ECRI's Strategic Insights for Ambulatory Care newsletter is being offered to CAPIC insureds at no cost. If you are interested in visiting any of the links in this edition, please contact Brad Dunkin, Assistant Vice President, at BDunkin@CAPphysicians.com.

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Strategic Insights for Ambulatory Care is a biweekly service provided by ECRI and the Cooperative of American Physicians (CAP). We welcome your comments; please send them to **AmbulatoryCareRM@ecri.org**.

COOPERATIVE OF AMERICAN PHYSICIANS

What's New?

- ECRI Now: In the ECRI Lab: Evaluating Bronchoscopes **view now**

Spotlight on Culture of Safety

If you're starting the year with a focus on effective communication, you'll need to make sure it's happening in the context of an effective culture of safety. In the simplest terms, a safety culture is the combination of attitudes and behaviors toward patient safety that are conveyed within a health facility. Numerous studies show a link between a positive safety culture (where safety is a shared priority) and improved patient safety. Use these resources to measure, evaluate, and improve your organization's safety culture:

- **Culture of Safety: An Overview**
- **Disruptive Practitioner Behavior**
- **Measuring Safety Culture**
- **Culture Of Safety 101 Training Program**

- **What Does a Culture of Safety Look Like?**

VIEW ALL RESOURCES

Patient Safety & Relations

Patients Using Cannabis for Pain More Likely to Smoke Tobacco Cigarettes

What's the news. Patients who use cannabis for treatment of pain use it more often and are more likely to smoke tobacco cigarettes than patients who use cannabis for other reasons, according to a **study in the November-December 2023 issue of the** *Journal of the American Board of Family Medicine*. The survey of more than 1,600 patients in Washington state also revealed that patients using cannabis for pain treatment were more likely to use applied and beverage cannabis products and were more likely to view cannabis as very or extremely helpful compared to those using it for nonpain reasons.

Why it matters. Understanding patients' patterns and reasons for using medical marijuana can help providers counsel them about the most effective methods for achieving therapeutic effects while minimizing accompanying risks, especially those related to tobacco smoking.

How ECRI can help. The guidance article **Addressing Medical and Recreational Marijuana** highlights key considerations in federal and state law, as well as important patient safety issues.

Legal & Regulatory

DOL Final Rule Clarifies Independent Contractor/Employee Determination

What's the news. The U.S. Department of Labor (DOL) has issued a **final rule**, taking effect March 11, 2024, to clarify criteria for establishing whether individuals qualify as independent contractors or employees under the Fair Labor Standards Act (FLSA). The new rule replaces one issued in January 2021, which DOL argued was inconsistent with FLSA. When the rule is effective, it will direct employers to consider six factors in determining an individual's independent contractor status: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed

is an integral part of the potential employer's business; and (6) skill and initiative. Additional details are available in a **frequently asked questions** document.

Why it matters. Employers can be subject to significant financial penalties if they misclassify employees as independent contractor, denying them access to minimum wage protections and other benefits.

How ECRI can help. The Guidance Article **Human Resources** highlights key considerations regarding hiring, crafting job descriptions, and determining scope of work.

Diagnostic Issues Primary Driver of High-Indemnity Claims, Doctors Company Finds

What's the news. Issues with patient assessment were a primary driver in 94% of high-indemnity claims, according to a **closed claims study by The Doctors Company**. The study examined payouts of more than $500,000 for loss years 2010 to 2022, of which 121 included at least one primary driver; other common drivers included failure to obtain consultation or referral (22%) and provider-to-provider communication (18%).

Why it matters. Diagnostic errors—and accompanying patient harm and litigation—are often preventable when providers are mindful of cognitive biases and use tools to overcome them, as well as when they take advantage of technologies to ensure closed-loop test and referral tracking.

How ECRI can help. The microlearning Safety Break **Provider Cognitive Bias: Impact on Diagnosis** can help providers understand common biases that can influence their diagnostic process and how to address them.

Internal Medicine Claims Indemnity Less Frequent but More Costly than Family Medicine Claims

What's the news. Claims against internal medicine providers result in indemnity less frequently than those against family medicine providers, but have a higher average cost, according to a new report from the **Medical Professional Liability Association's Data Sharing Project**. The review of more than 4,700 claims between 2017 and 2021 found that claims against family medicine providers resulted in indemnity 34% of the time, with an average payment of $328,000, compared to a 24% indemnity rate against internal medicine providers, with an average payout of $420,000.

Why it matters. Although both family medicine and internal medicine providers deliver primary care, the conditions and complaints that led to paid claims varied, even as diagnostic allegations were most likely to result in indemnity for both groups.

How ECRI can help. Tools in the Resource Collections **Diagnosis: Test, Referral, and Hospitalization Tracking** and **Diagnosis: Safety and Screening** can help

practices review and establish their processes for supporting providers in achieving diagnostic excellence.

Michigan Appellate Court Outlines Factors That May Create Vicarious Liability

In a case involving an appeal from denial of three motions for summary judgement (MSJ), the Michigan appellate court, in its opinion, outlines several factors that could raise sufficient issues of fact that support resolution by jury versus dismissal through an MSJ.

In this case, surgery was recommended to a 56-year-old female patient with a history of hyperparathyroidism (i.e., the parathyroid glands produce excess parathyroid hormone). The proposed procedure was a minimally invasive right inferior parathyroidectomy. The surgeon explained the procedure and associated risks, including that he might need to remove the entire thyroid gland. The surgeon claimed that the patient consented to the surgery as described; however, the patient testified that she told the physician she would not consent to removal of the thyroid due to the risk of damage to her larynx because she worked as a casino card dealer and needed to be able to speak clearly and loudly. The surgery was conducted at a stand-alone surgical center. When the surgeon conducted the parathyroidectomy, he removed the patient's thyroid. The plaintiff contends she suffered an injured laryngeal nerve that causes difficulty breathing, speaking, and swallowing.

The plaintiff sued the surgeon, the surgeons' medical group, and the surgical center's affiliated hospital. The defendants filed MSJs on the following claims:

1. Claim of vicarious liability against the medical group for the work performed by the surgeon.
2. Claim of agency (actual or ostensible) against the hospital for the work performed by the surgeon.
3. Claim of ordinary negligence against both the medical group and the hospital.

The trial court denied all three MSJs. The defendants appealed.

Considering the MSJs regarding vicarious liability and agency, the medical group and hospital argued that they did not control the surgeon's medical decisions and, therefore, should not be held vicariously liable for his acts. The plaintiff responded that the medical group entered into a professional services agreement (PSA) with the surgeon's surgical specialist group. The plaintiff argued that the PSA established either an employee or agent relationship with the medical group. As part of the agreement, the medical group promoted the clinic. Other terms of the PSA that raised factual issues and showed more than a *de minimis* degree of control over the surgeon included:

- The surgeon's specialist group may not alter its services without consulting with the medical group, and the medical group will make the final determination in accordance with its policies and procedures

- Physicians must comply with the medical group's rules, policies, and procedures
- The medical group retains control over credentialing and privileging
- Surgeons provide services exclusively for the medical group
- The medical group retains custody and control of electronic medical records
- The medical group selects medical records software
- The medical group received all payments for services provided

The hospital was not a party to the PSA; thus, the Michigan appellate court reversed the trial court's decision and granted the MSJ to the hospital. The appellate court found that there were factual questions regarding agency for the medical group based on the PSA, which should be resolved by a jury. Thus, finding that the trial court properly denied the MSJ on the vicarious liability claims against the medical group, the appellate court upheld the denial of their MSJ.

Finally, the appellate court analyzed whether the claims could be based on ordinary negligence as well as medical malpractice. The court noted that there are two factors that distinguish a medical malpractice claim from an ordinary negligence claim: first, the nature of the relationship between the two parties (professional relationship of physician and patient), and second, claims that raise questions about medical judgement versus acts or omissions that fall within the knowledge and experience of a layperson.

In this case, the plaintiff is not claiming that the surgeon failed to give her sufficient information to make a reasonable decision about treatment. Instead, the plaintiff claims that she explicitly told the surgeon not to remove her thyroid. The court did not see "how a failure to adhere to the clear limits on surgery set by the patient requires medical judgement." However, the appellate court also noted that if the plaintiff asserts that the surgeon performed the surgery itself negligently, that will sound in medical malpractice. Reluctant to substitute their own judgment, the appellate court noted that a determination about ordinary negligence should go before the jury. Therefore, the trial court properly denied the MSJ on this claim.

The appellate court affirmed in part, reversed in part, and remanded for further proceedings. (*Placido v. Hawasli*, 2023 Mich. App. LEXIS 3918*, 2023 WL 3768617, No. 359890 [Mich. App. June 1, 2023])

ECRI Resources:

- **Contract Management in Ambulatory Care**
- **Legal Basics**
- **Resource Collection: Informed Consent/Informed Refusal**

ECRI Commentary: Healthcare organizations typically enter into a large volume of contracts covering a wide range of goods and services. Examples include, but are not limited to, contracts for professional services, student affiliation, agency staffing, patient or resident transfers, purchasing, maintenance, supplies, leases,

entertainment, construction, consulting, corporate compliance, managed care, insurance, mergers and acquisitions, and joint ventures.

Although contracts enable healthcare organizations to achieve their missions, contracts also place legal obligations on the parties to the contract. When an organization does not manage risks involved in contracting, or when it fails to uphold its end of the deal, it may face a host of problems. Examples include:

- Lawsuits for breach of contract
- Triggering of negative contract terms (e.g., obligation to pay liquidated damages)
- Violations of federal or state statutes or regulations, or failure to satisfy accreditation standards
- Negative reimbursement consequences
- Broken or strained relationships with the other parties involved or reputational damage
- Interruptions or difficulties obtaining goods or services

A well-designed contract management process can help organizations effectively use contracts to manage and reduce risks and to identify and manage new risks that may arise as a result of contracting.

This abstract is a summary of a recent court decision, verdict, settlement, or other action affecting healthcare organizations and their risk management programs. When reviewing this abstract, keep in mind that laws and court decisions vary among jurisdictions and that decisions of lower courts may be overturned on appeal. For specific legal guidance regarding the significance or applicability of this decision, contact legal counsel.