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TRIAL ATTORNEYS

MEMORANDUM

DATE: March 23, 2020

RE: Federal Law on Rationing Medical Care on the Bases of Disability and Age

Question Presented: In light of the COVID-19 pandemic, many hospital networks and states are developing guidelines for how to ration healthcare should the number of patients overwhelm their medical system.¹ Under federal law, is it legal to ration medical care on the basis of disability or age, as applied to the current situation?

Short Answer: Federal law requires that decisions regarding the critical care of patients during the current crisis not discriminate on the basis of disability or age. In this respect, anticipated longevity or quality of life are inappropriate issues for consideration. Decisions must be made solely on clinical factors as to which patients have the greatest need and the best prospect of a good medical outcome. Therefore, disability and age should not be used as categorical exclusions in making these critical decisions.

LEGAL ANALYSIS

1. Background & Summary of Federal Laws

The federal Age Discrimination Act of 1975 (the “Age Act”) prohibits age discrimination in programs or activities that receive financial assistance from the federal government, including Health and Human Services (HHS) funding.²

The federal Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs conducted by federal agencies or programs receiving federal financial assistance.³

¹ See, e.g., Suzy Khimm, *Who gets a ventilator? Hospitals facing coronavirus surge are preparing for life-or-death decisions*, NBC NEWS (Mar. 18, 2020, 7:24 AM) (discussing proposed rationing by age in New York state); Laura Strickler, *Washington state preps for possible rationing of care and ventilators for coronavirus patients*, NBC NEWS (Mar. 20, 2020, 10:31 AM) (“‘If you are above a certain age and we have a shortage of ventilators, you don’t get one,’ Cassie Sauer, CEO of the Washington State Hospital Association explained.”).

² See 42 U.S.C. §§ 6101–6107; 45 C.F.R. § 91.11.

³ See 29 U.S.C. § 794.

Similarly, the federal Americans with Disabilities Act of 1990 (the “ADA”) prohibits discrimination on the basis of disability in the private sphere, and by state and local governments.⁴

The Affordable Care Act extends the above protections against discrimination on the basis of disability or age to individuals participating in any health program or activity administered by HHS or that receives funding from HHS.⁵

2. Analysis

Due to the absence of a global pandemic in over a hundred years, since the Spanish Flu Pandemic of 1918, the federal statutory prohibitions against age or disability discrimination have not been tested in emergency situations. However, due to the Avian and Swine Flu scares in recent years, some legal scholarship has emerged discussing this subject. That scholarship notes the lack of clear legal authority but provides reference to the relevant legal principles.⁶

Outside the context of an emergency situation, medical decisions are always tailored to the specific needs of a patient. In that context, numerous cases have rejected allegations of discrimination.⁷ “The logic of these cases, however, [is] inapposite to an evaluation of the legality of protocols promulgated in advance of a pandemic, particularly those which categorically preclude access to care.”⁸ The primary justification for age or disability discrimination is an appeal to practicality and necessity.

2.1. Disability Discrimination

The Supreme Court has made clear that “handicapped in[dividuals] are entitled to ‘meaningful access’ to medical services provided by hospitals, and that a hospital *rule* or state *policy* denying or limiting such access would be subject to challenge under” federal anti-discrimination provisions.⁹

Disability discrimination is permitted if accommodation would “fundamentally alter” the nature of the service provided.¹⁰ However, despite the vagueness of the statutory or regulatory language,

⁴ See 42 U.S.C. § 12101, *et seq.*

⁵ See 42 U.S.C. § 18116; 45 C.F.R. § 92.101.

⁶ See, e.g., Haavi Morreim, *Should Age Be a Basis for Rationing Health Care? Commentary 1*, 16 AMA J. ETHICS 339 (May 2014); Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 FLA. L. REV. 719 (2011); Nancy Lee Jones, Cong. Res. Serv., *The Americans with Disabilities Act (ADA): Allocation of Scarce Medical Resources During a Pandemic* (Apr. 21, 2006); Jessica D. Silver, *From Baby Doe to Grandpa Doe: The Impact of the Federal Age Discrimination Act on the “Hidden” Rationing of Medical Care*, 37 CATH. U. L. REV. 993 (1988).

⁷ See Jones, *supra*, at 8; Hensel & Wolf, *supra*, at 746 n.165. *But see* United States v. Univ. Hosp., State Univ. of New York at Stony Brook, 729 F.2d 144, 160 (2d Cir. 1984); Matter of Baby K, 832 F. Supp. 1022, 1028 (E.D. Va. 1993); Glanz v. Vernick, 750 F. Supp. 39, 46 (D. Mass. 1990).

⁸ Hensel & Wolf, *supra*, at 746

⁹ Bowen v. Am. Hosp. Ass’n, 476 U.S. 610, 624 (1986) (italics added); *see also* Silver, *supra*, at 1061 n.360 (noting how although *Bowen* was a plurality decision, this point was agreed upon unanimously).

¹⁰ See 42 U.S.C. § 12182(b)(2)(A)(ii).

meeting this test is difficult.¹¹ The policy-maker's argument would be that accommodating the disabled "would constitute a fundamental alteration to the provision of emergent care in a pandemic."¹² This argument fails.

First, *facial* disability discrimination is always prohibited; only *as-applied* disability discrimination considers the issue of "fundamentally altering" the service provided.¹³ Neither the federal disability nor age anti-discrimination statutes contain exemptions based on crisis or emergency; in fact, the opposite is the case. *See* 42 U.S.C. § 5151(a) (in emergency situations, federal regulations shall ensure "that the distribution of supplies . . . shall be accomplished . . . without discrimination on the grounds of race, color, religion, nationality, sex, *age, disability, English proficiency, or economic status.*") (italics added).

Second, a prime driver of the ADA was combatting the negative social view that disabled individuals have poor quality of life.¹⁴ Excluding disabled individuals from care solely because they are disabled is thus *per se* illegal.¹⁵ Indeed, when the federal disability anti-discrimination provisions were passed, "Congress intended that discrimination on the basis of a handicap be treated in the same manner that Title VI of the Civil Rights Act treats racial discrimination"—i.e., invidious and *never* justified.¹⁶

2.2. Age Discrimination

Facial age discrimination is sometimes permissible, but it depends on the purpose of the facial discrimination. Recipients of federal funds may discriminate based on age if they satisfy a four-part test to show that the age discrimination is necessary to the normal operation of a program or activity or to the achievement of a statutory objective.¹⁷ The four-part test requires that: (a) the age be used as a measure of another characteristic (such as physical fitness); (b) the other characteristic must be measured for the program to continue to operate normally or to meet a statutory objective; (c) the other characteristic can be reasonably measured by using age; (d) it is impractical to measure the other characteristic for each individual participant.¹⁸

As a preliminary matter, hospitals might attempt to justify age-based rationing by arguing that deference should be given to their crisis standards of care (CSC). But, CSCs from hospitals receiving federal funding are not exempt from federal anti-discrimination laws. Furthermore, hospitals may argue that deference should be given to its medical judgments. But such arguments

¹¹ *See Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002).

¹² Hensel & Wolf, *supra*, at 761.

¹³ *See Lovell*, 303 F.3d at 1054.

¹⁴ Hensel & Wolf, *supra*, at 753–57.

¹⁵ *Lovell*, 303 F.3d at 1054.

¹⁶ *Matter of Baby K*, 832 F. Supp. at 1028.

¹⁷ *See* 45 C.F.R. §§ 91.12, 91.13. "Normal operation is defined as operation of a program or activity without significant changes that would impair its ability to meet its objectives, while statutory objective means any purpose of a program or activity expressly stated in any Federal, state or local statute or ordinance adopted by an elected general purpose legislative body (45 CFR § 91.12)." Leon Rodriguez & Sarah E. Swank, *The Brave New World of HIPPA Compliance*, 2012 AHILA SEMINAR PAPERS 14 (2012).

¹⁸ *See* 45 C.F.R. § 91.13(a)–(d).

will also fail because “even reasonable medical judgment [is] not automatically . . . accepted but [is] subjected to closer scrutiny.”¹⁹

Here, the policy-maker will argue that use of age as a criterion for care satisfies the four-part test because age is not being used in a discriminatory manner but rather as a measure of a patient’s life expectancy, a patient’s likelihood of death, or a patient’s physical fitness. However, all these arguments fail the four-part test for the following reasons.

First, if age is simply a measurement of a greater remaining life expectancy, then the discrimination is barred for the same reason as disability discrimination—it is not for the government or private hospitals to decide whose life is more valuable.²⁰ There is no reason why the rationale in *Bowen* should not apply equally to age discrimination.²¹ Put another way, one’s current age cannot be used as a measure of how old someone will be when they die. Here, the policy-maker’s reasoning fails to satisfy subsection (a) of the four-part test: age is not being used as a measure of another characteristic.

Second, the policy-maker may argue that age can be used as a measure of likelihood of death, i.e., the older the patient, the more likely he or she is to die from COVID-19. However, such an argument fails because age is not a dispositive or exclusive indicator of mortality risk. Pre-existing conditions and sex are other factors that correlate to the probability of dying from COVID-19. According to Chinese Center for Disease Control, men are more likely to die than women and patients with pre-existing illnesses have higher mortality rates. Therefore, even if age may be a factor for determining the probability of death from COVID-19, it is only one of many factors and cannot be the only one. Therefore, probability of death cannot be reasonably measured by using just age, which violates subsection (c) of the age discrimination exception test.

Third, the policy-maker may argue that age is being used as a measure of physical fitness. However, this fails for the same reasons above. Without taking into consideration other factors, age cannot be used solely to determine whether one is physically fit—weight (body mass index), pre-existing conditions, habits regarding smoking and drinking, and exercise are all important factors to consider. Therefore, such an argument will fail subsection (c).

Additionally, all of the policy-maker’s arguments violate subsection (d) of the four-part test. If age is used as a measurement for life expectancy, probability of death, or physical fitness, the analysis depends on whether it is impractical (or nearly impossible) for hospitals to analyze individual patients and individually determine their fitness and likelihood of survival.²² Here, this is extremely unlikely because individual assessments of patients will necessarily occur. Even in times

¹⁹ In a seminal case, the employer sought to justify its use of age as a criterion on the basis of a reasonable medical judgment about the effects of aging. The Supreme Court stated that even reasonable medical judgment would not automatically be accepted but would be subjected to closer scrutiny. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 421–23 (1985). The Court reasoned that, under the anti-discrimination statutes, even a valid generalization would not justify an age test unless a more individualized method of evaluation was unavailable. *Id.*

²⁰ See *Silver, supra*, at 1066–67.

²¹ See *Silver, supra*, at 1061–62.

²² *Criswell*, 472 U.S. at 421–22.

of crisis, medical personnel have to perform individual assessments to determine the efficacy of the treatment. Thus, it seems more likely that the true measurement would be an illegal quality of life determination.

Therefore, because a hospital's rationing of medical care fails to satisfy the age discrimination exception under 45 C.F.R. § 91.13, age-based rationing most likely violates federal anti-age discrimination laws and most likely constitutes age discrimination.

Additionally, a significant problem with age-based rationing is that “[l]ife expectancy varies by gender and by racial group,” and so if a hospital or state “decides to set an age threshold for [medical care], it must logically vary that threshold for race and gender as well as age. Black males, Hispanic women, and white males and females could thus have different cutoffs of eligibility for” medical care.²³ Therefore, this reality, combined with the lack of “state of emergency” exemptions in the age and disability anti-discrimination statutes, makes clear that such discrimination, even in a state of emergency, should be viewed with the same disdain that American society would view race discrimination justified on the basis of “a state of emergency.”

3. Conclusion

The present pandemic may be used to try to justify the “hard decision” to issue policies rationing care on the basis of disability or age. Doing so, however, would violate federal law regarding invidious discrimination. It will open up the purveyors of those policies to legal liability which will likely be exploited.

²³ Morreim, *supra*, at 341.