

## Alert | OSHA



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### D.C. Circuit to Take on OSHA Authority to Regulate Workplace Violence

On Jan. 9, 2020, the U.S. Court of Appeals for the District of Columbia heard oral argument in *BHC Nw. Psychiatric Hosp. LLC v. Sec'y of Labor*, a case that asks the court to decide how far the Occupational Safety and Health Administration (OSHA) can go when directing a hospital to put in place measures to protect nurses and other staff members from patient attacks.

The hospital appealed to the D.C. Circuit, challenging an [order from the Occupational Safety and Health Review Commission](#) (Commission), in which Chief Judge Covette Rooney found that the hospital breached the OSHA general duty clause because (1) its measures for addressing patient on staff violence were insufficient, and (2) the hospital had not taken feasible measures to materially reduce the recognized hazard.

The OSHA general duty clause, Section 5(a)(1), is a catchall clause that requires an employer to furnish its employees a place of employment free from recognized hazards that are causing or likely to cause death or physical harm. Although the general duty clause has been used to cite a wide spectrum of hazards, from killer whales to excessive heat exposure, here, on appeal, the hospital argued to the D.C. Circuit that it was not on notice of the bounds of enforcement under the general duty clause.

The Department of Labor (DOL) responded with factual support that the hospital should have been on notice of the potential hazard. The case stemmed from a 2016 OSHA investigation, triggered by an anonymous employee complaint, which alleged that patient on staff violence was an ever-increasing

problem. Following an inspection, OSHA discerned that the hospital had several safety protocols in place, yet hospital employees told the inspectors that the measures were neither properly communicated nor implemented. This finding was ultimately part of the OSHA citation and notice issued against the hospital; OSHA concluded that there had been at least 51 violent incidents of patient on staff violence in the past year.

Employers, particularly those in health care and social service settings, are watching this case closely. This comes as many are already grappling with addressing the 2019 harbinger case *In Sec'y of Labor v. Integra Health Management, Inc.*, in which the Commission affirmed a citation issued to a social services provider after one of its employees was fatally stabbed by a mentally ill client. Further, there is pending legislation in Congress (H.R. 1309) to mandate that DOL/OSHA enact rules to address workplace violence in health care and social services settings, as well as sectors conducting similar activities. This comes as many states, including California, Illinois, Minnesota, and Oregon, have already passed their own regulatory schemes to address these serious concerns that require a significant compliance review and thoughtful plan of approach.

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