

The Fiduciary Challenges of the Board's Omicron Moment—and Beyond

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Omicron variant issues are certainly occupying the most prominent positions on the board of directors' agenda. In that regard, it is vitally important for the health system board to establish a common ground with system management and subsidiary leadership on the board's proper role in helping develop and maintain a system-wide response.

The system board will be guided by what the law suggests is to be its proper fiduciary role, the allocation of responsibilities between the system and subsidiary boards, and on practical applications in connection with the board/management dynamic at all hierarchical levels.

This is all made more challenging by a series of Delaware decisions over the last several years interpreting the *Caremark* obligation to maintain an effective management-to-board risk reporting system. The decisions have served to limit the protection historically afforded governing boards from personal liability under the *Caremark* obligation to maintain an effective management-to-board risk reporting system. The most recent of these decisions prioritize providing directors with a formal, detailed information reporting system on "mission critical" risks, such as regulation and product/consumer/worker safety (e.g., patient care and safety).

These cases, and their expectations for management-to-board reporting, are motivating boards to exercise closer oversight of management's response to mission-critical risks than they would have in the past. This is part because the topics considered to fall within the scope of governance oversight have expanded in the last

year or so to cover a broad range of matters that an interested third party considers material to the company.

Indeed, in the early stages of the pandemic, it was appropriate for the board to give wide deference to management in its handling of the crisis. So much was unknown, and there were risks of distracting management by excessive board involvement. That fiduciary model is unlikely to be accepted by courts and regulators at this point. The medical and economic risks are more established, the science and the public health strategies more clear, and the responsive landscape more tested.

Given this broadening scope of board oversight responsibilities, both case law and leading governance principles are likely to suggest a health system board Omicron portfolio that will include the following topics, among other financial and operational concerns:

- **Lessons learned:** Application of lessons from the previous pandemic “waves”; what worked and what didn’t work, as well as the efficiencies, shortcuts, ideas, and designs developed out of necessity.
- **Institutional preparedness:** The ability of the institution and its executive and clinical leadership to respond to the uncertain course of the variant.
- **Workforce culture:** The impact of the variant on the maintenance of a positive, committed, and supportive culture amongst the workforce, and on existing and planned return-to-work initiatives.
- **Employee staffing:** The impact of Omicron on the ability to attract and retain a trained and accessible workforce.
- **Clinician fatigue:** Supporting the physical and emotional needs of frontline clinicians and other healthcare workers as the pandemic moves to this latest stage.
- **Supply chain:** The extent to which Omicron will affect the organization’s ability to access supplies and technology critical to effective treatment.
- **Government regulation:** The application of existing and future state and federal regulation relating to vaccination and other medical treatment for employees.
- **Business resiliency planning:** Whether the health system’s current business resiliency planning is sufficient to address new Omicron-related concerns.
- **Impact on strategic initiatives:** The ability of the health system to sustain existing, and to implement planned future, strategic initiatives without basic re-evaluation.

- **Corporate social voice:** Whether there is perceived value in health system leaders speaking out in the public milieu on Omicron and related public health issues and concerns.

More broadly, the health system board may begin to have discussions on the organizational and public health implications of the nascent “Living with COVID” discourse. What is involved in such an approach? What would be the respective roles of both the health system, its subsidiaries, the public health mechanism, and government? What are the pressures it would place on the medical staff, nursing staff, larger workforce, and organizational facilities? How are risks to be managed, and the worst outcomes to be avoided?

A working partnership between the system and subsidiary boards and the senior leadership team is critical to the resolution of these issues. Yet that partnership may be difficult to maintain if 1) there is confusion between the duties of the system and affiliate boards and 2) the executive leadership does not respect the contributions of the board or the board regularly immerses itself in duties more typically the responsibility of management. Those are potential conflicts that must be resolved if

→ Key Board Takeaways

- Work with system management and subsidiary leadership to establish the board’s proper role in helping develop and maintain a system-wide response to Omicron variant issues.
- Have an Omicron portfolio that includes lessons learned, institutional preparedness, workforce culture/staffing/fatigue, supply chain, government regulation, and more.
- Ensure the system and subsidiary boards and senior leadership team have a solid relationship that is free of conflicts so that they can effectively respond to the Omicron variant as well as other future risks and threats.
- Demonstrate a high level of engagement on Omicron issues that reflects the board’s ability to be effective partners to management in the resolution of variant-related challenges.

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Indeed, a recent survey from the consulting firm PwC and the business membership and research group The Conference Board suggests an unsettling certain lack of CEO confidence in corporate governance. The board can confront any such concerns in part by demonstrating a level of engagement on Omicron issues that reflects their ability to be effective partners to management in the resolution of variant-related challenges.

These conflicts regarding roles and relationships can be mitigated by direct conversations between system board leadership and management on the critical issues of fiduciary responsibility in crisis situations, and executive expectations of director engagement. Indeed, resolving such conflicts and revisiting them when needed is an essential aspect of effective governance.

The Governance Institute thanks Michael W. Peregrine, Partner, McDermott Will & Emery LLP, for contributing this article. He can be reached at mperegrine@mwe.com.

