

# Management Liability Coverage:

Putting the healthcare industry's risk under the microscope.



Healthcare



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## Executive summary.

From hospitals and ambulatory care centers, to senior living facilities, physician networks, clinics and labs, a full spectrum of healthcare industry participants benefited immensely from new technological advancements—in both the administration and documentation of care. But with a rapid increase in vertical integration and M&A activity, coupled with an evermore complicated regulatory environment, participants now find themselves facing a greater complexity and diversity of liability risks. This environment is further complicated by an increasing shortage of qualified workers as the industry struggles to keep up with increased demand—all while maintaining the highest standards for patient safety and quality of care.

Recent increases in class actions, ethical and harassment-related complaints, as well as a changing social media, technology and cultural environment make it more challenging than ever to prepare for tomorrow's risks with a properly planned response.

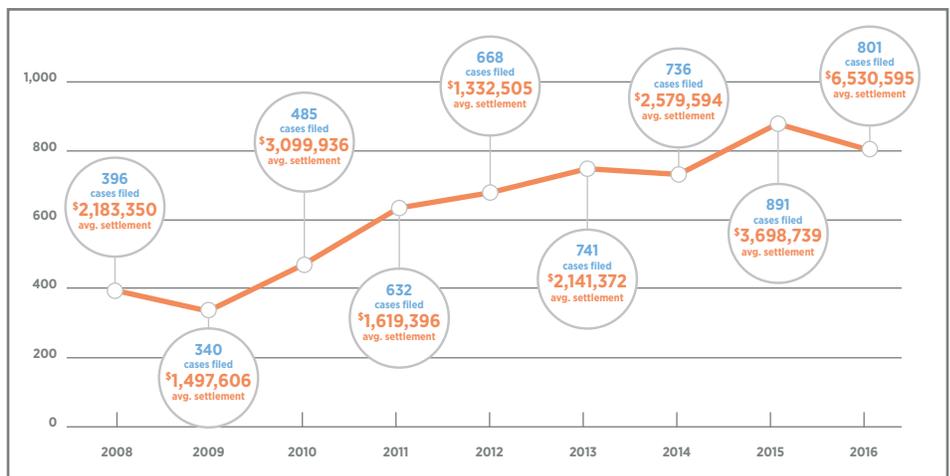
Liability exposures facing most healthcare organizations do not discriminate based on size, revenue, intention or location. This paper outlines the management liability landscape for the healthcare industry, as well as best practices and industry-leading solutions for mitigating those risks. Further, it provides examples of how Gallagher helps clients in the industry better understand, plan for and manage their exposures while identifying and bridging their coverage gaps.



## The time to act is now.

Any change to the regulatory environment presents a new set of challenges for any industry. When a federal law brings about sweeping change, it necessitates an industrial transformation. Such was the case in the healthcare industry with the passage of the Affordable Care Act. Already facing razor-thin margins and an environment of mergers, acquisitions and consolidations, many healthcare organizations were inadequately prepared to address the emerging management liability risks associated with the new law, thus increasing their exposure to claims and litigation.

According to a recent report by Advisen, *Coverage in an Age of Healthcare Change and Uncertainty*, between 2008 and 2016 the average award or settlement of management liability cases in the healthcare industry rose by more than 300%, while the number of annual filings more than doubled.



Healthcare segments included in the above data represent the following: Aging Services • Allied Healthcare Facilities • Doctors, Nurses and Dentists • Hospitals (less than \$1 billion in revenue) • Life Science Lines of business included: Directors & Officers • Employments Practices Liability • Fiduciary • Crime • Kidnap & Ransom<sup>1</sup>

<sup>1</sup>Source: "Coverage in an age of healthcare change and uncertainty" Advisen

30 percent of female doctors have been sexually harassed, compared with 4 percent of men.<sup>4</sup>

## The proof of risk is in the claims.

In a 2017 whistleblower case, a New York hospital operator paid to resolve allegations it engaged in improper financial relationships with referring physicians. Relationships included compensations and lease arrangements that did not comply with Stark Law. The operator agreed to a \$4 million settlement, including a \$600,000 payment to the informant.

Also in 2017, a large privately held long-term elderly care company and its owner agreed to pay \$145 million to settle allegations that it caused skilled nursing facilities to submit false claims for rehabilitation therapy services that were not reasonable, necessary or skilled. This was the largest civil settlement with a skilled nursing facility chain in the history of the False Claims Act.<sup>2</sup>

## Growing problems for the largest economic segment.

A recent article in *The Atlantic* magazine highlights the fact that healthcare became the largest U.S. employer by segment in 2017.<sup>3</sup> And the healthcare workforce is expected to grow 18% from 2016 to 2026 according to the U.S. Bureau of Labor Statistics. With an increase both in market share and absolute number of employees, healthcare organizations are facing increased pressure to identify emerging risks and address them before they become costly claims.

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<sup>2</sup> Department of Justice Office of Public Affairs Press Release Accessed May 22, 2018.  
<https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>

<sup>3</sup> Thompson, Derek, "Healthcare Just Became the U.S.'s Largest Employer" Accessed May 22, 2018.  
<https://www.theatlantic.com/business/archive/2018/01/health-care-america-jobs/550079>

<sup>4</sup> Chuck, Elizabeth "MeToo in medicine: Women, harassed in hospitals and operating rooms, await reckoning" Accessed May 22, 2018  
<https://www.nbcnews.com/storyline/sexual-misconduct/harassed-hospitals-operating-rooms-women-medicine-await-their-metoo-moment-n846031>

In 2017, nonprofit hospital rating downgrades rose sharply, with 41 credit downgrades and 12 credit upgrades, compared to 32 downgrades and 21 upgrades in 2016.

## What's driving the risk?

Healthcare employment is undergoing a transformation period among physicians, with women now making up more than half of new medical student enrollees. In addition to the aforementioned gender disparities, many current employees have salaries significantly higher than the median salaries that form the basis for historical retentions. Claims involving high wage earners pose a significant risk, as the process can be lengthy and costly to defend, regardless of the outcome. Additionally, the healthcare industry is subject to the trends of the broader employment universe and, as a leading employer, profoundly impacted by movements such as #MeToo.<sup>4</sup>

In 2017 nonprofit hospital rating downgrades rose sharply, with 41 credit downgrades and 12 credit upgrades, compared to 32 downgrades and 21 upgrades in 2016. Moody's attributed the credit stress in 2017 to rising labor and supply costs, coupled with a low revenue growth environment.<sup>5</sup> This phenomenon continues to fuel M&A activity as organizations scramble to maintain viability or align themselves with other organizations benefiting from a stronger financial foundation. With realignment comes a host of new challenges at every level of management, for everything from office culture amalgamation to regulatory compliance and crisis response. The high-pressure environment enhances the difficulty of managerial decision making, particularly as organizations attempt to navigate FTC enforcement.

Investigations under the False Claims Act, which enable the U.S. Department of Justice to recover funds associated with false and fraudulent claims against them, are costly to defend. Of the \$3.7 billion recovered in 2017, \$2.4 billion came from the healthcare industry—including drug companies, medical device companies, hospitals, nursing homes, laboratories and physicians.<sup>6</sup> These claims and level of activity are expected to continue under the administration.

As regulatory and financial hurdles continue to climb, some of the largest companies in America are disrupting the industry by taking at least some elements of healthcare into their own hands. Amazon, JPMorgan Chase, Apple, Uber and others are planning everything from proprietary clinics to exclusive health management partnerships. The uncertainty surrounding this potential sea change for the industry could further increase the financial impact of a liability claim, as competitors allocate resources to adapt as the industry shifts.

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<sup>4</sup> Paavola, Alia, "Moody's: Nonprofit hospital rating downgrades rose sharply in 2017" Accessed May 22, 2018. <https://www.beckershospitalreview.com/finance/moody-s-nonprofit-hospital-rating-downgrades-rose-sharply-in-2017.html>

<sup>6</sup> Department of Justice Office of Public Affairs Press Release Accessed May 22, 2018. <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>

Gallagher can help you develop a practical strategy to evaluate exposures and manage financial risk that complements and enhances any existing portfolio.

## Managing management liability risk requires an experienced partner.

An experienced broker is vital to help navigate the management and professional liability landscape, particularly in the dynamic healthcare industry environment. Equally important is a broad understanding of how management liability coverages fit into an organization's greater risk management needs. Gallagher can help you develop a practical strategy to evaluate exposures and manage financial risk that complements and enhances any existing portfolio. More importantly, we bring in the right healthcare experts, at the right time, to help our clients prepare for and mitigate risks they didn't even know they had.

## From prevention to protection, Gallagher is here for you.

With the rapid evolution of the #MeToo movement, traditional HR compliance training is no longer meeting workplace standards. Organizations must take a holistic approach that applies not only to the operation but also to the individual and the team. Gallagher provides tools and resources you can count on to help prevent a similar situation from occurring in your organization.

We evaluate all aspects of risk.

**CORE360™** is our unique comprehensive approach of evaluating our client's risk management program that leverages our analytical tools and diverse resources for customized, maximum impact on six cost drivers of their total cost of risk.



Ask a Gallagher broker for more information on how **CORE360™** can help you better manage your total cost of risk.

Gallagher's experience by the numbers:

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|---|--|---|
| <p><b>215</b><br/>management liability specialists</p>                                  |  | <p><b>26,000+</b><br/>clients</p>                                   |
| <p><b>\$200M+</b><br/>in improved claims recovery due to value-added claim advocacy</p> | <p><b>\$1.5B</b><br/>total premiums placed</p>                       | <p><b>61%</b><br/>experts with 10+ years experience</p>             |
| <p><b>44%</b><br/>client executives with 20+ years</p>                                  | <p><b>28%</b><br/>experts who spent entire career with Gallagher</p> | <p><b>15.9</b><br/>years of average client executive experience</p> |

Gallagher has eight attorneys on staff, with an average of 19.8 years of experience, that act as claims advocates. With customized management liability coverages and comprehensive assessments, coach and employee training, Gallagher can help your organization better understand and address the risks of harassment and discrimination, and build a workplace culture that respects, values and empowers your employees.

## About the Author.



**Natalie Douglass, Esq.** is the Chief Legal Director for Gallagher's Management Liability Practice. She is responsible for the leadership and growth of the practice, including the development of intellectual capital, negotiating enhanced coverage terms and assisting in best practices for coverage and exposure analysis.

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