

Miscellaneous Healthcare Spotlight

Temporary Medical Staff Make Tempting Litigation Targets

by Evan Smith

When something goes wrong in a medical setting -- whether in labor and delivery, surgery and recovery, or ICU -- finger pointing begins. Nonpermanent medical personnel and the nurse staffing agencies that place them are tempting targets.

As the size of the temporary nurse staffing industry has grown, so have the stakes. Once primarily the domain of small nurse registries, the temporary nurse staffing industry, while still fragmented, has become dominated by larger publicly traded and private agencies. These agencies place all types of nurses (e.g., registered nurses, licensed vocational nurses, licensed practical nurses), as well as respiratory, occupational, and physical therapists, surgical technicians, social workers and a host of other allied medical professionals. Some have dedicated units focused on specialty needs, such as clinical trials and correctional medicine.

Nurse staffing agencies send individuals into healthcare positions on either a per diem (per day) or a traveling basis. "Travelers" often move around the country, taking on assignments in industry-standard 13-week increments. They are often handed the least desirable work hours -- like holidays and graveyard shifts -- when the senior and more experienced medical staff and doctors are not around, increasing their susceptibility to claims and making them easy scapegoats for those looking to lay blame.

The greatest demand for temporary personnel comes from acute care facilities, such as hospitals and medical centers, which tap this market to replace vacationing staff, align nurse to patient ratios, manage costs, and ensure continuity of care. Demand for non-permanent staffing tends to be cyclical, ebbing and flowing with the economy. In boom times, demand is high. More Americans are employed -- and insured. Elective surgeries, such as cosmetic procedures, are more frequent.

When the economy slows, demand for healthcare services does too. Hospitals and other medical care providers make do with permanent staff. Still, agency registers grow, as everyone from practitioners laid off by hospitals to non-active RNs who have been homemakers, seek work. And even during economic downturns, demand can spike. A flu epidemic, for example, will send patients to local hospitals in droves and have nurse staffing agency phones ringing off the hook.

The call for temporary staff in certain sectors, such as correctional healthcare facilities, student and occupational health clinics, and clinical trials, remains relatively steady, though it too can vary. Non-acute care is a fast-growing market niche: As the population ages, custodial caregivers or "sitters" are increasingly sought to provide temporary support to elderly or infirm patients at home or in long term care settings.

Variations in claims severity

In the acute care setting, professional liability claims against allied medical staffing agencies can be both frequent and severe. Potential damages can vary significantly depending upon the medical specialty and jurisdiction involved. Specialties like labor and delivery are particularly high risk; jurisdictions like Cook County, the New York City boroughs and Philadelphia are notoriously unfavorable for defendants.

The inconsistent training of temporary medical personnel impacts exposure. Training can range from "here's the manual, now get to work," to more sophisticated formalized orientation, and the level of education can have obvious effects on a staffer's ability to follow protocols, avoid errors -- and mount an effective defense to a claim.

Claims in the non-acute care setting are more benign, but can be frequent. These typically arise from medication errors, phlebotomy issues, failure to adequately follow-up, and the like.

Outsiders, often the last to know

When there is a claim, the dynamics of litigation can be especially challenging for staffing agencies. Hospitals, other acute care facilities, and physician groups tend to devote substantial resources to managing and mitigating claims. When something goes wrong, they circle the wagons. As outsiders, temporary staff are vulnerable.

Moreover, there is often a significant lag time between when a hospital is aware of a claim and when a staffing agency is drawn in. A medical center may be months down the road preparing its defense, when a physician's deposition reveals that it was a temporary nurse on duty at the time of the improper sponge count or when the fatal infection took root. Consequently, staffing agencies are often forced to prepare in weeks a defense that others have had months or years to craft. Sometimes hospitals and medical centers will settle a case without involving the agency, intent on seeking subrogation against it in a subsequent third party action.

Protection in the details

Many lessons have been learned over the years from supporting clients through professional liability insurance and claims. We know that smaller entities can face higher exposures: Smaller medical staffing agencies may have a lower number of placements or full time equivalents (FTEs), but they place those FTEs in high risk settings. Larger medical staffing agencies with a risk management mindset are less willing to place workers in undesirable shifts, high risk specialties, and venues with records unfavorable to defendants, which helps to mitigate their risk.

Properly protecting allied medical and nurse staffing agencies is not just about insurance; it's about insight. We accordingly emphasize education on key points that can help our clients manage risk and mitigate future claims. For example:

- ✓ *Make no assumptions on credentials.* A uniform credentialing process must be adhered to, and reviewed regularly.
- ✓ *Proactively ensure appropriate orientation.* Agencies that require a thorough orientation and training of their staff have a better track record in claims.
- ✓ *Be clear on contractual risks.* Contractual relationships can be complicated. What contractual indemnifications apply? Do the right parties have the right insurance in place? In some cases, a staffing agency may act as a vendor manager, overseeing and handling the client's supply agreements and staffing levels. It is important to assess who is contractually obligated to whom.

Experience makes a difference

Our experience in the larger healthcare professional liability industry informs our approach to defending and mitigating the risks of allied medical staffing agencies. We understand the unique flow of these claims and the dynamics that put staffing agencies at particular risk. We also know how to diffuse these issues. For instance, even if temporary staffers are not permanently employed by a hospital, they could fall under the legal cloak of a "borrowed servant" -- which shifts liability back to the hospital.

While it makes sense that a staffing agency might seek out the defense attorney known for handling healthcare cases, we can help our insureds avoid the pitfalls of retaining counsel whose true allegiance is to the doctors and hospitals that supply them their regular case load -- and avoid what would inevitably be a less rigorous defense of their claim.

Our underwriting appetite focuses on large and midsized agencies, including those with specialized clinical staffing areas, who can be true partners in the process ... sharing risk and collaborating with us to manage their complex and severe exposure and litigation. Along with professional liability insurance we can provide general liability as well as umbrella coverages. We also consider agencies with travelers residing in the US and overseas.

When it comes to professional liability claims, the chips can seem stacked against nurse staffing and allied medical agencies, by the very nature of their business. With Beazley, agencies find the coverage, claims and litigation management expertise that shift the odds in their favor.

DISCLAIMER: Beazley Miscellaneous Healthcare Spotlight is prepared and edited by Beazley Group. The opinions of the author are solely those of the author. Beazley Miscellaneous Healthcare Spotlight is published and distributed by Beazley Group with the understanding that neither it nor the editors or authors is responsible for inaccurate information. The information set forth in Beazley Miscellaneous Healthcare Spotlight should not be construed nor relied upon as legal advice and is not intended as a substitute for consultation with counsel. This is intended for informational purposes and is for broker use only.

CB SL 209_US_12/11