STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
LABOR BUREAU

May 13, 2020

VIA ELECTRONIC MAIL

Ramon J. Rodriguez
President and Chief Executive Officer
Wyckoff Medical Center
374 Stockholm St.
Brooklyn, N.Y. 11237
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Re: Wyckoff Medical Center

Mr. Rodriguez:

The Office of the New York Attorney General (the "Attorney General") has received information suggesting that Wyckoff Medical Center ("Wyckoff") retaliated against its employees whom raised concerns that Wyckoff unnecessarily risked the health and safety of staff members at its Positive Heath AIDS/HIV ambulatory clinic (the "Clinic"), some of whom are themselves immunocompromised or suffer from chronic health conditions, and the Clinic's immunocompromised patient. While understanding that Wyckoff is faced with many challenges during the COVID-19 pandemic, allegations of retaliatory action by Wyckoff against its employees is of grave concern.

Wyckoff Medical Center's Retaliation Against Its Employees Who Complained About Safety Conditions

The Attorney General has received information that strongly suggests Wyckoff violated its obligations under New York Labor Law's whistleblower protection provisions by retaliating against employees who raised concerns about Wyckoff's compliance with Executive Order 202.8 concerning telecommuting and the health risks resulting from Wyckoff's redeployment protocol to the immunocompromised patients at the Clinic.

Under New York Labor Law Section 740, an employer is prohibited from taking retaliatory action against an employee who "discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety." NY Lab. L. § 740(2)(a). An employer is also prohibited from taking retaliatory action

against an employee who "objects to, or refuses to participate in any such activity, policy or practice in violation of a law, rule or regulation." NY Lab. L. § 740(2)(c).

Section 740 protects employees who make complaints to their supervisors or to the Attorney General that their employers failed to comply with Executive Order 202.8, an emergency order designed to contain the public health crisis resulting from the COVID-19 outbreak. A party prevails on a claim under Section 740(2)(a) when it demonstrates that "(1) [the employee] disclosed or threatened to disclose an activity, policy, or practice of his employer to a supervisor or public body, (2) the underlying activity, policy, or practice constituted an actual violation of a law, rule, or regulation, and (3) the violation presented a substantial and specific danger to the public…. [and] a causal nexus—i.e., that the adverse employment action was taken 'because' of his disclosure or threatened disclosure of the violation." *Rivera v. AffinEco LLC*, No. 16 Civ. 7621 (RJS), 2018 WL 2084152, at *3, S.D.N.Y. Mar. 26, 2018). Under the Labor Law, adverse action is established when "it well might have dissuaded a reasonable worker" from complaining about a Labor Law violation. *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 472 (S.D.N.Y. 2008) (adopting standard in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) in Labor Law retaliation analysis)). In a case brought under section (2)(c), the first element would be to establish that the employee objected to or refused to participate in such an illegal activity, policy or practice; other elements would be the same.

The Labor Law also contains specific whistleblower protections for employees who "perform healthcare services" and "disclos[e] or threate[n] to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care." NY Lab. L. § 740(1)(a). The statute defines "improper patient care" as "any law, rule, regulation or declaratory ruling adopted pursuant to law, where such violation relates to matters which may present a substantial and specific danger to public health or safety or a significant threat to the health of a specific patient." *Id.* at § 740(1)(d). The elements of a claim under Section 741 mirror those under Section 740, except that "[a] cause of action alleging a violation of Labor Law § 741(2) differs from a cause of action alleging a violation of Labor Law § 740(2) in that such a complaint is required to allege *only a good faith, reasonable belief* that there has been a violation of the applicable standards, rather than an actual violation." *Minogue v. Good Samaritan Hosp.*, 100 A.D.3d 64, 70 (2d Dep't 2012) (emphasis added).

Our preliminary investigation indicates that after the Clinic's Director, Laurel Young, and staff members complained to members of Wyckoff's management about the unlawful and hazardous nature of Wyckoff's redeployment protocol – specifically that the protocol did not comply with the Governor's work from home directive under Executive Law 202.8 and that it compromised the well-being of Clinic patients and staff in violation of patient care standards under relevant state and city regulations – we understand that Wyckoff swiftly retaliated against employees for making these protected complaints.

First, Wyckoff initially effectively suspended Ms. Young for expressing reservations about the adequacy of patient care under the protocol and other concerns of the staff she supervised. On April 6, 2020, Ms. Young raised her concerns to Mr. Rodriquez and Ms. Cornelius that the protocol placed the Clinic's vulnerable patients at increased risk of exposure, reduced the Clinic's capacity to serve these patients, and required the Clinic's office employees to perform tasks for which they

were not trained. On or about April 15, fewer than 10 days later (and only two days after arriving back to work after being out on account of illness), Wyckoff stripped her of her Director title and her supervisory duties and placed her under investigation by Human Resources—leaving the Clinic without a director and with no plan for an alternative person to perform her duties. *See Kessler v. Westchester Cty. Dep't of Soc. Servs.*, 461 F.3d 199, 207 (2d Cir. 2006) (diminished job title and responsibilities constitutes actionable retaliation). On April 22, Ms. Young was informed that once her reassignment tasks are complete, another party has been appointed as Administrator of the Behavioral Health Department and the Positive Health Clinic and that Ms. Young will report to this person as her supervisor. We understand that Ms. Young's pay will also be reduced as a part of the demotion.

Wyckoff threatened adverse consequences to other staff members, including employees in the care coordination, patient services, social work, and administrative factions of the Clinic, who raised similar concerns about patient care and safety. These staff members also expressed opposition to the redeployment protocol on the basis that it revoked the work from home plan that had been approved by the CMO and violated Wyckoff's obligation to maximize telecommuting under the Executive Order and threatened to leave the Clinic's patients under-served. On or about April 6, 2020, Wyckoff threatened to fire or place on unpaid leave employees who continued to question the redeployment protocol. In an email, you stated that "anyone [sic] not deployed officially by the end of this day is out of work . . . [i]f staff refuses the assignments they will be placed on unpaid furloughed [sic] effective tomorrow." Human Resources Direct Margaret Cornelius also emailed Ms. Young confirming that "[i]f staff refuses the assignments they will be placed on unpaid furloughed [sic] effective tomorrow." Ms. Cornelius also stated that "[i]f the staff refused the assignment it will be considered insubordination and will not be able to use PTO [paid time off]." *See Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 26 (2d Cir. 2014) (threatened job loss constitutes actionable retaliation). In one instance, you raised your voice and shouted threats of physical violence and made violent gestures toward an employee, saying that "you better have come back [from remote work]. I was about to go grab your neck to get you here" in front of a group of her colleagues, as well as stating that she "talk[s] too much" and is "disrespectful." *See Tournois v. Waterloo Premium Outlet/Simon Prop. Grp.*, Inc., No. 12 Civ. 6501T, 2013 WL 3936465, at *5 (W.D.N.Y. July 30, 2013) (verbal abuse and unwanted scrutiny constitutes unlawful retaliation).

Additionally, many employees from the Clinic who complained were ultimately assigned tasks that were among the most hazardous in the hospital, including transport of corpses and cleaning contaminated areas, for which they had no prior training. *See Hill v. Rayboy-Brauestein*, 467 F. Supp. 2d 336, 363 (S.D.N.Y. 2006) ("The assignment to arduous tasks, even without a change of job title, is one type of adverse action that could deter [engagement in] protected activity"). Clinic staff were initially assigned to social work and nursing duties at the hospital. On or about April 8, 2020, two days after Ms. Young complained about the redeployment protocol, and the same day Mr. Rodriguez engaged in a verbal altercation with another staff member, Wyckoff advised them of their reassigned tasks, effective the following day, including "sweeping the staircase, emptying garbage cans from outside patient rooms and disposing the refuse into the dumpster, sweeping the elevators, moving patients between departments and the deceased from the floors into the trailers."

Wyckoff's actions sent a clear message to all hospital staff that any complaints about the redeployment protocol, even those concerning the health and well-being of patients and staff, would not be tolerated.

Wyckoff's Obligations under Executive Order 202.8

Under Executive Order 202.8, commonly referred to as "New York on Pause," "an entity providing essential services or functions . . . may operate at a level necessary to provide such service or function." The Order provides that all businesses, including essential businesses, are under an obligation to "utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize."

As part of the New York on Pause Order, Governor Cuomo also instructed that individuals that are over 70 years of age, over 50 years of age with a pre-existing health condition, or persons of any ago who are immunocompromised are to remain indoors and not to take public transportation unless "urgent and absolutely necessary."[1] This directive is commonly referred to as "Matilda's Law." As the Executive Order specifies, such action is necessary "in order to facilitate the most timely and effective response to the COVID-19 emergency disaster."

Wyckoff's Redeployment Protocol Implementation Raises Concerns About Its Compliance with the Executive Order

Preliminary information gathered from our investigation suggests that Wyckoff at no time implemented a systemwide measure that would maximize remote work to the extent possible, as directed by the Order. However, we further understand that on March 21, 2020, pursuant to Executive Order 202.8, Wyckoff's Chief Medical Officer, Gustavo Del Toro, approved a work from home plan for social workers and non-medical staff at the Clinic, which successfully permitted those staff, approximately 45 in total, to serve patients full-time while rotating staff to serve in-person patient needs only to the extent necessary, thus reducing the risk of exposing patients to infection.

It is our understanding that despite this, on March 30, 2020, Wyckoff revoked the work from home plan by issuing a redeployment protocol that required Clinic staff to report in-person to their regular job posts and be available for additional work throughout the hospital. Wyckoff may re-assign staff as necessary to respond to emergency conditions at the hospital. However, our office is concerned that certain of Wyckoff's decisions were not necessary and that re-assignment decisions were implemented in a manner that endangered both staff and patients. Particularly concerning is Wyckoff's statement to managers that "[a]ll of [your] people who are able-bodied and working from home, need to come into [your] facility" and further that "all of the staff who are sick need to be cleared by employee health, this is not the time for anyone to walk away from their responsibility and their duty."

Our preliminary investigation raises concerns that Wyckoff's broad redeployment plan for all employees, even office workers and social workers in the Clinic who can perform their duties effectively via phone and computer, did not comply with Executive Order 202.8 because it failed

[1] https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order

to maximize work from home to greatest possible extent. As the Empire State Development Office has explained that, "to the maximum extent possible, employees needed to support [essential services] (i.e. human resources, accounting, legal, etc.) are still required to utilize telecommuting or work from home procedures to the maximum extent possible."[2] Mandatory redeployment is particularly concerning for those over 70 or those employees with preexisting medical conditions, which are groups of high-risk persons highlighted by the Governor under Matilda's Law. We understand that in the first week of April, the Clinic's Interim Director, Laurel Young, raised these concerns.[3]

Moreover, because the redeployment protocol requires Clinic staff to travel back and forth daily from areas of the hospital contaminated from COVID-19 to receive potential additional assignments, it subjects the Clinic's immunocompromised patients and staff to unreasonable risk of exposure. As you know, the virus is particularly deadly for those with compromised immune systems and the New York City Department of Health and Mental Hygiene has issued guidance directing healthcare providers to minimize in-person care where possible.[4] Wyckoff's failure to mitigate the risk of exposure and violation of relevant guidance appears to be inconsistent with the requirements governing care of patients with HIV/AIDS. *See* 10 N.Y.C.R.R. 420.3. Additionally, because employees are called away to perform other assignments during the day, it is our understanding that the Clinic is now understaffed and struggles to meet the needs of its patients. *See* DOHMH Guidance (stressing the need for healthcare providers to maintain vital services for the vulnerable HIV/AIDs-affected population during this pandemic). Ms. Young and other Clinic staff raised these concerns about improper patient care with Wyckoff management in or around April 6, 2020.

Finally, the redeployment protocol required non-medical employees to perform tasks for which they lacked adequate training. For example, case managers, prevention counselors, and other office staff that were assigned to cleaning tasks are unfamiliar with the procedures for donning and doffing personal protective equipment ("PPE") and are at increased risk of placing PPE on contaminated surfaces during breaks or mistakenly moving a contaminated item from one part of the hospital to another. Preliminary information supplied to our Office suggest that other, experienced staff were available to serve these functions. Ms. Young and other Clinic staff raised these health and safety concerns to Wyckoff management in or around April 6, 2020.

Wyckoff's Conduct Deters Employees From Complaining About Safety Conditions

Wyckoff's retaliation against employees in the Clinic has significant consequences. Wyckoff's suspension and later demotion of the Clinic's director and threats against its staff discourages other employees from raising concerns about the well-being of patients and colleagues. As the Second Circuit has explained, "[a] retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights." *Holt v. Cont'l*

[2] *See* Empire State Development Corporation, Coronavirus Essential Employer FAQs, Question 9, available at: https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf

[3] While many Clinic patients can be served remotely under the work from home plan, and continue to be, some of them must receive services in-person. Up to approximately 10 patients who receive in-person care are in proximity of all the employees present at the Clinic.

[4] *See* New York City Dep't Health and Mental Hygiene, "Maintain HIV and STI Services and Minimize In-Person Care During COVID-19 Outbreak" (2020) (DOHMH Guidance).

Grp., Inc., 708 F.2d 87, 91 (2d Cir. 1983). *See also Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (under the Fair Labor Standards Act, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240, (1978) (under the National Labor Relations Act, "[t]he danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage."). Courts have widely recognized that an employee's discharge is often designed to, and has the effect of, sending a severely chilling message to the rest of the workforce: a reason "reinstatement for unlawfully discharged employees is routinely granted as part of . . . injunctive relief [is] to prevent the 'chilling effect' that otherwise takes hold among remaining employees." *NLRB v. Sprain Brook Manor Rehab*, LLC, 91 F. Supp. 3d 531, 547 (S.D.N.Y. 2015) (citing *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir.1980)). This is a particularly dangerous message to send during a pandemic, when chilling worker speech about health and safety could literally be a matter of life and death.

Wyckoff Medical Center Should Immediately Cease and Desist from Engaging in Any Conduct that is Inconsistent with Executive Order 202.8 and New York's Labor Laws and Remedy and/or Mitigate Actions Repressive of Employee Speech

The Attorney General communicated its concerns about Wyckoff's conduct described in this letter on April 16, 2020, but Wyckoff has yet to take and/or communicate that is has taken adequate remedial steps. The Attorney General directs Wyckoff to cease and desist from any illegal conduct alleged in this letter. Specifically, the Attorney General suggests that Wyckoff (a) reinstate a work from home plan that maximizes telecommuting for all employees at the hospital, effective immediately; (b) reinstate Ms. Young as the Director of the Clinic; and (c) notify all Clinic employees that they may raise concerns about Wyckoff's compliance with the Executive Order, health authority guidance, and patient care without fear of reprisal. Please provide the Attorney General with a written description of Wycoff's remedial effects and documentation evidencing its corrective measures and/or compliance.

This information must be received by May 15, 2020, by electronic mail to Brittany.Haner@ag.ny.gov.

Sincerely,

s/ Brittany M. Haner

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