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Leadership & Management

The unique governance challenges presented by the delta wave

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The unanticipated consequences of the "fourth wave" of the pandemic are colliding with important new case law to present a notable governance challenge for healthcare providers and their boards.

It's a challenge that evolves around increasing the information flow to the board on "mission critical" risks. With that, it's a challenge that invites further tension between the board and management. But it's a challenge that, with the combination of shared understandings on the one hand, and a few more formal governance processes on the other hand, can be readily addressed.

In the early months of the pandemic, it was appropriate for the board to "give a wide berth" to management in its handling of the crisis. So much was unknown, and there were risks of distracting management by excessive board involvement. If the board was being excessively deferential to management, didn't ask a lot of detailed questions, and didn't seek detailed information, the thinking was that it was all for a good reason.

That fiduciary model is probably not going to fly now. The infection and economic risks are more established, the science and the public health strategies more clear, the responsive landscape more tested. But the delta-driven surge continues the pandemic's presenting of serious issues that go to the core of the provider's patient care mission. They're issues with which, eighteen months into the crisis, boards and their key committees will want to be engaged.

They're issues for which a passive governance approach will no longer work. And they include, but are not limited to:

− Sharp increases in new COVID cases and community spread

− Unavailability of hospital beds for patients in need of traditional care

− The extent to which critical non-COVID care is being postponed

− Spiking COVD patient needs prompting rationalization of services

− The activation of "crisis standards of care"

− Relaxed licensing requirements, patient transfer orders and similar initiatives

− Significant levels of fatigue amongst healthcare workers and administrators

− Substantial workforce shortages, particularly amongst clinicians

− Lack of COVD awareness amongst the workforce

− The unwillingness of some clinicians to be vaccinated

− Challenges in reducing the number of vaccinated below 40% of the population

− Challenges in reaching the 80% "herd immunity" vaccination rate

− Confusion and conflicting guidance from public health agencies

− Declining levels of public support for healthcare workers

Some of these issues were certainly present in the pandemic's first wave, but many of these were not. Particularly unique among these is what the communications firm Jarrard, Inc. suggests as the "Tired of Being Your Hero" syndrome; i.e., the extent to which healthcare workers are leaving the profession, whether for reasons of burnout, stress, safety, moral harm — and in some cases a desire for "personal freedom" over all else. As Jarrard observes, "[T]hey're answering the question, 'Is it worth it?' with a decisive, 'No.'"

These are all issues with which, eighteen months into the crisis, boards and their key committees will want to be engaged. They're issues for which a passive governance approach will no longer work.

Had these issues arisen in the first wave of the pandemic, it would have been understandable (even if not desirable) if the board chose to "pass" on close briefing from management, out of deference to the challenges facing executive leadership. *We don't want to be a bother at such a critical juncture*. This, despite their obvious relevance to the board's financial, strategic, workforce culture and quality of care interests. But now, given recent changes in applicable case law, such "standing on the sidelines" could be risky from a board liability perspective.

That's because a series of recent decisions interpreting the important *Caremark* standard for director oversight underscore the need for boards and their committees to exercise careful monitoring of "mission critical" product safety risks.

Such monitoring should be designed to position directors and committee members to receive sufficient information on such risks as to alert them to potential "yellow flags" and "red flags" of warning.

These decisions have particular application to the healthcare industry and its monoline focus on patient care delivery, quality and safety. They speak loudly to the importance of making sure that these new delta variant risks are reported to the highest level of corporate governance authority, not just to that of operational subsidiaries. The board is perceived as having a need to be more informed and aware of these and similar risks, so it can exercise more focused oversight of management's response to the latest pandemic issues.

Enhanced board reporting commitments could be supplemented by high-quality reports on institutional COVID responses provided to healthcare consumers. Some leading health systems have provided detailed "playbooks" that serve to memorialize their pandemic response; e.g., documenting lessons learned from the first COVID wave; new challenges experienced during subsequent surges, and specific system safety interventions.

Addressing this might include the use of formal board structures (e.g., committee; task force) with specific responsibilities to monitor mission-critical risks such as those presented by the delta surge. It will be important to avoid circumstances in which the board is solely dependent upon management, or ad hoc procedures, for providing updates on mission-critical operational risks. In these and other ways, "playbook" style reports contribute to an organization's commitment of transparency to all of its constituents.

Fully engaged boards can be useful resources to executive leadership on difficult issues regarding patient safety, resource allocation, service delivery and procurement of suppliers, and the impact of the surge on pre-existing and planned financial and strategic initiatives. They can also be an effective partner to leadership in the interpretation of conflicting messages from the WHO, CDC, DOH and other regulatory bodies.

The current delta variant surge is creating a host of unanticipated consequences for healthcare providers and systems. New case law suggests that these consequences and similar should be shared with the board through formal reporting arrangements intended to position the board to exercise appropriate oversight of not just patient care and safety, but also other aspects of organizational operation materially affected by the surge. Engaged boards will likely welcome the opportunity to work closely with management on these and related surge issues.

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