

Capozzi Adler, P.C.
Attorneys at Law
P.O. Box 5866
Harrisburg, PA 17110



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The Quarterly

Capozzi Adler, P.C. Attorneys at Law

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June
11

Capozzi Adler, P.C. celebrated its 17th Anniversary.

Aug.
19

10:00-11:30 a.m.
Andrew R. Eisemann, Esq. and Marc A. Crum, Esq. presented a Webinar (10:00-11:30 a.m.) in cooperation with LeadingAge PA on "Taking Control of Your Accounts Receivable."

Oct.
2

8:30 a.m. – 5:00 p.m.
Bruce G. Baron, Esq. will present a full-day seminar as part of Penn State Greater Allegheny's licensing program for nursing home administrators on "The Government's Role in Health Care Policy, Regulation and Reimbursement" at the campus in McKeesport (8:30 a.m. – 5:00 p.m.).

Oct.
23

8:00 a.m. – 5:30 p.m.
Capozzi Adler, P.C. Semi-Annual Continuing Education Seminar – "Current Issues Affecting Pennsylvania Nursing Facilities" – at the Independence Ballroom in the Radisson Hotel at the Valley Forge Casino & Convention Center (8:00 a.m.–5:30 p.m.). Admission is free along with 7 continuing education credits for NHA's, lawyers, and CPA's. For a brochure and registration information, email Erin Motter of our Firm at: ErinM@CapozziAdler.com.

Dec.
6

Capozzi Adler, P.C. Annual Holiday Party at The Historic Woodburn Farm Barn in Carlisle, with special guest band "Three Dog Night." Additional information will be mailed later this year.



Come view our recently launched new website at www.capozziadler.com.



New Mortgage Rules?

NEW MORTGAGE RULES MAY HAVE CHILLING EFFECT ON REAL ESTATE MARKET

Nicholas J. Luciano, Esquire

If you have applied for a mortgage this calendar year and found the process more grueling than before, you probably aren't alone. On January 10, 2014, new regulations became effective implementing many of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Passed in the wake of the financial industry meltdown of 2008, Dodd-Frank overhauled much of how the financial industry did business. A good portion of those reforms were directed at mortgage lenders—to the tune of more than 200 pages dedicated solely to a section called the Mortgage Reform and Anti-Predatory Lending Act.

One of the purposes of this legislation was "to assure that consumers are offered and receive residential mortgage loans on terms that reasonably reflect their ability to repay the loans and that are understandable and not unfair, deceptive or abusive." To accomplish those goals, the statute greatly enhanced the scrutiny lenders must utilize when screening possible loan applicants. Creditors must make

The process of buying a home was never easy. Now the stress of buying a piece of the American dream is being shared by those offering the means by which so many achieve that dream.

good faith determinations based on verified and documented information that the borrower had reasonable ability to repay loan according to its terms, and all applicable taxes, insurance and assessments at the time of the

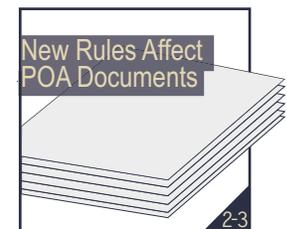
application.

Lenders will need to verify that monthly living expenses do not eclipse more than 43% of the purchaser's gross income. It is essentially the old

pre-qualification process on steroids. Dodd-Frank is also an attempt to remove certain practices and offerings from the mortgage market, thereby reducing choices for some borrowers. This would include certain interest-only loans. Self-employed borrowers are likely to see the greatest reduction in mortgage availability, thanks to new Dodd-Frank documentation requirements.

Time will tell if these new rules - and those likely to follow - will dampen a real

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estate market beginning to revive, or if these new mandates will be merely afterthoughts once lenders have a command on the new landscape. If you have questions about the new mortgage rules or other real estate matters, you may contact Nicholas J. Luciano, Esq. at our Firm (email: NicholasL@CapozziAdler.com).

SAME-SEX MARRIAGE AND EMPLOYEE BENEFITS IN PENNSYLVANIA

Brandon S William, Esquire

On May 20, 2014, U. S. District Court Judge John E. Jones III ruled that Pennsylvania's ban on same-sex marriage violated the Due Process and Equal Protection Clauses of the United States Constitution. Judge Jones's decision paved the way for same-sex couples to begin marrying in Pennsylvania. In light of this decision, and the same-sex marriages that have been celebrated in Pennsylvania since its announcement, employers in the Commonwealth should review their employment and benefit practices to ensure they are complying with all legal requirements.

To begin with, Pennsylvania employers are now required to extend Family and Medical Leave Act (FMLA) benefits to same-sex spouses. In 2013, the Federal Department of Labor issued an opinion extending FMLA leave to same-sex spouses in states that recognized same-sex marriage. Now that Pennsylvania has joined the ranks of those states, FMLA leave should now be approved for: employees who need to care for a same-sex spouse with a serious health condition; employees

who need leave because of a qualifying exigency due to the employee's same-sex spouse's active duty military service; and employees who qualify for FMLA military caregiver leave if the employee is the same sex spouse of a covered service member.

However, despite the recent ruling, extension of employer provided benefit plans to same-sex spouses will continue to depend on the provisions of each specific plan plan's definition of "spouse." If the plan defines "spouse" with reference to Pennsylvania law, then

it is likely that the plan would now cover same-sex spouses, however, if the plan defines spouse to exclude same-sex spouses, benefits are not required to be extended.

Employers are encouraged to review their policies and procedures and ensure that they are complying with new requirements and to verify that they are providing the benefits they intend to provide. Contact Brandon S. Williams, Esq. at BrandonW@CapozziAdler.com or (717) 233-4101 with questions regarding the impact of the same-sex marriage ruling on your employees or with other employment related questions.

NEW RULES AFFECTING YOUR RESIDENTS' POA DOCUMENTS

*Andrew R. Eisemann, Esquire
Marc A. Crum, Esquire*

In the last issue, we discussed the pitfalls created when a Power of Attorney (POA) is involved in your resident's care. Questions frequently arise as to the validity and effect of POA documents for nursing home residents and employees. In July 2014, Pennsylvania General Assembly passed Act 95 of 2014 which amended sections of the Decedents, Estates and Fiduciaries code related to power of attorneys. The amendments were drafted in response to the Pennsylvania Supreme Court's decision in *Vine v. Commonwealth*, 607 Pa. 648, 9 A.3d 1150 (Pa. 2010), in which the Court refused to extend the protections afforded to third parties under the prior version of Act 95 when the third party acted in reliance on an invalid POA.

Execution

The amendment adds a new provision regarding execution of the POA by the principal. Section 5601(b)(3) provides,

It is important for long-term care providers to understand the changes in the law, the new requirements for execution, and the new provisions regarding third party liability.

For a power of attorney executed on or after the effective date of this paragraph, the signature or mark of the principal, or the signature or mark of another individual signing a power of attorney on behalf of and

at the direction of the principal, shall be:

The amendment adds a new provision regarding execution of the POA by the principal. Section 5601(b)(3) provides,

For a power of attorney executed on or after the effective date of this paragraph, the signature or mark of the principal, or the signature or mark of another individual signing a power of attorney on behalf of and at the direction of the principal, shall be:

(i) Acknowledged before a notary public or other individual authorized by law to take acknowledgments. The notary public or other individual authorized by law to take acknowledgments shall not be the agent designated in the power of attorney.

(ii) Witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be the individual who signed the power of attorney on behalf of and at the direction of the principal, the agent designated in the power of attorney or the notary public or other person authorized by law to take acknowledgments before whom the power of attorney is acknowledged.

20 Pa. C.S. § 5601(b)(3). Pursuant to this revision, any POA signed after July 2014 must now be signed before a notary public and two witnesses. The prior version of this statute did not require a notary and only required the signature of two witnesses if the principal was executing by mark or the document was signed by another individual. The additional requirements are designed to ensure the validity of the document at the time of execution.

Liability

The amendment adds another new section that relates to the "genuineness" of the signature and the immunity of third parties acting in reliance on the validity of the POA. Section 5608(d) provides,

A person who in good faith accepts a power of attorney without actual knowledge of any of the following may, without liability, rely upon the power of attorney as if the power of attorney and agent's authority were genuine, valid and still in effect and the agent had not exceeded and had properly exercised the authority that:

(1) The power of attorney is void, invalid or terminated.

(2) The purported agent's authority is void, invalid or terminated.

(3) The agent is exceeding or improperly exercising the agent's authority.

20 Pa. C.S. § 5608(d). The amendment overturns the decision in *Vine*, allowing third parties to rely upon a properly executed POA. The amendment also allows for, but does not require, further verification by the third party. Under Section 5608(e),

A person who is asked to accept a power of attorney may request and, without liability, rely upon without further investigation:



(1) An agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney or an affidavit under section 5606 (relating to proof of continuance of powers of attorney by affidavit).

(2) An English translation of the power of attorney, if the power of attorney contains, in whole or in part, language other than English.

(3) An opinion of counsel relating to whether the agent is acting within the scope of the authority granted by the power of attorney if the person making the request provides in writing or other record the reason for the request.

20 Pa. C.S. § 5608(e). The amendments also provide a list of circumstances under which acceptance of the POA is not required and further requires that a party not falling within one of those circumstances either accept the POA or request documentation under Sections 5606 or 5608(e). Therefore, it is important to seek legal counsel regarding any questionable POA documents to determine whether your circumstances fit within one of the exceptions whereby acceptance is not required or if further investigation is necessary. The amendments allow for greater protection from liability for accepting POA's that would otherwise be in question under *Vine*. If you have questions regarding a Power of Attorney, you may contact a Andrew R. Eisemann, Esquire at our Firm (Email: Andrew@CapozziAdler.com).

"no later than seven business days after presentation of the power of attorney for acceptance." 20 Pa. C.S. § 5608.1(a)(1).



Senior Financial Analyst Timothy Ziegler presenting at the semi-annual Firm Seminar at Hollywood Casinos on Medicaid Reimbursement, April 11, 2014

BACKGROUND CHECK UPDATE

Dawn L. Richards, Esq. and Bruce G. Baron, Esq.

The most recent Governor's Regulatory Agenda published on February 1, 2014 at 44 Pa. Bulletin 709 continues the regulatory silence since February 2, 2013 on updates to the Department of Aging's regulations implementing Criminal Background Check requirements for nursing homes and other residential facilities under the Older Adult Protective Services Act (OAPSA/Act 13) to resolve the constitutional concerns about the Act 13 requirements in the Pennsylvania Supreme Court's 2000 decision in *Nixon v. Commonwealth*.

The last time the Governor's Regulatory Agenda indicated that the Department of Aging was working on updating the regulatory guidance was July 7, 2012 at 42 Pa. Bulletin 4262; and, no new proposed regulations have been issued to date.

In 2013, instead, the Department of Aging's Consumer Protection Division issued information about its online self-study training course on "Mandatory Abuse Reporting and Criminal History Background Checks." In this 2013 transmittal, along with a "Dear Administrator Letter," the Division included information on the Department's electronic

fingerprinting process effective June 3, 2013, a listing of the kinds of facilities and individuals subject to the background check requirements, a summary of the Act 13 requirements and sample forms. The 2013 transmittal, however, also included the Department's February 2004 "interim" policy for facility compliance with the Act's limitations on hiring and retention of employees, pending changes in the law by the General Assembly in response to the Nixon decision. The 2013 transmittal indicates that the 2004 "interim" policy is still in effect. The 2004 "interim" policy permits facilities to hire and retain employees with some otherwise prohibitive offenses if the requirements of the

"interim" policy are met. The "interim" policy states that:

1. Criminal history reports are still required for all applicants.

2. State police will continue to process applications and provide information.

3. PDA will continue to process FBI criminal history reports.

4. Letters from PDA will continue to show "clear" or "prohibited" based on FBI criminal history reports.

5. Facilities will not be sanctioned for hiring or continuing to employ individuals who demonstrate rehabilitation by evidence of a minimum five year aggregate work history in care-dependent services, without incident, from either the date of conviction or release of incarceration, whichever is later. Applicants are responsible for submitting evidence of these dates. Facilities are required to maintain documentation supporting such evidence of rehabilitation in the employees personnel file.

6. The court's ruling in no way prohibits a facility from refusing to hire an employee, even one who has a clean aggregate five year work history based on information obtained in a criminal history report. Employers may consider felonies and misdemeanors, to the extent they relate to the applicants suitability for employment in the position.

House Bill 2014 PN 3326 was introduced in the current 2013-2014 Session of the General Assembly, on April 7, 2014, to revise the preclusion sections of the Act to

permit some life-time preclusions while continuing the current interim policy for offenses not subject to the proposed new permanent preclusions, in addition to

application of the preclusion provisions to current employees, including requiring annual updates of background check information. This bill has not gotten out of committee to date and will not pass in this Session.

Nursing homes and other covered facilities are therefore required to continue to comply with all of the requirements of the Act except as modified by



the “interim” policy. Nursing homes must also comply with all of the background check requirements established by Federal law (42 CFR 483.13(c)) and by Department of Health regulations (28 Pa. Code 201.2), none of which were superseded by the decision in Nixon, as well as with CMS and Department of Health requirements for continuing monitoring of employees and contractors. See our March 2009 Newsletter article on those additional requirements, in the Newsletter link on our Website at: www.CapozziAdler.com.

Facilities must require all applicants to submit a State Police criminal history record. If the applicant is not and for the 2 years immediately preceding the date of application has not been a resident of this Commonwealth, the facility must require the applicant to submit a Federal criminal history record and a full set of fingerprints to the Department which will be forwarded to the Federal Bureau of Investigation. Facilities should require all applicants to furnish proof of residency through documentation which may include: a valid driver’s license, housing records (mortgage, rent receipts), public utility records, local tax records, income tax returns or other employment records.

Employees that are required to submit a criminal history report

include Administrators and operators who have direct contact with clients and who began serving as administrators and operators after July 1, 1998 and Employees of a facility who were employed after July 1, 1998. Exceptions to this rule exist which include employees continuously employed by the facility for one year prior to July 1, 1998, certain contractors with no resident contact, volunteers, and employees acquired through transfer of ownership. Facilities that provide staff to other facilities to perform services are responsible for completing the background check. Facilities should not assume that this requirement is automatically waived for owners and operators who have no resident contact. A signed statement, indicating that the owner-operator has had and will have no resident contact, must be submitted to the Department.

Once the criminal history check is completed, the facility may not hire an applicant nor retain an employee required to submit a criminal history report if the criminal history report reveals a prohibitive offense, except as otherwise permitted by

BOTH the “interim policy” AND the applicable Federal and Department of Health regulations.

A complete listing of these offenses can be found in the Department of Aging online training materials at: www.aging.state.pa.us/psolinetraining.

Prohibited offenses include felonies and multiple misdemeanors. Summary judgment offenses which may show up on a State police criminal background check are not prohibitive and a facility may choose to hire such individuals, where such offenses are not directly related to resident care or job requirements. Employers must analyze Federal or out-of-state offenses to determine if they are similar in nature to those listed under the Act.

All applicants must be advised of the process orally and in writing in a language they understand and facilities must maintain, as confidential, employment records which include copies of completed request forms for criminal history reports, State Police criminal history records and Department letters of determination regarding Federal criminal history records.

If the decision not to hire or to terminate employment is based in whole or in part on State Police criminal history records, Department letters of determination regarding Federal criminal history records, or both, facilities must provide applicants and employees with information on how to appeal to the sources of criminal history records if they believe the records are in error. An applicant or employee may review, challenge and appeal the completeness or accuracy of the applicant’s or employee’s criminal history report.

The Act provides for provisional employment pending background check results for a single period

not to exceed 30 days for applicants requesting a State Police criminal history record, and a single period not to exceed 90 days for applicants requesting a Federal criminal history record under certain conditions. The Applicant must have applied for a criminal history report and provided the facility with a copy of the completed request forms. The facility must have no knowledge about the applicant that would disqualify the applicant from employment. The applicant must swear or affirm in writing that the applicant is not disqualified from employment under the Act. The provisionally employed applicant must receive an orientation which provides information on policies, procedures and laws which address standards of proper care and recognition and reporting of abuse or neglect. AND...

The facility must regularly supervise the applicant carrying out assigned duties. The results of the observations must be documented in the employee personnel file until such time as the results of the background check are revealed.



Attorney Louis J. Capozzi, Jr. presenting at the Valley Forge Casinos on Labor and Employment Law, March 20, 2014

If the information obtained from the criminal history report reveals that the applicant is disqualified from employment the applicant must be dismissed immediately.

Facility owner-operators or administrators who intentionally or willfully fail to comply or obstruct compliance are subject to an administrative penalty. The Commonwealth agency may issue an order assessing a civil penalty of not more than \$2,500. Criminal penalties may also be assessed. An Administrator or designee or facility owner who intentionally or willfully fails to comply or obstructs compliance commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of \$2,500 or to imprisonment for not more than 1 year, or both.

If you have questions about compliance with Federal and State criminal background check and monitoring requirements at your facility, you may contact Bruce G. Baron, Esquire, Esquire at our Firm (email: BruceB@CapozziAdler.com).



Attorney Andrew Eisemann presenting at the semi-annual Firm Seminar at Hollywood Casinos on Liquidation of Resident Accounts Receivable, April 11, 2014



Attorney Matthew Thomsen presenting at the semi-annual Firm Seminar at Hollywood Casinos on Facility Bed Transfers, April 11, 2014

CAPOZZI ADLER, P.C. WELCOMES

Nicolas J. Luciano, Esquire has joined our Firm as an associate attorney. He received his law degree from the University of Pittsburgh School of Law with a concentration in International Law. He also has a Bachelor of Arts in Political Science from Messiah College including overseas study at Tantur Ecumenical Institute in Jerusalem, Israel.

Prior to joining Capozzi Adler, P.C., Nicholas served as Legislative Counsel with LeadingAge PA, where he advised the membership on regulatory compliance issues with the Pennsylvania Departments of Aging, Health, and Public Welfare and counseled members regarding the impact of proposed statutory and regulatory mandates. He also provided a legal education program for the Pennsylvania Bar Institution on the implementation of Pennsylvania's new assisted living residence regulations. He is also a registered lobbyist in Pennsylvania and has extensive experience lobbying both the state and federal government.

His practice with our Firm will focus on real estate transactions and corporate organization. His email address at our Firm is: NicholasL@CapozziAdler.com.



Attorney Andrew Eisemann presenting at the LeadingAge PA Conference on the Medicare 3-Day Rule, June 20, 2014



Attorney Craig Adler presenting at the semi-annual Firm Seminar at Hollywood Casinos on Financing & Acquisitions, April 11, 2014



Attorneys Andrew Eisemann, Marc Crum, and Brandon Williams at the LeadingAge PA "Block Party" as a 5-Star Partner in Hershey, June 18, 2014



Attorney Donald Reavey presenting at the semi-annual Firm Seminar at Hollywood Casinos on Contract & Litigation Issues, April 11, 2014



Attorney Daniel Natirboff presenting at the semi-annual Firm Seminar at Hollywood Casinos on Medicaid Rate Reimbursement, April 11, 2014