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**LATSHA DAVIS YOHE & MCKENNA, P.C.'s**

**SPEAKING ENGAGEMENTS**

**2011**

<b>February 8, 2011</b>	PTLA Webinar	"Employee Red Flags for Supervisors"	Speaker: Angela L. Thomas, Esq.
<b>March 16, 2011</b>	PBI Health Law Institute	"Roundtable Discussion on NF Regulatory Developments"	Speaker: Kimber L. Latsha, Esq.
<b>March 22, 2011</b>			Speakers: Angela L. Thomas, Esq.
<b>March 24, 2011</b>	LDY&M	"8th Annual Employment Law Seminar"	Glenn R. Davis, Esq. Daniel R. Jameson, Esq.
<b>March 29, 2011</b>	Juniata Valley Employer Advisory Council	"Employment Law Issues in Human Resources and Management"	Speaker: Angela L. Thomas, Esq.
<b>April 28, 2011</b>	Business Women's Forum	"Managing Differences in the Workplace: The Right Thing To Do vs. The Smart Thing To Do"	Speakers: Angela L. Thomas, Esq. Deborah Vereen
<b>May 9, 2011</b>	Gettysburg Area Personnel Association (GAPA)	"Family and Medical Leave Act"	Speaker: Angela L. Thomas, Esq.
<b>June 8, 2011</b>	Carlisle Area Personnel Association (CAPA)	"Employment Law Update"	Speaker: Angela L. Thomas, Esq.
<b>June 2011</b>	PANPHA	"Labor and Employment Law Legal Update"	Speakers: Glenn R. Davis, Esq. Angela L. Thomas, Esq.



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*The material in **FORUM** is for informational purposes only and is not intended to render legal services or advice.*

**Break Time for Nursing Mothers**

*By: Daniel R. Jameson, Esq.*

The Patient Protection and Affordable Care Act (P.L. 111-148, known as the "Affordable Care Act") amended Section 7 of the Fair Labor Standards Act (FLSA) to require employers to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." The break time requirement became effective with the signing of the Affordable Care Act. The U.S. Department of Labor, Wage and Hour Division (<http://www.dol.gov/whd/>) has posted a Fact Sheet, as well as Frequently Asked Questions, that address the break time requirement.

The Act does not quantify the number and length of breaks available. Rather, it requires the employer to provide a reasonable amount of breaks and break time for the nursing mother. The Department of Labor (DOL) recognizes that the frequency of breaks as well as the duration of each break will likely vary. Since the requirement does not set forth a specific length of time for a break, employers are exposed to potential abuse by employees.

A bathroom, even if private, is not a permissible location for the expressing of milk. While DOL states that the location provided must be functional as a space for expressing breast milk, it provides no further explanation of this requirement. Employers are not required to create a permanent, dedicated space. Rather, a space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient, provided that the space is shielded from view and free from any intrusion from coworkers or the public. If the space is not permanently dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. The statute requires employers provide a space for a nursing employee "each time such employee has need to express milk." Therefore, if there is no employee with a need to express breast milk, then the employer has no obligation to provide a space.

Only hourly employees not exempt from Section 7 or overtime requirements are entitled to breaks. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of Section 7,

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## Break Time for Nursing Mothers

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they may have an obligation under state laws. The federal requirement of break time for nursing mothers does not preempt state laws that might provide greater protections (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond one year after the child's birth).

All employers covered by the FLSA, regardless of the size of their business, are required to comply with the break time provision. However, employers with fewer than 50 employees are not subject to the FLSA break time requirement if the employer can demonstrate that compliance with the provision would impose an undue hardship. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. DOL counts all employees in determining the employer's size, regardless of work site, who work for the covered employer. This includes full-time employees, part-time employees, and any other individuals who meet the FLSA's definition of employee. To err on the side of caution and to ensure compliance with the statutory requirement, DOL

encourages employers to provide breaks to all nursing mothers regardless of their status under the FLSA.

Importantly, employers are not required to compensate nursing mothers for break time. However, where employers already provide compensated breaks to employees, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for their break time.

The FLSA's general requirement that the employee must be completely relieved from work duties or else the time must be compensated as work time also applies. Predictably, the Act provides no insight into the method employers are to utilize to track and record non-compensable break time. It is presumed standard "punch out" and "punch in" practice or other record keeping method would be used to document this non-compensable time while at work.

If you have any questions about the Affordable Care Act, the FLSA or any other employment law questions, please contact Glenn R. Davis, Angela L. Thomas or Daniel R. Jameson.

## ALR IMPLEMENTATION AND IMPLICATIONS

By: Dayna E. Mancuso, Esq.

The Assisted Living (AL) regulations became effective in Pennsylvania on January 18, 2011. As of the effective date, providers cannot use the term "Assisted Living" in any of their agreements or other written materials (i.e., Disclosure Statement if you are a CCRC provider) unless they are or become licensed as an Assisted Living Residence (ALR). Per the AL regulations, an ALR must execute a resident-residence contract or assisted living admission agreement with each of its residents. The assisted living admission agreement must contain, at a minimum, those requirements set forth in the AL regulations.

In an effort to avoid any consumer/resident confusion, misunderstanding or potential non-compliance, personal care home (PCH) providers that currently use the term "assisted living" in their admission agreement and/or related document and that do not intend to become ALRs, should provide notice or execute an addendum with each current resident by the effective date of the AL regulations explaining that the facility is a PCH. The notice or addendum would explain that the term "assisted living" as used in the existing admission agreement is intended to and will afterwards mean "personal care." Providers not wanting to enter into an addendum with their residents could issue a unilateral notice

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## ALR IMPLEMENTATION AND IMPLICATIONS

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regarding the change in terminology, which notice should be attached to each admission agreement.

It is uncertain whether the Department of Public Welfare (DPW) or the Office of Long Term Living (OLTL) would cite a provider for failure to issue a notice to current residents or execute an addendum, or whether an addendum rather than a notice will be required. We are in the process of seeking guidance from DPW and OLTL on this matter. While it is clear that providers can not utilize assisted living terminology on or after January 18, 2011 unless they are licensed as ALRs, it is unclear whether providers that will not be licensed as ALRs must amend their current admission agreements to purge them of the term "assisted living." The AL regulations do not expressly provide that current agreements must be amended, but do prohibit the use of the term. DPW and OLTL recently indicated that they will allow leeway in enforcing use of the term "assisted living." PCHs utilizing this term as of their next survey will receive a letter of non-compliance with the regulatory requirement. Providers will need to submit a Plan of Correction (POC) stating how and when they will become compliant, and such POCs will be accepted on a case-by-case basis.

As a result of this new regulatory scheme, ALRs will need to ensure that their assisted living admission agreements are in compliance with the AL regulations. If you have any questions regarding the AL regulations, please contact Kimber L. Latsha, Dayna E. Mancuso or Tanya Daniels Harris.

### 8<sup>th</sup> Annual Employment Law Seminar

Presented by



Tuesday, March 22, 2011  
Carlisle, PA

Thursday, March 24, 2011  
Plymouth Meeting, PA

For more information, contact D'Ann Grob  
at (717) 620-2424 or dgrob@ldylaw.com.

## IRS Rules on the Use of FSAs to Pay for Over-the-Counter Medicines and Drugs

By: Douglas C. Yohe, Esq.

Section 9003 of the Patient Protection and Affordable Care Act revises the definition of medical expenses as it relates to over-the-counter drugs, establishing a new standard that, effective January 1, 2011, applies to flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), health savings accounts (HSAs), and Archer medical savings accounts (Archer MSAs). Under the new standard, the cost of over-the-counter medicines or drugs cannot be reimbursed from these accounts unless a prescription is obtained.

Beginning after December 31, 2010, expenses incurred for a medicine or a drug may be paid or reimbursed by an employer-provided plan, including an FSA or HRA, and distributions from an HSA or Archer MSA for a medicine or drug are tax-free qualified medical expenses, only if the medicine or drug: (1) requires a prescription; (2) is an over-the-counter medicine or drug and the individual obtains a prescription; or (3) is insulin. The new standard does not apply to items that are not medicines or drugs, such as crutches, supplies such as bandages, and diagnostic devices such as blood sugar test kits.

To be reimbursed, over-the-counter medicine and drug purchases must be substantiated. This is accomplished by submitting the prescription (or a copy) and the customer receipt.

FSAs that include a grace provision, allowing an employee to spend the amount left in their account on December 31 to reimburse expenses incurred during the first two-and-a-half months of the following year, are also affected by the new standard. If employees buy over-the-counter medicines or drugs without a prescription during the two-and-a-half month grace period of 2011, they cannot use the amount left in the account at the end of 2010 to reimburse those expenses because the new standard applies to all purchases made on or after January 1, 2011.

Cafeteria plans may need to be amended to conform to the new standard. An amendment to conform a cafeteria plan that is adopted no later than June 30, 2011, may be made effective retroactively for expenses incurred after December 31, 2010.

If you have any questions regarding the new standard, please contact Douglas C. Yohe or Angela L. Thomas.