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

SPEAKING ENGAGEMENTS

2010

October 20, 2010			
PALA Fall Conference	"Contract Requirements for Assisted Living Regulations"	Speaker:	Kimber L. Latsha, Esq.
November 2, 2010			
AAHSA Annual Meeting	"The Legal Implications of Resident Choice"	Speaker:	Kimber L. Latsha, Esq.
November 3, 2010			
AAHSA Annual Meeting	"The Legal Barriers to Aging in Place"	Speaker:	Kimber L. Latsha, Esq.
November 3, 2010		Speakers:	David C. Marshall, Esq. Angela L. Thomas, Esq.
AAHSA Annual Meeting	"Conducting Effective Workplace Investigations"		
November 4, 2010			
PTLA 2010 InnTouch Conference	"Answers to Important Legal Questions for Pennsylvania Innkeepers"	Speaker:	Glenn R. Davis, Esq.



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

Health Care Reform: Mandatory Reporting of Elder Abuse

By: Steven M. Montresor, Esq.

The Patient Protection and Affordable Care Act (PPACA), the technical name for the health care reform bill signed into law by President Obama on March 23, 2010, contains many provisions that affect providers across the continuum of care. An unheralded but significant component of the PPACA is the Elder Justice Act (EJA). The EJA imposes new abuse reporting obligations on long-term care facilities that receive at least \$10,000 in federal funds annually. The importance of these provisions is hard to overstate, as lack of compliance can result in severe consequences.

Under the EJA, a long-term care facility is an entity that provides supportive and health services to individuals who have a loss of capacity for self-care. This definition is arguably broad enough to include not only nursing facilities, but also assisted living facilities and other entities providing health and supportive services to individuals who have an inability to engage in one or more activities of daily living. The scope of this definition is to be clarified by the Secretary of the Department of Health and Human Services (Secretary).

Assuming a provider meets the definition of a long-term care facility and receives \$10,000 annually in federal funds, the owner/operator of the facility has several duties. First, it must advise all covered individuals of their obligation to comply with the abuse reporting requirements. "Covered individuals" is a broadly defined term which includes owners, operators, employees, managers, and contractors. The inclusion of contractors in the definition of covered individuals means that facilities must provide an annual notice of reporting responsibilities to a wide range of vendors and independent contractors, many of whom may never come in contact with a resident, and would not otherwise be subject to the EJA's reporting requirements. The EJA as written, however, makes the duty to advise these covered individuals mandatory.

Second, covered individuals are required to report to both the Secretary and the appropriate law enforcement agency or agencies "any reasonable suspicion of a crime . . . against any individual who is a resident of, or is receiving care from, the facility." The time frames for reporting reasonable suspicion of a crime are very tight. If the events that cause the suspicion result in a serious bodily injury, the covered individual must report the suspicion immediately to the Secretary

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Health Care Reform: Mandatory Reporting of Elder Abuse

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and the appropriate local law enforcement agency, but no later than two hours after forming the suspicion. If no serious bodily injury is involved, the time frames for reporting a reasonable suspicion are extended to 24 hours. As it is written, the EJA arguably requires every covered individual that has a reasonable suspicion of the commission of a crime to make a report. These reporting requirements are in addition to any state abuse reporting requirements.

The penalties for non-compliance have the potential to be draconian. Covered individuals who fail to meet their reporting obligations are subject to a civil monetary penalty of up to \$200,000. The covered individual may face exclusion from participation in any federal health care programs. The amount of the penalty may increase to as much as \$300,000 if the failure to report a reasonable suspicion results in harm to another person or exacerbates the harm to the victim. If a facility employs an excluded individual, then the facility is ineligible to receive any federal funds.

The statute also incorporates whistleblower protections prohibiting retaliation against individuals who fulfill their reporting obligations. Facilities must post a sign in a conspicuous location that details the rights of employees

to be free from retaliation for reporting a reasonable suspicion of a crime. The sign must also state that employees may file a complaint with the Secretary if the employee believes he or she has been subject to retaliation. The potential penalties for retaliating or discriminating against whistleblowers are severe: a civil monetary penalty of up to \$200,000, and possible exclusion from federal health care programs for two years.

The EJA's requirements were effective as of March 23, 2010. If facilities have not already done so, they should immediately implement procedures to notify all covered persons of their obligations under the EJA. Because the EJA requires contractors to be notified as well, facilities should consider revising their agreements with vendors and contractors to meet this obligation. Facilities should also identify appropriate law enforcement agencies for reporting purposes, establish internal policies and procedures for the reporting of any reasonable suspicions by covered persons, and screen prospective employees for excluded individuals. For any questions regarding your reporting obligations under the EJA, or any other compliance issues, please do not hesitate to contact Kimber L. Latsha, David C. Marshall or Steven M. Montresor.

FMLA: Fathers and Mothers, Sons and Daughters

By: Angela L. Thomas, Esq.

Under the FMLA, eligible employees are entitled to up to 12 weeks of unpaid leave for the birth, adoption or foster placement of a child, as well as leave to care for a sick son or daughter. This summer, the United States Department of Labor (DOL) issued guidance regarding the definition of "son and daughter" under the Family and Medical Leave Act (FMLA), effectively addressing who may qualify as a parent for purposes of sick leave.

The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." According to the DOL guidance, the term "in loco parentis" includes those with day-to-day responsibilities to care for and financially support a child. Thus, employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave.

The DOL's guidance indicates that an employee who assumes the role of caring for a child is entitled to leave regardless of the legal or biological relationship to the child. It is the DOL Administrator's interpretation of the regulations that an employee who intends to assume the responsibilities of a parent is not required to establish that he or

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she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. By way of example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered as standing in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child has a serious health condition.

According to the DOL, the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child. DOL opined that neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. Thus, where a child's biological parents divorce and each parent remarries, the child may be the "son or daughter" of both the biological parents and the stepparents.

In its press release highlighting the guidance, DOL stated that "[FMLA] rights, which provide work-family balance, extend to the various parenting relationships that exist in today's world." DOL has made it clear that many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, are entitled to FMLA leave rights to care for their sick children. Likewise, the interpretation makes clear that an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave, or a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer.

If you have any questions about DOL's recent FMLA guidance or any other employment law questions, please contact Angela L. Thomas or Glenn R. Davis.

Reporting Requirements for Pennsylvania Nonprofit Corporations

By: Douglas C. Yohe, Esq.

Pennsylvania imposes certain reporting requirements on nonprofit corporations. In two instances, a reporting obligation is triggered by an operational change within the corporation. First, every nonprofit corporation that has effected a change in its officers during the preceding calendar year must file Form DSCB:15-5110, Annual Statement-Nonprofit Corporation, with the Department of State by April 30 of each year. This statement must include the name of the corporation, the address of the corporation's principal office, and the names and titles of the persons who are its principal officers. There is no fee associated with this filing.

Second, a nonprofit corporation that intends to change location of its registered office must either amend its Articles of Incorporation or file with the Pennsylvania Department of State a Statement of Change of Registered Office (Form DSCB:15-1507/4144/5507/6144/8506) prior to change of office. The statement must include the name of the corporation, the address of its current registered office, the address of its new registered office, and a statement that the change was authorized by the corporation's Board of Directors or other governing body. The filing fee is \$70.

Nonprofit corporations, as well as for profit corporations, limited liability companies, and limited partnerships must file every ten years during the years ending with the number "1" (for example, 2001, 2011, 2021) a statement of continued existence with the Department of State. The statement must include the name of the corporation, the address of its registered office, and a statement that the corporation or other association continues to exist. The Department of State will give notice of this filing requirement on or after November 1, 2010, and will include the decennial filing form with the notice; however, the Department's failure to give notice or an entity's failure to receive the notice does not relieve the entity of its obligation to make the decennial filing. There is a \$70 filing fee associated with the decennial filing.

If you have any questions regarding the filing requirements for nonprofit corporations or need assistance with such filings, please contact Douglas C. Yohe.