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Legal Aspects of Assessing the Aging Physician—An Update

Rick D. Barton

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LEGAL ASPECTS OF ASSESSING THE AGING PHYSICIAN—AN UPDATE

Administrators in Medicine 2016 Annual Meeting

April 27, 2016





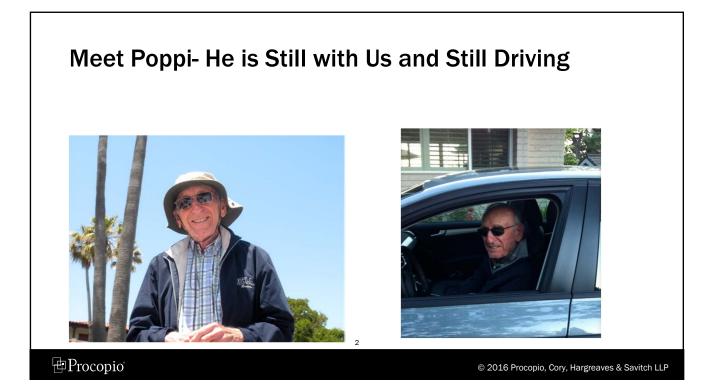
Legal Aspects of Assessing the Aging Physician—An Update Administrators in Medicine

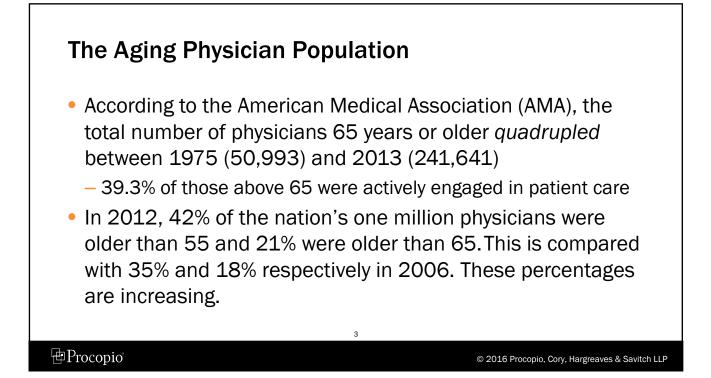
2016 Annual Meeting



Richard D. Barton Partner rick.barton@procopio.com 619.515.3299

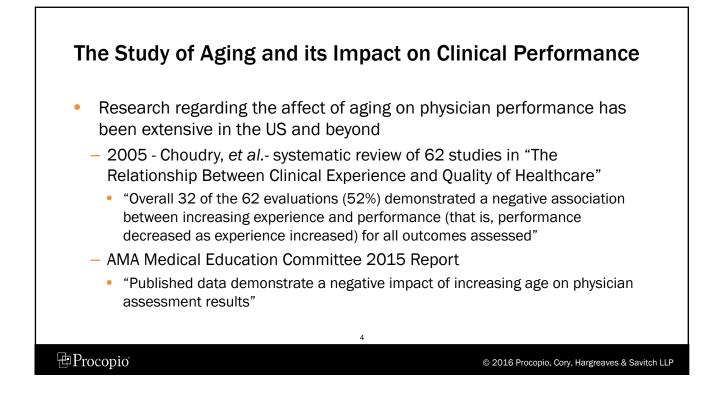


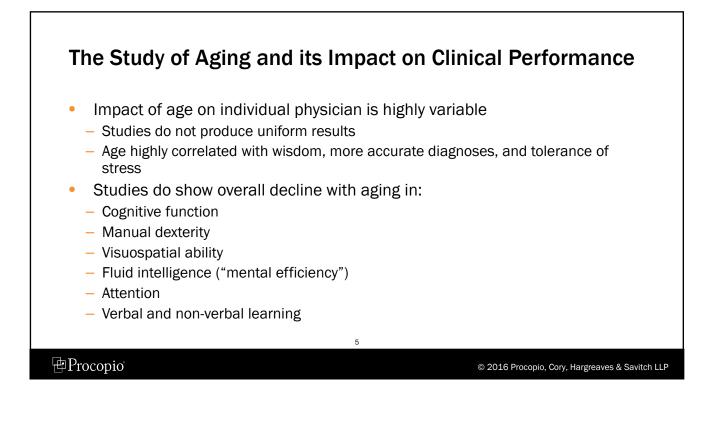






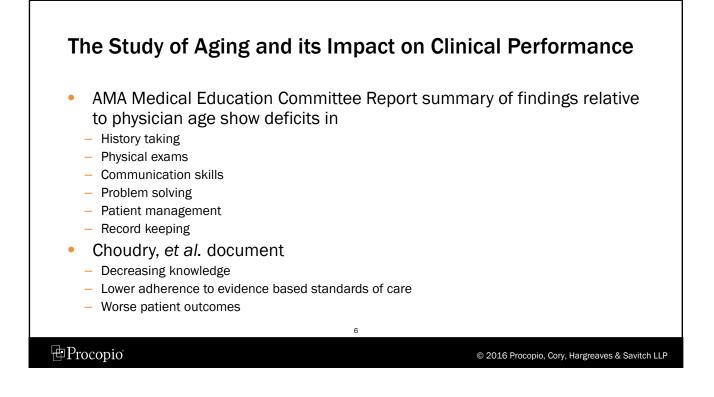
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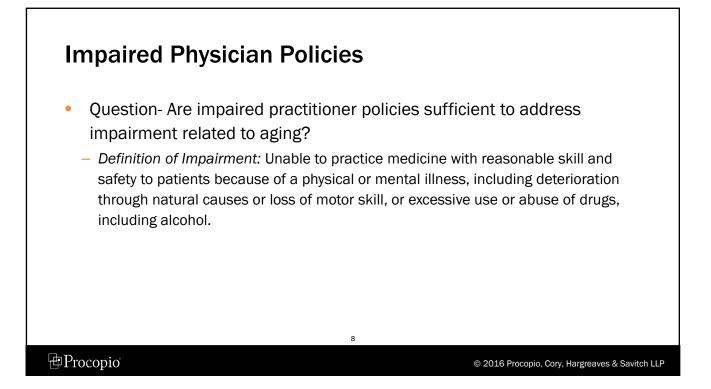
Impaired Physician Policies

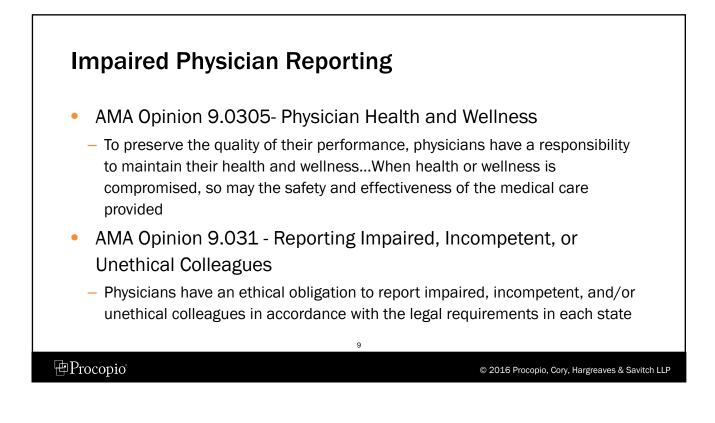
- Every hospital is required to have a policy for acting upon concerns that a practitioner is impaired
 - To assure patient safety by providing guidance on how to identify, report, and treat impaired medical staff members.
 - To provide assistance and rehabilitation to aid impaired medical staff member.
 - To provide medical staff members with information and education regarding potential

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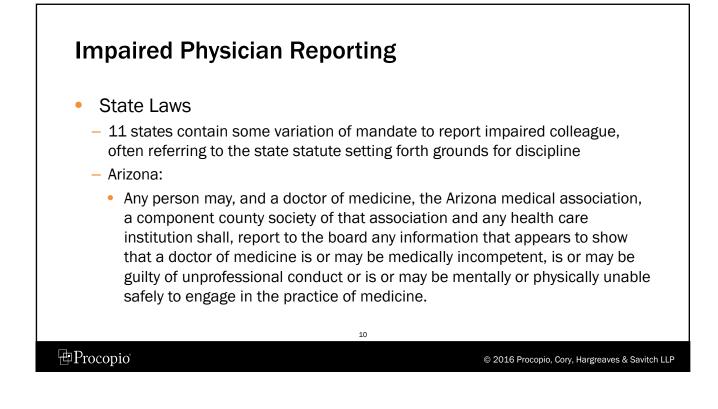
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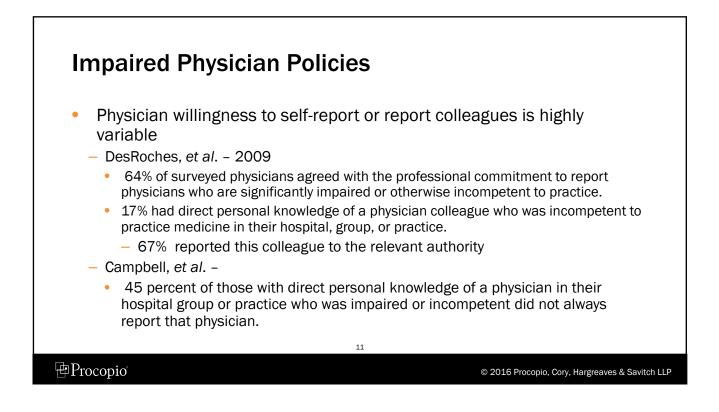






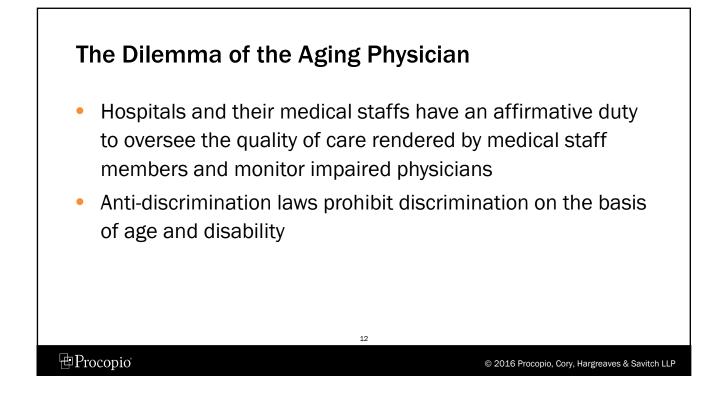
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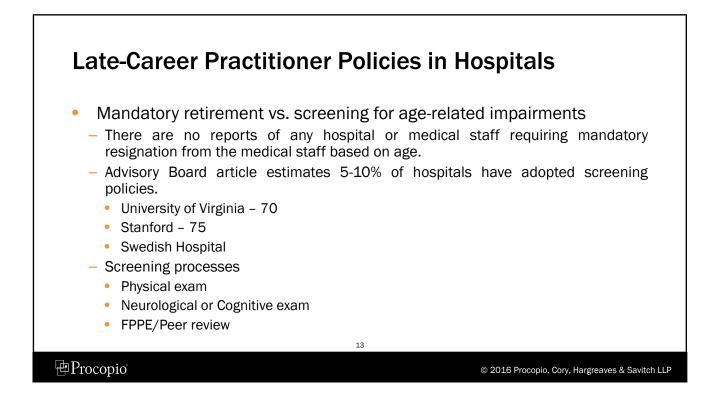






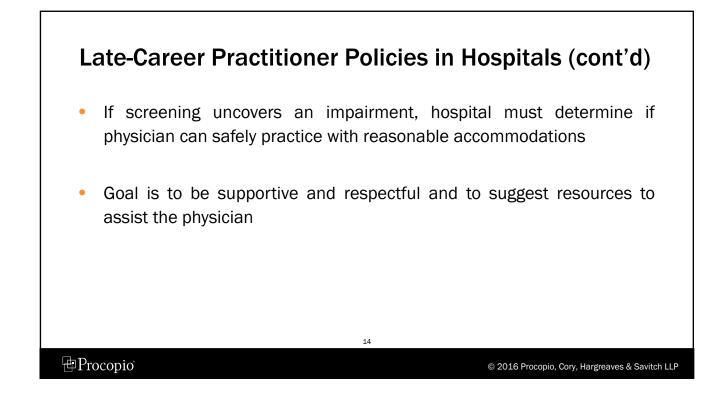
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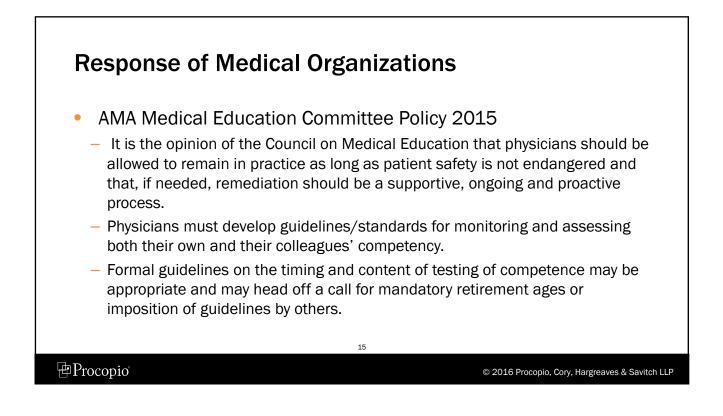






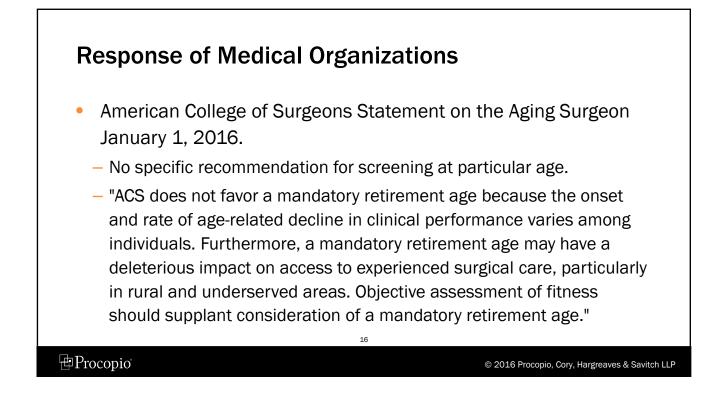
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History of Age Discrimination Laws

• Civil Rights Act of 1964 signed into law by Lyndon B. Johnson on July 2, 1964

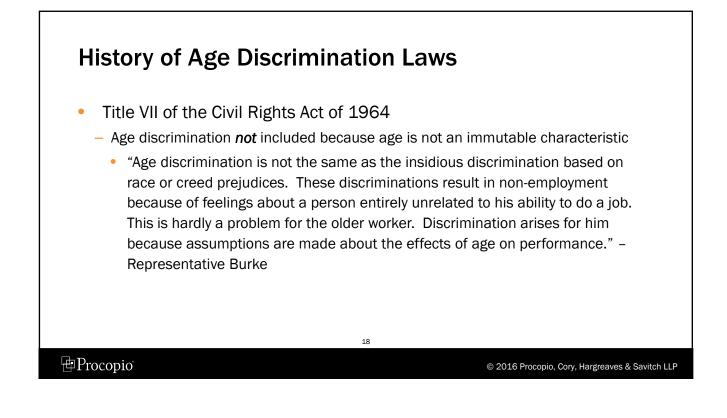


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History of Age Discrimination Laws

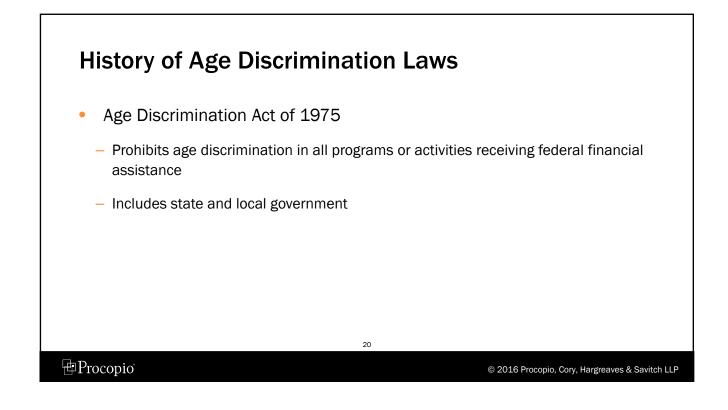
- 1967 Age Discrimination in Employment Act ("ADEA")
 - Prohibited age discrimination for individuals ages 40-65
 - Employers may not "fail or refuse to hire, or fire, any worker based on age"
 - Applied to employers with more than 20 employees
 - Did not apply to states or local governments
 - Administration and enforcement by U.S. Dept. of Labor

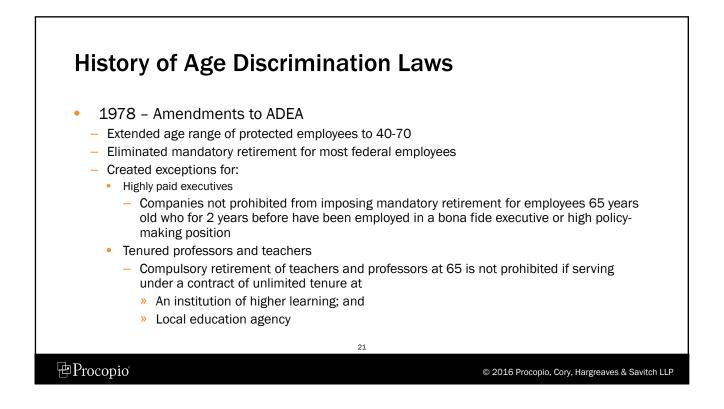
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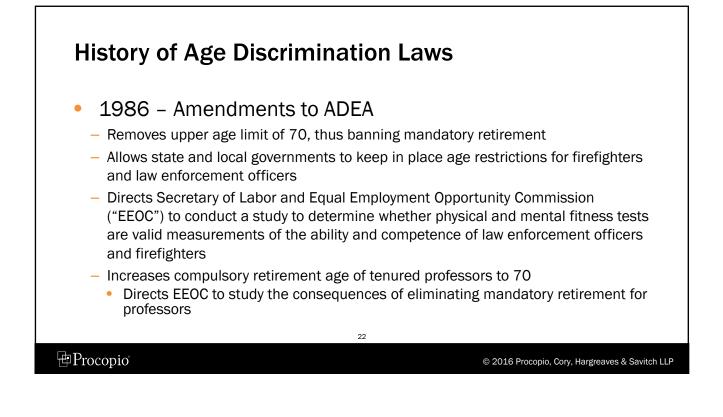
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History of Age Discrimination Laws

1990 - Older Workers Benefit Protection Act

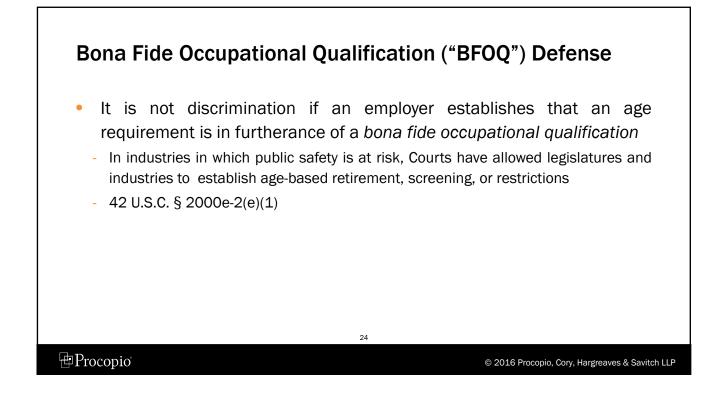
- Protects older workers from discrimination in implementation of employee benefit plans
- Prohibits reduction in benefits based on age such as life insurance, health insurance, disability benefits, etc.

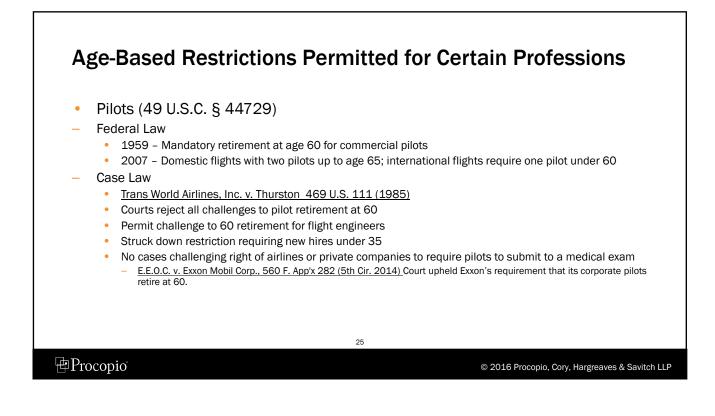
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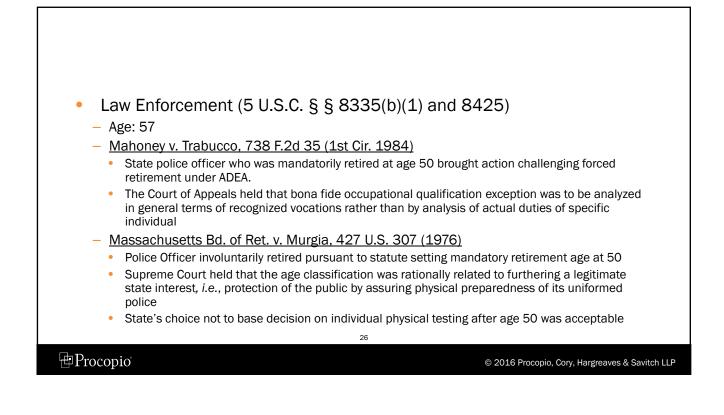
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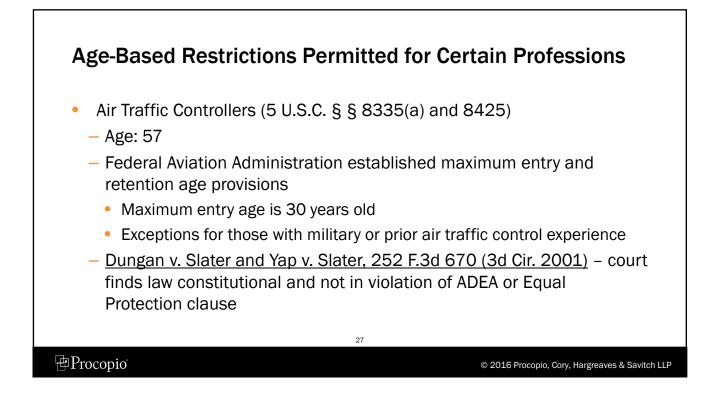






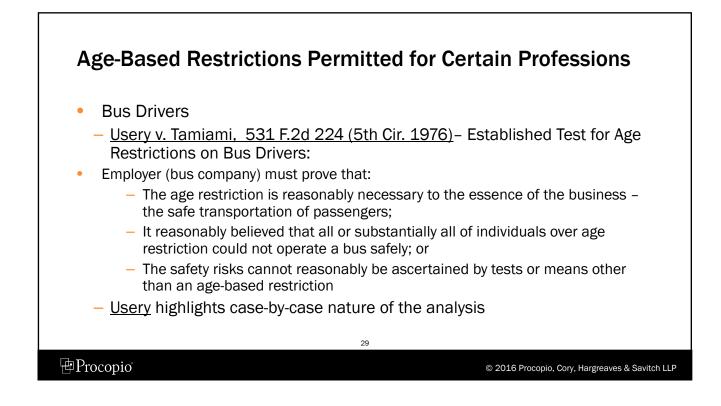
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Additional Age-Based Restrictions Permitted for Certain Professions

Firefighters

5 U.S.C. § § 8335(a) and 8425

- Tenured Professors
 - Certain states like California (Cal. Gov. Code § 12942(c)) and New Jersey (N.J.S.A. 10:5–2.2) allow higher education institutions to impose retirement policies for tenured faculty members
- Judges
 - 33 states and District of Columbia have mandatory retirement ages; Majority of states require that judges retire at 70, Vermont allows Judges to serve until age 91. (4 V.S.A. § 609.)

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- High Policy-Making Executives
- 29 CFR 1625.12
- Law Firms
- Physicians?
 - Cal. Gov't Code § 12942(c)

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Challenges to Age-Based Screening

- E.E.O.C. v. Com. of Mass.
 - 858 F.2d 52 (1998)
 - Court strikes down Massachusetts law requiring all state employees over 70 to take an annual physical examination as violation of the ADEA

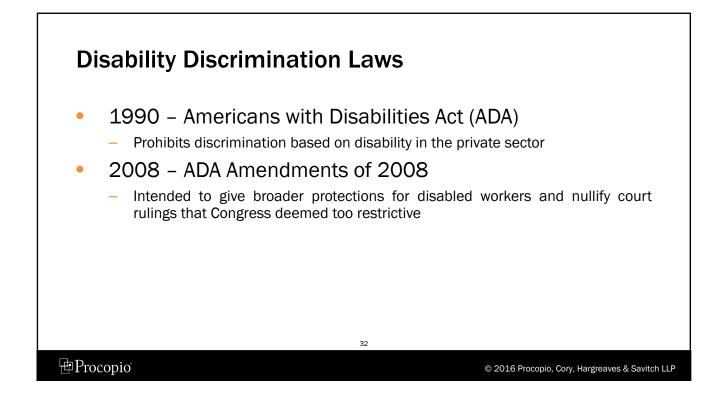
• Epter v. New York City Transit Authority

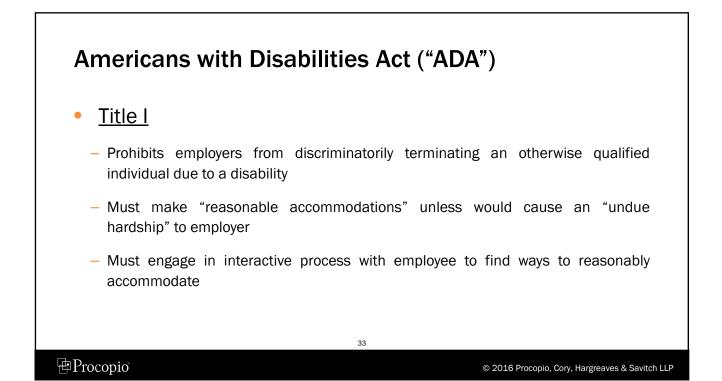
- 216 F.Supp.2d 131 (2002)
- New York Transit Authority policy of requiring all candidates over 40 seeking promotion to undergo a physical exam is discriminatory on its face
- Court distinguishes cases where public safety is involved e.g. police officers

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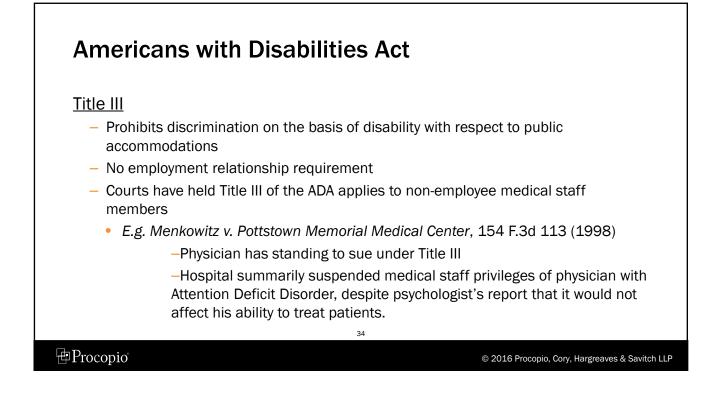
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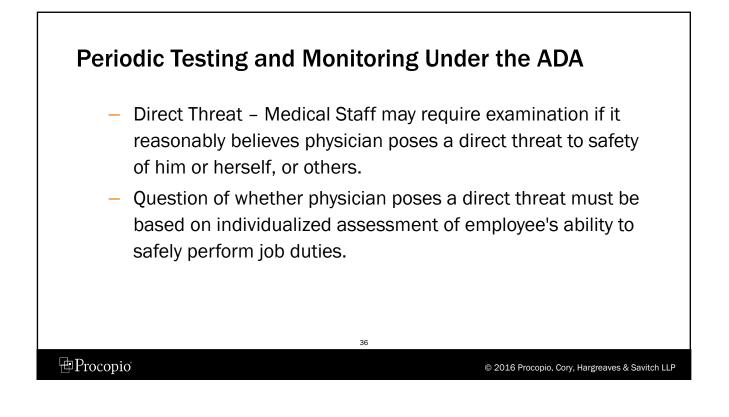


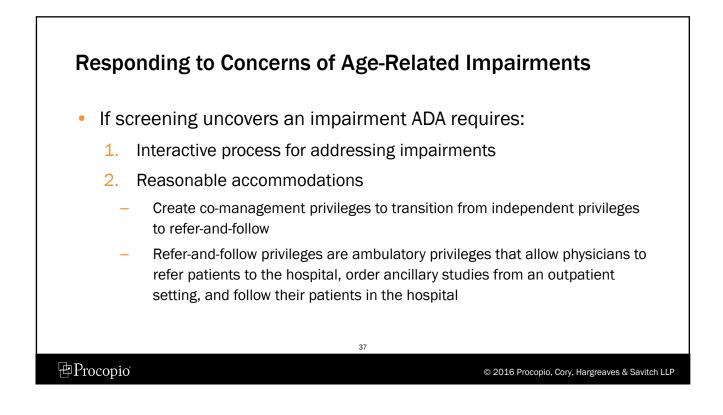




- Job related and consistent with business necessity
- Generally, a medical staff can request an examination and documentation from a member regarding a disability so long as it is reasonably related to job functions and based on reliable information that clinical performance and/or safety may be impaired.













Richard D. Barton, Partner

Practice Areas	Health Care
	Litigation
	Native American Law
Admissions	California
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Direct Fax	619.744.5499
Email	rick.barton@procopio.com

Professional Summary

Richard D. Barton has represented healthcare providers and health systems for more than 30 years. Richard's consulting and litigation practice focuses on health systems, hospitals, health associations, physician groups and individual healthcare providers. He is experienced in assisting provider organizations with their quality oversight compliance obligations and governance. He also serves as an Adjunct Professor of Law for the University of San Diego School of Law teaching Health Law and Policy.

Recognitions

- The Best Lawyers in America® 2007-2015 (Medical Malpractice Law Defendants, Personal Injury Litigation Defendants)
- Martindale-Hubbell® AV Preeminent Rating
- San Diego Super Lawyers® 2007-2015 (Health Care)
- San Diego Magazine's Best Lawyers
- ADL Torch of Liberty Award
- "Top Lawyers," San Diego Magazine, 2013 2015
- "Southern California Super Lawyers," Super Lawyers Magazine, Southern California 2014

Community

- University of California President's Advisory Council on Campus Climate, Culture, and Inclusion (2010-2012)
- American Board of Trial Advocates
- Anti-Defamation League San Diego Regional Advisory Board Chairman (1998-2002), ADL National Commissioner (2000 to present), National Executive Committee (2002 to present), Vice Chair of International Affairs (2003-2006), National Chair of Leadership (2006-2009), National Chair of Education (2009-2012), Chair Education Equity Task Force (2012 to present)
- Litigation Counsel of America Fellow
- San Diego County Bar Association and San Diego County Medical Society Co-Founder Joint Medical Legal Committee
- National Immigrant Women's Advocacy Project Board Member



• International Association of Judicial Independence and World Peace International Project of Judicial Independence – Member

Education

- JD, University of Southern California Gould School of Law, 1981
- BA, University of California, Los Angeles, 1977

News Coverage

• Clark, Cheryl. "Out to Pasture: Age-Based Personnel Policies Rankle With Docs," *MedPage Today*, July 30, 2015.

Seminars

Rick has been a guest lecturer at the University of San Diego Law School, California Western School of Law, University of Vermont School of Law, Dartmouth College, San Diego State University and is a regular guest speaker on health care issues at venues around the country. He has lectured and is a regular speaker on the conflict in the Middle East, Anti-Semitism, Holocaust, Religious Freedom in the U.S. and Church-State issues.

- Co-presenter. "Impact of Recent Regulatory Changes on Medical Staff Bylaws: Proposed Amendments and Best Practices," Strafford Productions, San Diego, CA, March 3, 2016.
- Sharp Healthcare Medical Staff Leadership Retreat, January 22, 2016.
- Co-presenter "Navigating Health and Safety Code Section 1278.5," ACC-SD, San Diego, CA, August 26, 2015.
- "Managing the Multiple Layers of Physician Oversight," CAMSS Desert Chapter, 16th Annual Educational Conference, August 14, 2015.
- "Legal Aspects of Assessing the Aging Physician", Federation of State Physician Health Programs, Inc. -Annual Education Conference & Business Meeting - April 25, 2015.
- Medical Staff Boot Camp Sharp Memorial Hospital New Department Chair Orientation, February 10, 2015.
- "Managing the Multiple Layers of Physician Oversight," 2015 CAMSS 44th Annual Education Forum, Universal City, CA, May 20, 2015.
- "Legal Aspects of Assessing the Aging Physician," CMA OMSS Assembly, San Diego, CA, December 4, 2014.
- "Legal Aspects of Assessing the Aging Physician," CSHA Annual Fall Seminar, Los Angeles, CA, November 7, 2014.
- "Medical Staff Bootcamp Representing Healthcare Clients," California Western School of Law, San Diego, CA, October 20, 2014.
- Co-presenter. "SD Health Law Roundtable: To Report or Not Report Ending Relationships with the Employed or Contract Providers," ACC-SD, San Diego, CA, September 30, 2014.
- "Legal Aspects of Assessing the Aging Physician," SCCMA Workshop, San Jose, CA, September 27, 2014.
- Co-presenter. "Dismantling the School-to-Prison Pipeline," KPBS, San Diego, CA, September 16, 2014.
- Co-presenter. "Medical Staff Bylaws: Meeting New Medicare Conditions of Participation and Joint Commission Requirements," Strafford, Webinar, September 11, 2014.
- "Medical Records Training" Southern Indian Health Council, Alpine, CA, July 29 and August 14, 2014
- "Assessing the Aging Physician Legal Aspects," CPPPH, Los Angeles, CA, July 26, 2014.
- Co-presenter. "Meet Your Counterpart: Landmark Healthcare Legislation Revealing the Real Impact of the ACA 2014 Update," Association of Corporate Counsel, San Diego, CA, June 19, 2014.
- "Assessing the Aging Physician Legal Aspects," CPPPH, Oakland, CA, June 7, 2014.



- "The Dilemma of the Aging Physician: Legal and Practical Challenges," 43rd Annual CAMSS Education Forum, Sacramento, CA, May 9, 2014.
- "Assessing the Aging Physician Legal Aspects," CPPPH, Sacramento, CA, May 3, 2014.
- "Medical Staff Boot Camp," Sharp Chula Vista Medical Center, Chula Vista, CA, February 27, 2014.
- "The Dilemma of the Aging Physician: Legal and Practical Challenges," Association of Corporate Counsel, San Diego, CA, February 20, 2014.
- "Age-Based Policies for Physician Faculty: Legal and Practical Challenges," Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions Conference, Washington, DC, January, 23, 2014.
- "Legal Aspects of Assessing the Aging Physician," CPPPH, San Diego, CA, November 16, 2013.
- "Pursuing Quality Through Medical Staff and Physician Oversight: A Report from the Trenches," September 12, 2013.
- "Pursuing Quality through Medical Staff and Physician Oversight," Tri-City Board Training, San Diego, CA, July 10, 2013.
- "Promoting Quality Medical Management in Multi-Hospital Systems: A View from the Front Lines," CSHA Annual Meeting and Spring Seminar, Newport Beach, CA, April 13, 2013.
- "Pursuing Quality Through Medical Staff and Physician Oversight A Report from the Trenches," ACC-SD/Procopio Health Law Roundtable, San Diego, CA, January 31, 2013.

Publications

Rick served as the primary author of an Amicus Curiae brief to the California Supreme Court on behalf of Jewish and Islamic medical ethics scholars in Benitez vs. North Coast Women's Group in a nationally publicized matter involving the right of a physician to refuse treatment on religious grounds on the basis of a patient's sexual orientation. In his role in the Anti-Defamation League, Rick has traveled to the Middle East and Europe for meetings with officials of the Israeli Government, the Palestinian Authority, the United Nations and European Governments. He has served as a contributor to the San Diego Union Tribune on the Israeli Palestinian conflict and Anti-Semitism.

- Contributor. "Assessing Late Career Practitioners: Policies and Procedures for Age-based Screening," California Public Protection and Physician Health, Inc., 2015.
- "Whistleblowers and the California Supreme Court's Decision in Fahlen v. Sutter Central Valley Toward a Workable Balance for Promoting Advocacy for Patient Care," *The Legal Secretary*, February 2015.
- Co-author with Jamie D. Quient. "The Single Shared Governing Body in Multi-Hospital Systems CMS Revisions to 42 CFR 482.12 in a Climate of Change," The American Health Lawyers Association MedStaff News, April 2013.



Health Care

Lawyers in our Health Care practice represent many groups comprising the healthcare industry including hospitals, physician groups, Health Maintenance Organizations (HMOs), County Organized Health Systems (COHSs), public agencies, medical equipment and device companies and ancillary providers. Our healthcare attorneys are frequent speakers and authors on a wide range of healthcare issues and stay up to date by participating in professional and industry organizations such as the California Association Medical Staff Services (CAMSS). We also provide legal analysis for a California task force reviewing the issue of aging physicians.

Our Services

Our healthcare attorneys provide counsel on a wide range of issues including:

- Accreditation, Licensing and Certification
- Billing and Payment
- Business and Transactional Matters
- Fraud and Abuse
- HIPPA, Privacy and Security
- Labor
- Laboratories
- Healthcare litigation
- Managed Care
- Medical Staff
- Medical Technology
- Public Agency
- Regulatory and Governmental Compliance

Business and Transactional Matters

- Facilitation work for affiliation of healthcare organizations
- General corporate issues
- Mergers and acquisitions
- Corporate reorganizations
- Taxable and tax-exempt financing for public and private healthcare providers
- Vendor contract negotiation
- Intellectual property issues
- Tax, including nonprofit tax matters
- Antitrust analysis
- Real estate and land use matters

Representative Matters

Whistleblower. Represented our client against a physician plaintiff who brought a claim under Health & Safety Code Section 1278.5. We pursued a strategic and investigative approach and were successful in demonstrating that the plaintiff's whistleblower claims were without merit. In a mere 3 ½ hours after a 4-week trial, we secured a unanimous verdict in favor of our client.