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The Quarterly

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DEPARTMENT PREPARED TO ACCEPT ASSISTED LIVING RESIDENCE APPLICATIONS

Information is now available on the Pennsylvania Department of Aging website pertaining to the application process required for licensure of Assisted Living Residences. Keep in mind that according to the regulations, if you are a facility utilizing the term "assisted living" in any way, you will not be permitted to continue use of this particular phrase following January 18, 2011 in any marketing materials, advertising, signage or literature. Recently the Department of Aging has advised that due to the pending CMS Waiver Application for potential reimbursement to facilities, they do not intend to take measures to immediately assess penalties for use of the nomenclature until additional guidance can be provided. However, the Department intends to identify those Providers who have not applied for licensure, notify them by mail and request a response with regard to their intent to obtain licensure. The response will be due thirty days from the issuance of the notification letter. Failure to respond could result in enforcement action. In addition, should it be found during a scheduled or unscheduled survey that a facility is continuing to utilize the nomenclature, a notice will be issued and the facility will be required to submit an action plan confirming its intent to either apply for licensure or remove all references to "assisted living".

Applying to become a licensed Assisted Living Residence is a five part process initiated by the submission of an application to the Department of Public Welfare, Office of Long Term Living. Although the first step is relatively painless, there is a long list of documents that must be submitted and approved by the Department before an on-site inspection can take place. These include: administrator training and qualifications, criminal background checks, planned staffing patterns, floor plans and various policies and procedures related to reporting and investigating unusual incidents, emergency preparedness, quality management, records security, discharge/transfer and assistance with supplemental health care services. This is not an exhaustive list. To obtain complete information, please visit their website at www.aging.state.pa.us.

All required policies and forms must be in compliance with the newly released regulations found at 55 Pa. Code Section 2800. The new regulations vary in many ways in comparison to the regulations now applicable to Personal Care Homes. Administrators are required to complete an additional 100 hours of education, successfully pass the state's required testing and be physically present in the facility (except for temporary absences) for 36 hours per week. The Department has scheduled full day orientations for new ALR administrators. An orientation is required under the regulation Section 2800.64(a)(1) before an administrator is employed by the licensed facility. The first session was scheduled for January 11th in Camp Hill. Additional seminars will follow.

Deciding whether or not to apply for licensure should be a well thought out business strategy motivated by the new "aging in place" concept of the Department. It is expected that over 150 facilities will apply within the first six months. If you have any questions regarding the process, please contact Dawn L Richards, Esq. at our firm.

MANAGING YOUR ACCOUNTS RECEIVABLE

By Andrew R. Eisemann, Esquire

This is the fifth installment of our firm's series known as "Managing and Collecting Your Accounts Receivable". As you are already aware, the financial survival of most nursing facilities in Pennsylvania depend on how aggressively and effectively their business office managers administer their accounts receivable. This series is devoted solely to the design, management, and improvement of your accounts receivable program and collections efforts. Also, I will continue to use this space to share with you tips, legal updates, personal observations, and "lessons learned" to help you improve the effectiveness of your accounts receivable management program.

Specific Terms of the Admission Agreement. In our previous newsletter, I identified the common weak links in the admissions and account management process that negatively impact a nursing facility's bottom line. In this installment, we focus on the Admission Agreement as a contract. I have concluded that a large number of problems related to collecting on a delinquent account are the result of a poorly drafted or incomplete Admission Agreement. Thus, the design of your facility's collections system starts with the Admission Agreement, and the following key terms will improve the ability of your business office manager and collections attorney to reduce the size of your accounts receivable and your average Days Revenue Outstanding (DRO):

1. Payment terms. When and how much?
2. Interest or late fees. A court will not allow you to collect interest or late fees without contract terms that clearly express the amount and calculation method.
3. Attorneys' fees and costs of collection. Unless the Admission Agreement provides for the assessment of these additional costs, a court will not permit you to recover fees and costs.
4. Legal Representative definition, duties, responsibilities, and potential liability.
5. Venue. Which county can your facility file a civil complaint or injunction?
6. Acknowledgement. Make sure the resident, if competent, and the Legal Representative sign and date the Admission Agreement.

Legal Representative Provisions. Since my last article, I have received several requests for assistance regarding the "Legal Representative" provisions of the admission agreement. Recent Pennsylvania case law clearly favors for various reasons the term "Legal Representative", rather than "Responsible Party". The most important lesson learned from the case law is that your Admission Agreement must clearly identify the person serving as Legal Representative, his or her responsibilities, and potential personal financial liability. An Admissions Director's goal must be to execute an Admission Agreement and DPW Admission Packet Notice that contains the name, contact information, and signature of the Resident and Legal Representative. Although a Legal Representative is not required for admission, a family member typically assumes the role of managing and accessing a resident's liquid assets, income, and financial information. The same person normally also pays the resident's bills.

Accordingly, you want to clearly identify the name and relationship of the Legal Representative, have him or her review and sign the Admission Agreement and DPW Admission Packet Notice certification page, and ensure the Legal Representative understands his or her duties to transfer the resident's patient pay liability each month to the facility and to provide a complete accounting of the resident's assets to submit an accurate application for medical assistance, if applicable.

The Nursing Home Reform Act of 1987 does allow nursing facilities to "require an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care." 42 U.S.C. §§1395i-3(c)(5)(B)(ii) and 1396r(c)(5)(B)(ii). Thus, do not use the term "Guarantor" in your Admission Agreement form. Of course, in the event the Legal Representative breaches that duty, then the nursing facility has grounds for civil action under contract law and fraudulent transfer law.

Fraudulent Transfers. Under the provisions of the Deficit Reduction Act of 2005 ("DRA") that affected Medicaid law, nursing facilities have more flexibility to hold family members legally responsible for any outstanding balance owed to the facility. 42 U.S.C. §§1396p, 1396r-5, and 1396r. The DRA increased the Medicaid look-back period for fraudulent transfers to five years. Fraudulent transfers are transfers of resources for less than fair market value to an individual or to a trust.

A more significant change to the law regarding the Medicaid look-back period is that the "penalty period" starts not when the transfer was made, but when the resident enters the nursing facility, submits a Medicaid application, and is financially eligible for medical assistance. As a result, the resident will not be able to afford private payments during the penalty period, which will presumably force the nursing facility to hold family members, or those who received the fraudulent transfer, liable for the debt.

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MANAGING YOUR ACCOUNTS RECEIVABLE — *Continued from Page 2*

When I receive a delinquent account from a Business Office Manager and we believe the resident had significant resources, I normally conduct an asset search to determine whether the resident fraudulently transferred any resources to a third party. I have also found in numerous cases where the resident or family fails to cooperate in submitting a Medicaid application, there are hidden assets that are "waiting" to be found.

Delegate Responsibility to Manage Accounts Receivable.

1. This person must be fully trained on the medical assistance application process, Medicare, insurance claims, the Social Security Administration representative payee program, the procedures to discharge a resident for non-payment, and the facility's legal rights and remedies under the Admission Agreement to satisfy a debt.
2. Maintain a regular report that identifies the facility's accounts receivable.
3. Draft and mail an effective demand letter for overdue accounts, but don't make empty threats of litigation.
4. Develop and maintain a collections record and communications log.
5. Develop a working relationship with your local CAO, Office of Aging, Social Security office, county VA director, local Magisterial District Justice, guardianship services, and county Register of Wills for estate claims.
6. Transfer delinquent accounts to an attorney experienced in long term care collections, the medical assistance process, and the unique circumstances faced by nursing facilities. Residents and family members tend to react with urgency upon receipt of a demand letter under a law firm's letterhead.
7. Remember, be the "squeaky wheel" because the "squeaky wheel gets the grease." The longer you wait, the more difficult it gets to recover a resident's assets and locate family members.

Questions? Please call or email me if you have any questions or concerns about the legal rights of your nursing facility as a creditor under the terms of your current Admission Agreement or under Medicaid law. My email address is andrewe@capozziassociates.com. In our next newsletter, I will focus on residents' social security and pension income issues and your facility's rights under the Fair Debt Collection Practices Act.

FMLA LITIGATION RESULTS IN VALUABLE LESSONS FOR EMPLOYERS

The Family and Medical Leave Act ("FMLA"), and its implementing regulations, were recently updated; and, recent court decisions provide guidance to employers in implementing policies and procedures that will protect them against FMLA litigation.

Misuse of FMLA Leave

An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act. An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act. The following case indicates that there are limits to an employee's rights where the employee has misused leave. In *Moran v. Redford Union School District* (E.D. Mich.), the Court held that an employee with a history of absenteeism who requested FMLA leave but took a vacation in Florida was not retaliated against in violation of the FMLA when she was terminated for refusing to sign a last chance agreement.

Suspecting that the plaintiff fabricated her leave request to enable her to travel to Florida, the School District attempted to contact her at home on several occasions during her leave and she did not return any messages. Upon her return from Florida, she was suspended pending an investigation into the reason for her absence. The union attempted to negotiate a last chance agreement, whereby the plaintiff would be reinstated and agree, among other things, that any further absences would result in termination, and she would forgo any grievance in the event of her termination. The plaintiff refused to sign the agreement and was terminated. While the Court held that a jury could find that there was nothing plainly inconsistent about traveling to Florida while suffering from acute situational anxiety, it held that the School District had an honest belief that the plaintiff had misused her FMLA leave, and its termination of the plaintiff for failing to sign a last chance agreement was not a pretext for discrimination.

Sufficient Notice under FMLA

An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered service member. If 30 days notice is not practicable, such as because of a lack of

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FMLA LITIGATION RESULTS IN VALUABLE LESSONS FOR EMPLOYERS *Continued from Page 4*

knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally.

As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In *Saenz v. Harlingen*, (5th Cir.), the Employer knew Saenz was incapacitated because the company's health supervisor visited Saenz in the emergency room after she was hospitalized for bipolar disorder. The court concluded that the employer had not acted reasonably under the circumstances in discharging the employee for unapproved absences based on all the information that the employer knew regarding the employee's mental health condition. The employer had sufficient notice that she needed FMLA leave.

Employers need to require employees to provide notice and meet other applicable requirements, but must be reasonable in determining whether employees have met those requirements. In this case, enforcing the employer's strict notice requirement was not reasonable or permissible because the employee had given sufficient notice under FMLA.

Selection of Employees for Reduction in Force

If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. In selecting the employees for a reduction in force the employer should not take into consideration the fact that the employee has taken or is on leave.

In *Goelzer v. Sheboygan County* (7th Cir.), the court noted the only negative input on the performance reviews was absences and sided with the Employee. In *Cutcher v. Kmart Corp.* (6th Cir.), the Court also sited with the Employee where the Employer's analysis expressly referred to the Employee's taking FMLA leave.

An employer can take adverse action if it would have occurred separate from the request for or taking of leave. For example, where an employee has been disciplined or it has been recorded that there were shortcomings in the employee's performance. Decisions related to reductions in force can be made based on employee performance but evidence of poor performance must be documented on annual performance evaluations.

Adverse Employee Action

As a general rule, on return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

In *Cracco v. Vitran Express, Inc.* (7th Cir.), the Employee worked as the service center manager for one of Vitran's trucking terminals. While he was on FMLA leave, the company hired several replacement employees to cover his responsibilities. These employees discovered several problems about operations attributed to the Employee; and, when he returned from FMLA leave he was fired. The Court granted summary judgment in favor of the Employer, finding that FMLA allows employers to base adverse actions on significant performance problems discovered during an employee's FMLA leave and that, even with 15 years of good performance reviews, the Employer was permitted to rely on information discovered after FMLA leave, and that the termination was based on job performance, not FMLA rights.

Authenticity of Certification

Generally, if an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.

In *Smith v. The Hope School (7th Cir.)*, the Employee submitted a request for FMLA leave; and, her doctor's certification specified diagnoses of muscle tension and neck and arm pain, but, the Employee added to the diagnoses in handwriting "plus previous depression," backdated the

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FMLA LITIGATION RESULTS IN VALUABLE LESSONS FOR EMPLOYERS *Continued from Page 4*

form, and also filled out a separate "Attending Physician" statement, listing diagnoses of muscle tension, chronic headaches and depression. She had never been diagnosed with, nor treated for, depression. The Court granted summary judgment to the Employer, noting that the FMLA did not require employers to grant leave based on a fraudulent leave request.

The recent FMLA amendments now permit employers to contact physicians directly to authenticate or clarify FMLA certification. Strong evidence of false certification could justify denying FMLA leave depending on the specific facts. But, employers should recognize the difference between false certification and questioning whether the doctor's diagnosis is correct. The latter circumstance would require a second medical opinion.

Eligibility for FMLA leave

In summary, an "eligible employee" is an employee of a covered employer who has been employed by the employer for at least 12 months, and has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the *commencement of the leave*. The employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. The 12 months an employee must have been employed by the employer need not be consecutive months.

In *Reynolds v. Inter-Industry (7th Cir.),* the Court found that FMLA protects even the "attempt" to exercise the right to FMLA leave, such as asking for the leave before being eligible to take it. The Court also noted FMLA regulations requiring that "[t]he determination of whether an employee… has been employed …at least 12 months must be made *as of the date the FMLA leave is to start*." The Court noted that an Employer cannot fire an "ineligible" employee for intending to take FMLA leave after the employee becomes eligible since the FMLA contemplates that notice of foreseeable leave should be given 30 days before the leave begins.

Additional Lessons for Employers

Some less known provisions of the Family Medical Leave Act are for the benefit of the employer and should be incorporated into the employers' employee handbook and human resources policies. For example, a husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.

Also, an employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

For more information on the Family and Medical Leave Act, please contact Dawn L. Richards, Esq. at our Firm.

CAPOZZI & ASSOCIATES, P.C. WELCOMES MICHELE CANDY, Paralegal & ERIN MOTTER, Audit Analyst

Michele Candy, Paralegal – assists Dan Natirboff, Esq. and Dawn Richards, Esq. with our Firm's nursing home litigation and compliance work. Michele moved to the Harrisburg Area from Dallas, Texas, after attending college and graduate school is Austin. She worked in Texas as a school teacher and later a paralegal with two Dallas-area firms, specializing in estate planning, family law, and nursing home litigation.

Erin Motter, Audit Analyst – assists Tim Ziegler, our Firm's Reimbursement Analyst, with reimbursement impact issues related to Medicare and Medical Assistance audits and rates and new payment program policies. Erin has been working in Accounting for eight year while she is completing her degree program. She is also a Certified Automotive Technician.

COMPLIANCE PROGRAMS NOTE:

The HHS Office of Civil Rights (OCR), which administers compliance reviews of the HIPAA Privacy Rule, recently fined Maryland-based CIGNET Health $4.3 Million, of which $1.3 Million was for denying 41 patients access to their medical records and $3.0 Million was for failing to cooperate with the federal investigation, including refusal to comply with the OCR subpoena until CIGNET received a federal court order to do so.

OCR has announced plans to increase enforcement of privacy rules requirements. Provider Compliance Programs should include reviews for compliance with Privacy Rule compliance, as well as policies and procedures for patient access to their medical records and for working with OCR in the event of a federal investigation. Our Firm's Compliance Section is available to help with updating your facility's Compliance Program. For information, contact: Bruce G. Baron, Esq. or Dawn L. Richards, Esq.

RECENT AND UPCOMING EVENTS:

Congratulations to Attorney Andrew Eisemann who submitted his packet to retire from the U.S. Army after 27 years of service and multiple deployments overseas to the Middle East and Europe. He will retire as a Lieutenant Colonel after 16 years in the Regular Army and an additional 11 years in the Army Reserve. Our thanks to Andy for his service to our country.

Additional congratulations to Andy on his selection as one of Pennsylvania's Rising Stars for the 2011 Pennsylvania Super Lawyers. The selection process includes a statewide survey of lawyers, an evaluation of candidates, and a panel review by practice area. Andy's work with our Firm focuses on Creditors' Rights, Bankruptcy Law, and Commercial Litigation.

March 5, 2011	Bruce G. Baron, Esq. will be teaching the full-day seminar as part of Slippery Rock University Department of Allied Health's licensing program for nursing home administrators on "The Government's Role in Health Care Policy, Regulation and Reimbursement," in Slippery Rock.
March 8-9, 2011	Bruce G. Baron, Esq. will be teaching 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" as well as the two-hour "Module 5" program of DPW's required training for personal care administrators on "Local, State and Federal Laws and Regulations Pertaining to the Operation of a Home," at the campus in McKeesport.
March 10, 2011	Spring Program of Capozzi & Associates, P.C. Seminar on "Current Issues for Nursing Facilities in Pennsylvania," in Grantville at the John Henry Conference Room at Hollywood Casino, including continuing education credits for NHA's, CPA's, and attorneys (Fall Program scheduled for October 13, 2011). TO REGISTER FOR THE MARCH 10 PROGRAM, CONTACT ERIN MOTTER AT OUR FIRM – Email: ErinM@CapozziAssociates.com.
May 2011 (date to be announced)	Bi-Annual Capozzi & Associates, P.C. Adopt-A-Highway Cleanup on I-81 near Wertzville Road Exit in Cumberland County.
June 11, 2011	Capozzi & Associates, P.C. 14th Anniversary.
June 15, 2011	Bruce G. Baron, Esq. is a scheduled speaker for the 2011 PANPHA Annual Conference, in Hershey, on "Elder Justice Act: Reporting Requirements for Nursing Facility Crimes."

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