1522-4821-1000269.pdf.

[2] https://www.nursingworld.org/~4af23e/globalassets/docs/ana/ethics/riskandresponsibilitypositionstatement2015.pdf

[3] *See* https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/guidance-hcf.html.

[4] https://www.omicsonline.org/open-access/beyond-ebola-ethics-do-nurses-have-a-duty-to-treat-1522-4821-1000269.pdf.

CPH & Associates, a professional liability company, produced a bulletin in response to the Ebola virus outbreak regarding what steps caregivers should take if they are assigned an infected patient and have reservations about their safety.[5] The bulletin advises that the assigned caregiver should carefully consider the following:

1. Refuse the assignment, following the established policies and procedures of your employer (e.g., in writing, factual reasons);
2. Request that the required PPE, training and re-training, and the presence of a trained monitor be provided before care is undertaken;
3. If a member of a union, contact the union representative;
4. Seek outside legal advice for guidance about the refusal, should the employer not heed your requests;
5. Report the lack of CDC guidelines and/or lack of adherence to state health department mandates (with guidance from your lawyer); and
6. Provide factual information about the situation to media sources (again, with guidance from your lawyer).

H. Practical Advice for Nurses Treating COVID-19 Patients

The following practical advice may be useful in developing further communications with nurses:

1. Do not refuse a direct request from a supervisor without a good reason.

2. If you believe you are being asked to do something unsafe, refer to safety guidelines with your manager and explain why you think it is not safe.

3. If possible, propose reasonable safe (or at least safer) alternatives. Request appropriate PPE or other OSHA-recommended safety precautions.

4. Find out if your hospital has a policy regarding when a care provider can refuse to treat a patient, and invoke any such reasons that apply.

5. If you have a condition that you believe would be exacerbated by having to take care of COVID-19 patients, make that known to the employer and request a reasonable accommodation. Get a doctor's note supporting your request if possible.

6. If you face discipline, contact your Union Rep immediately.

[5] CPH & Associates, *Can I Refuse to Care for a Patient who has Ebola or any other Viral Disease?*, https://www.cphins.com/can-i-refuse-to-care-for-a-patient-who-has-ebola-or-any-other-viral-disease/. (Nov. 1, 2014).