

How Will the FTC Evaluate Pandemic-Weakened Hospitals?

David A. Argue

It would be a serious understatement to say that the COVID-19 pandemic and the public response to it has had an adverse impact on the hospital services industry. Recent estimates of the financial impact on

U.S. hospitals have been as high as \$200 billion in lost revenue and increased costs between March and June, with ongoing losses of \$50 billion a month. Whether these continuing losses bear out fully is still uncertain, but some hospitals likely will seek mergers in response to the losses they already have incurred. Although any such transaction should expect to receive no special treatment from the Federal Trade Commission (“FTC”) regarding failing- or failing-firm defenses, it may still be the best option available.

The pandemic has driven many hospitals well into negative profit margins. Treating COVID-19 patients required higher costs for staffing, supplies, and hospital operations, while state mandates prevented hospitals from providing elective surgical services. The financial pressure threatens to deepen as state governments cut Medicaid rates to help balance their budgets. Additionally, upcoming managed care contract negotiations for these hospitals may be affected by their financial weakness relative to health plans, which so far have been spared most of the adverse consequences of the pandemic. Stand-alone community hospitals, in particular, often lack the strong balance sheets of larger systems and are more prone to face financial crises. These weakened hospitals likely will seek the shelter of stronger systems. The FTC staff, however, has affirmed its intention to look skeptically at hospitals presenting pandemic-related failing firm justifications, and FTC Commissioner Wilson has promised broad scrutiny of all hospital transactions.

Some of the key questions the FTC will consider in reviewing hospital mergers related to the pandemic include how much will the cost increases abate as COVID-19 hospitalizations diminish, supply chain bottlenecks improve, and treatment plans evolve to rely on less of the high-cost intensive care, and how much cancelled elective hospital volume will emerge as pent-up demand in 2021. By all indications, the FTC will continue to demand high levels of proof for a failing-firm defense regarding the availability of other buyers or the feasibility of bankruptcy reorganization. Nevertheless, failing-firm arguments remain available to merging hospitals, along with arguments that a hospital’s pandemic-weakened financials condemns it to being an ineffective future competitor in the high-cost world of hospital competition. The hurdle for FTC approval is high, but some hospitals will have no choice but to leap.



EI Principal David A. Argue has extensive experience with competition in the healthcare industry, having taught, written and testified on the subject numerous times.

Also In This Issue

COVID-19 and Natural Experiments to Quantify Economic Harm

Stuart D. Gurrea discusses how an occurrence such as COVID-19 and policy responses to it can act as natural experiments from which to test and measure the impact of an alleged conduct on economic outcomes. Dr. Gurrea discusses how economists may establish the causal relationship between explanatory variables and an outcome of interest through actual world occurrences such as COVID-19. Dr. Gurrea considers a May 2020 ruling by the Wisconsin Supreme Court that abruptly ended the “Safer at Home” order by the Wisconsin Department of Health Service. Dr. Gurrea indicates that counties in Wisconsin subject to this change constitute a treatment group, while counties in other states where shelter-in-place orders remained in place provide a control group to measure the impact of lifting shelter-in-place orders. Dr. Gurrea also considers how varying policy responses across counties can be used as natural experiments in economic damages cases filed by employees based on alleged negligent responses to the pandemic.

Disparate Impact and Employment Actions During COVID-19

Erica E. Greulich discusses that in response to the COVID-19 pandemic employers continue to face unprecedented employment decisions across many industries and that employers should be mindful of the potential for these employment decisions to have disparate impact on employees and job applicants. For example, Dr. Greulich discusses how laying off a disproportionate number of part-time employees may adversely impact women. Dr. Greulich also discusses the statistical considerations that should be considered in determining whether a facially neutral selection process has disparate impact on a particular group. Dr. Greulich concludes that careful consideration and statistical analysis of COVID-19-related employment decisions can assist in preventing disparate impact on any particular group of employees.

COVID-19 and Natural Experiments to Quantify Economic Harm

Stuart D. Gurrea

Quantifying economic harm is predicated on establishing a causal relationship between the conduct at issue and an outcome of interest. Often, it is difficult to obtain experimental data to assess this relationship. An event like COVID-19 offers an opportunity to obtain quasi-experimental data for this purpose. Temporal and geographic variation in the incidence of the pandemic, and in policy responses to it, provide natural experiments to assess economic harm and damages.

To quantify the economic harm attributable to a conduct at issue, it is necessary to assess the causal link between the conduct and economic outcomes of interest such as market shares, sales revenues, profits, or royalty payments. To this end, economists typically adopt a *but-for* paradigm where the outcomes of interest are measured and compared with and without the conduct at issue. Defining and quantifying the outcomes of interest in a scenario without the conduct at issue can be challenging.

Economists may establish the causal relationship between explanatory variables and an outcome of interest through laboratory and field experiments. For example, in laboratory experiments, participants are randomly assigned to control and treatment groups. Random assignment is aimed at eliminating any systematic differences between the two groups other than the treatment itself, so that different outcomes between the control group and experimental group can be attributed to the treatment. Field experiments provide evidence by using a similar experimental design but implemented in the real world. For example, employment discrimination may be assessed through audit studies where success in applying for job vacancies is analyzed for selected pairs of applicants that differ only in their race, color, religion, sex, national origin, age, disability, or genetic information.

Generating laboratory or field experiments to measure a causal relationship is difficult, particularly in the context of litigation. Economic phenomena often are not amenable to laboratory experiments, and field experiments can be costly, complex, and time consuming to implement and evaluate. An occurrence such as COVID-19 and policy responses to it can act as natural experiments from which to test and measure the impact of an alleged conduct on economic out-



EI Principal Stuart D. Gurrea has been qualified in Federal Court as an expert witness in economics, quantitative analysis of survey data, and impact evaluation.

comes. Rather than relying on a laboratory or a field experiment in which an intervention is implemented by design, actual world occurrences can provide an analytical empirical paradigm analogous to a control-treatment experiment. Naturally occurring random differences in exposure to a government policy or other exogenous events define a treatment and a baseline (or control) group. Observational data on the outcomes for each group can be collected to quantify economic effects.

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For example, a May 2020 ruling by the Wisconsin Supreme Court abruptly ended the “Safer at Home” order by the Wisconsin Department of Health Service. This court-mandated lift of statewide COVID-19 shelter-in-place orders in Wisconsin has been used to assess the economic and health effects of these orders. Observational data to measure the effects of lifting shelter-in-place orders typically would only be available when certain thresholds are

met indicating low hospitalization or low contagion rates. The Court’s decision offers a unique opportunity to collect data where shelter-in-place orders are lifted but thresholds are not met. That is, evidence can be collected from instances where the lifting of shelter-in-place orders is exogenous and not dependent on the incidence of the pandemic. Counties in Wisconsin subject to this change constitute a treatment group. Data from counties in other states where shelter-in-place orders remained in place provide a control group to measure the impact of lifting shelter-in-place orders.

COVID-19 and policy responses to it have disrupted most areas of economic activity and have led to economic disputes. Yet, the variance in spread and different policy responses also provide opportunities to gather reliable empirical evidence from which to address damages questions. In particular, the behavioral response of interest at the center of an economic dispute may be examined by exploiting temporal and spatial variation in the spread of the pandemic

Disparate Impact and Employment Actions During COVID-19

Erica E. Greulich

In response to the COVID-19 pandemic, employers faced and continue to face unprecedented employment decisions across many industries throughout the United States. These decisions include whether to lay off or furlough employees, whether to change employees' pay or hours, as well as how to staff for partial or full re-openings. Besides concerns over profitability and the health of their employees, employers also should be mindful of the potential for employment decisions to have disparate impact on employees and job applicants. The Equal Employment Opportunity Commission ("EEOC") and Office of Federal Contract Compliance Programs ("OFCCP") are continuing to enforce and ensure compliance with employment non-discrimination laws during the pandemic.

Disparate impact occurs when an employer's policies or practices are facially neutral but have a disproportionately negative impact on individuals based on their race, color, religion, sex including sexual orientation and gender identity, national origin, age, disability status, or veteran status (if the employer is a federal contractor). Numerous employment practices or decisions in response to the COVID-19 pandemic could lead to disparate impact, even though they appear to be facially neutral. For example, employers may seek to prioritize retention of more experienced workers due to their firm-specific knowledge or skills. However, if an employer had recently expanded its diversity outreach efforts and hired a more racially diverse workforce leading up to the onset of the COVID-19 pandemic, its retention efforts may have disparate impact on one or more racial groups. Additionally, shutdowns and rehiring based on geography or company division may lead to disparate impact if targeted locations or divisions are disproportionately staffed with an older or more diverse workforce. Further, laying off a disproportionate number of part-time employees may adversely impact women, who according to 2019 data from the Bureau of Labor Statistics ("BLS") are twice as likely as men to be working in or seeking part-time employment.

Determining whether there is disparate impact typically requires measuring the selection rate for each group within a particular category, such as the number of hires by race. The selection rate for each group is then compared to the



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selection rate for the most-favored group. Among positive employment outcomes such as hiring, the most-favored group has the highest selection rate (for example, the group with the most hires per 100 applicants). Among negative employment outcomes such as layoffs or reduced hours, the most-favored group has the lowest selection rate. For example, given women's greater propensity to work part-time, the most-favored group associated with an employer's layoff of part-time workers is likely to be men. Such a layoff is likely to be subject to greater scrutiny or possible legal challenge if the selection rate for a given group (e.g. women) is statistically significantly higher than that of the most-favored group (e.g. men). Another guideline utilized to indicate disparate impact – useful in some but not all situations, and not dispositive in and of itself – is whether any given group's selection rate is less than 80% or four-fifths of the selection rate of the most-favored group.

However, accurate determination of whether a facially neutral selection process has disparate impact on a particular group requires more than just a simple comparison of selection rates.

Additional statistical considerations also should be incorporated to the extent possible, such as limiting comparisons to similarly situated employees, capturing the process or levels at which decision making occurs, and using techniques such as Fisher's Exact test or regression analysis. For example, using a regression analysis, an employer may compare hiring rates across groups by looking within each organizational unit or job title and controlling for relevant factors such as performance ratings, tenure, and location. A Fisher's Exact test, which compares frequencies, may be more suitable than regression analysis or other statistical tests when sample sizes are small or one or more selection rates are low. Employers, as well as employees seeking to challenge an employment practice, should consider the practical significance as well as the statistical significance of potential

COVID-19 and Natural Experiments

and differences in responses over time and geography. For example, employees across the country have filed economic damages claims against employers based on alleged negligent responses to the pandemic. Because policy responses vary across counties for reasons unrelated to the incidence of the pandemic, it is possible to rely on these natural experiments to assess the effect of the alleged negligent conduct on worker health. Employees in counties that relax safety measures for the business at issue in accordance with state mandates constitute a treatment group. Employees in counties that are categorized as comparable in terms of the incidence of the pandemic but choose not to relax safety measures for the business at issue provide a control group. To the extent that the two groups of employees differ only in the application of safety measures by their employers, the exogenous variation in safety measures across counties allows for measuring their effect on employees' health.

To rely on a natural experiment as a tool for drawing causal inferences, it is necessary to show that the treatment group in a naturally occurring experiment is effectively randomly assigned. Such random assignment implies that the only systematic difference between the control and treatment groups is the treatment itself. Thus, caution must be taken when extrapolating the results of the effects on the treatment group to the total population. Even in an ideal randomized trial, imbalances in the profile of the participants of each group can be present by chance. This is exacerbated in natural experiments where the assignment to the control and treatment groups is not random.

In sum, economists typically rely on empirical evidence to assess damages causation and quantify damages. Sometimes, however, it is challenging to identify suitable data for this purpose. Natural experiments offer an alternative source of data to test and measure damages. COVID-19 and policy responses to it produce observational data that approximates empirical evidence that could only otherwise be generated from an experimental design.

Disparate Impact and Employment Actions

disparate impact. Practical significance can be measured by comparing the difference in selection rates across groups and assessing the shortfall of a group's actual selection rate relative to its expected selection rate.

Importantly, even if an employer's selection procedure results in disparate impact, it may still be permissible if the employer can show that the procedure is job-related and consistent with business necessity and that there are no less discriminatory alternatives available. For example, a café re-opening for breakfast and lunch service may hire only individuals that are available to work on-site between the hours of 7 a.m. and 2 p.m. This may disparately impact certain gender, race or national origin groups if those groups are more likely to need to work remotely or flexibly due to child care, distance learning or other familial responsibilities during the pandemic. However, the café may be able to successfully defend its hours as a business necessity for which there is no less-discriminatory alternative.

The COVID-19 pandemic also may increase challenges faced by businesses such as restaurants as they re-open indoor and outdoor service and now confront a changed labor pool. Such businesses may confront greater labor supply from the large number of unemployed workers and recent college graduates seeking employment but reduced labor supply among former workers who are older or have underlying health conditions and opt to drop out of the labor force or seek employment in an industry perceived as posing less COVID-19-related risk. Hiring from a younger-on-average external applicant pool rather than rehiring former employees could lead to claims of disparate impact or even disparate treatment (i.e., intentional discrimination).

The effects of COVID-19 will continue to impact employers and employees in myriad ways for the foreseeable future. Many industries are likely to experience additional business re-openings, new shutdowns, hiring, and layoffs as the pandemic continues to have an uneven impact across states. Careful consideration and statistical analysis of COVID-19-related employment decisions can assist in preventing disparate impact on any particular group of employees.

EI News and Notes

Paper on Merger Efficiencies and Antitrust Analysis

Senior Economist Jéssica Dutra published her paper “Paradigm Shifts on Merger Efficiencies in Antitrust Analysis” in the *Symposium Issue* of the *Kansas Law Review*. Dr. Dutra was a featured speaker at the *Antitrust Law and Policy in the 21st Century Symposium* held in November 2019.

Favorable Termination in Collusion Case Involving Vermont Gasoline Station Chains

Principal Philip B. Nelson and Vice President Gale R. Mosteller successfully supported a joint defense group who represented four of the largest Vermont gasoline station chains in a “Plus Factors” collusion case. Based on Dr. Nelson’s testimony, which included the analysis of market definition, market power, firm conduct, damages estimation, and an effective cross-examination of the plaintiffs’ expert, the joint defense group was able to terminate the case on favorable terms. The settlement payment of \$1.5 million is substantially less than plaintiffs’ initial damages claim of more than \$100 million. The settlement also is reported to be less than the expected incremental litigation costs. The joint defense group included lawyers from Downs Rachlin Martin PLLC, Gravel & Shea PC, O’Connor & Kirby, P.C., and Sheehey Furlong & Behm P.C..

Presentation on the Economic Aspects of Price Transparency in HealthCare

Principal David A. Argue discussed price transparency at the American Health Law Association (AHLA) Annual Meeting on July 1, 2020. While some healthcare experts believe that price transparency is the key to making markets work more effectively, others are concerned that price transparency will undermine helpful competitive market forces. Dr. Argue considered empirical evidence of price transparency and noted that tools that are easy for consumers to use, as well as tools that provide accurate measures of consumers expected out-of-pocket costs, appear to be most helpful in reducing costs.

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