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FORUM

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Editors: Glenn R. Davis, Esq. & Steven M. Montresor, Esq.

Preparing for the DRA

By: Steven M. Montresor, Esq.

On March 3, 2007, the Department of Public Welfare published a Statement of Policy in the *Pennsylvania Bulletin* implementing the Deficit Reduction Act of 2005 (DRA) as it relates to Medical Assistance eligibility for long-term care services. Generally, the DRA rules will apply to applications filed on or after March 3, 2007. In addition to the Statement of Policy, DPW has issued several Operations Memoranda to clarify and interpret the Department's regulations concerning Medical Assistance eligibility. In order to prepare for the changes, providers should review their admission agreements, policies, and procedures to mitigate potential problems caused by DRA implementation.

Most providers are well aware that the DRA lengthens the look-back period for Medical Assistance eligibility from 36 months to 60 months. The extended look-back period applies only to assets transferred on or after February 8, 2006. If an asset was transferred before that date, the 36 month look-back period will continue to apply.

More significant, and more problematic, is that the DRA changes the start date for the penalty period if an applicant has transferred assets for less than fair market value. The start date of a penalty period will now be the date on which the applicant would otherwise have been eligible for Medical Assistance. Under the DRA, an individual could hypothetically be admitted to a nursing home, pay privately for several years, and still be subject to a substantial penalty period. As a result, it is essential to identify any transferred assets prior to admission, and in particular, assets that were transferred on or after February 8, 2006.

The DRA imposes new requirements on promissory notes, loans and mortgages of an applicant. Under the DRA, funds loaned to a third party by an applicant would be considered a transfer of assets unless the repayment term is actuarially sound, the payments are in equal amounts, and there is no provision for cancellation of the balance upon death. Accordingly, prior to admission, providers should identify whether any of these transactions have occurred, and if so, obtain documentation relating to the note, loan or mortgage to verify whether the transaction meets DRA requirements.

The DRA also addressed life estates. As a way of sheltering assets, some prospective residents would purchase a life estate interest in a home, often never living at that residence. In such cases, the prospective resident is effectively making a gift to the homeowner. Under the DRA, an individual can be penalized for the purchase of a life estate unless the purchaser resides in the home for at least one year after the date of purchase. Thus, providers should identify whether the prospective resident is the owner of a life estate, and if so, ascertain whether the arrangement meets the DRA requirements. The DRA does not apply when the applicant transfers his or her property but retains a life estate interest in the property. In those cases, the value of the applicant's life estate interest would be used in determining whether a transfer of assets has occurred.

As a condition of eligibility, applicants must disclose and describe any interest that the applicant or the community spouse may have in an annuity. The Department must be named as a residual beneficiary on any annuity purchased on or after February 8, 2006. The

*(See **DRA,** page 2)*

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(**DRA,** *continued from page 1)*

DRA requires that the annuity be treated as a transfer of assets if the Department is not named as a residual beneficiary. An annuity purchased on behalf of an annuitant who has applied for Medical Assistance will not be treated as a transfer of assets if it is considered either an individual retirement annuity or deemed an individual retirement account under a qualified employer plan. Nor is an annuity considered a transfer of assets if it is purchased from the funds of certain types of IRAs, retirement accounts, employee pensions, or a Roth IRA. Finally, an annuity will not be treated as a transfer of assets if it is irrevocable and nonassignable, actuarially sound, and payments are in equal amounts with no deferred or balloon payments.

The DRA changes the way the Community Spouse Monthly Maintenance Needs Allowance (CSMMNA) is determined. The DRA mandates that states must now use the "income first" rule rather than the "resource first" rule. States must now transfer income from the institutional spouse to the community spouse to fund the CSMMNA. If a shortfall in funding for the CSMMNA remains, then resources may be allocated to fund the remaining balance.

Also, individuals applying for Medical Assistance are not eligible for benefits if their home equity exceeds $500,000. The home equity limitation does not apply if a spouse, minor child or disabled child lives in the house.

The DRA provides for a hardship waiver process which would apply if the application of a penalty period would deprive a resident of medical care such that the resident's health or life would be endangered, or would deprive the resident of food, clothing, shelter or other necessities of life. A facility can file a hardship waiver with the consent of the resident or the personal representative.

In response to the DRA, facilities should consider doing the following:

1. Implement a comprehensive financial screening process. Facilities should closely screen the financial transactions that have occurred within the applicable look-back period. In particular, facilities should be inquiring about annuities, notes, loans, mortgages and life estates. Potential problems should be identified before admitting the resident.

2. Revise the admission agreement to take advantage of the hardship waiver process.

3. Educate residents and responsible parties of the consequences of a transfer, in particular the Department's expectation that the resident will use his or her income to pay for the cost of care, and the impact that a diversion of income or resources will have on eligibility.

4. Obtain from the resident a consent to access financial information, either through a separate authorization, contractual language or a combination of both.

5. Revise the admission agreement to include a consent to apply for Medical Assistance and/or file an appeal of a denial if family members or the responsible party fail to do so.

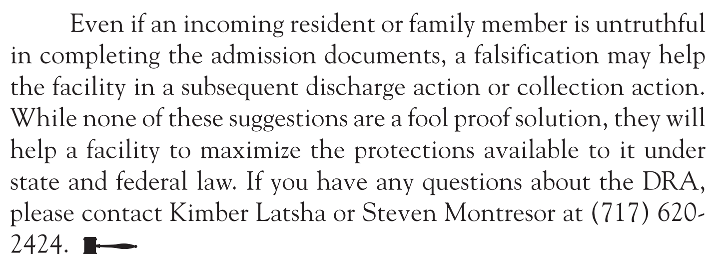
6. Contractually obligate the responsible person to pay for the resident's care from the resident's resources, and require the responsible person's cooperation in the Medical Assistance application process.

7. Notify the Social Security Administration when residents or their representatives fail to turn over the monthly social security income.

8. Impose a requirement that the facility be notified of change in the resident's assets, income or payor source.

9. Revise the admission agreement to include a certification of the accuracy of financial information.

Even if an incoming resident or family member is untruthful in completing the admission documents, a falsification may help the facility in a subsequent discharge action or collection action. While none of these suggestions are a fool proof solution, they will help a facility to maximize the protections available to it under state and federal law. If you have any questions about the DRA, please contact Kimber Latsha or Steven Montresor at (717) 620-2424.



LDYM will be holding a breakfast seminar on *The Deficit Reduction Act: Admission Agreements, Applications & Policies* on April 24, 2007, in Lancaster, PA. Presenters will review the Deficit Reduction Act of 2005 (DRA) and discuss how to revise admission agreements, applications, policies and practices in response to DRA implementation. For more information, please contact Michelle Fournier at (717) 620-2424.

The Firm held its annual Employment Law Seminar on March 22 and 27, 2007. The last session will be held on May 3, 2007, in Cambridge Springs, PA, which will be hosted by Healthcare Ventures Alliance. HVA members receive a discount on the registration fee. For more information, please contact D'Ann Grob at (717) 620-2424.

Amendments to the Pennsylvania Mechanics' Lien Law

By: Douglas C. Yohe, Esq.
and Lorie A. Taylor, Esq.

Prior to January 1, 2007, it was standard practice for a contractor to file a waiver of mechanics' liens/ stipulation against liens prior to starting any work on a construction project. However, recent amendments to the Pennsylvania Mechanics' Lien Law have now limited the ability to waive mechanics' liens prior to the commencement of any work. Unless certain conditions are met, an owner cannot require a contractor to waive its right to file a mechanic's lien prior to the commencement of a construction project.

For non-residential buildings or when the total construction price between owner and general contractor is more than $1,000,000.00 for residential buildings, a waiver of liens is no longer allowed because it is against public policy. In such a case, a contractor may only waive its lien rights for actual payment received for the work, services, materials and/or equipment. Also, subcontractors may waive their lien rights only for actual payment received for the work, services, materials and/or equipment or if the contractor posts a bond guaranteeing payment for labor and materials provided by subcontractors.

For residential buildings where the total consideration is less than $1,000,000.00, a waiver of a mechanic's lien can be filed against the contractor and subcontractor. A residential building includes: (1) property in which there is a residential building, (2) property zoned or approved for residential development, planned development or agricultural use, or (3) property in which there has been a residential subdivision plan or a planned residential development plan received.

To provide protection against mechanics' liens for construction mortgages, mechanics' liens (even if construction has already begun) no longer have priority over an open-end construction mortgage (all of the proceeds are used to pay for all or a part of construction on the premises) and purchase money mortgages (the proceeds are used to buy the property).

The time period for filing mechanics' liens with the Prothonotary has increased from four months to six months after the work is completed by the claimant. The definition of claimants who can file liens now includes second tier subcontractors or material suppliers through their first tier subcontractors.

This article only highlights the amended law. If you have any questions or would like more detailed information, please call Doug Yohe or Lorie Taylor at 717-620-2424.

Employer-Provided Athletic Facilities – Does it Pay to Work Out?

By: Andrea E. Dean, Esq.

Today, many employers are focusing on employee wellness programs as a way to battle ever-increasing health care costs. Some employers provide the use of athletic facilities as a fringe benefit for their employees as part of such programs. Employers and employees should be aware of the tax consequences of this fringe benefit.

Generally, this employer-provided benefit constitutes taxable employee compensation. Employees may exclude the value of the athletic facilities from their gross income only when an employer provides athletic facilities (a gym, pool, tennis court or golf course) to its employees that meet certain criteria under the Internal Revenue Code. According to the Internal Revenue Service, if it is reasonable to believe that an employee will be able to exclude the value of the athletic facilities from his/her gross income, the fringe benefit is also excluded from the calculation of wages for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) and federal income tax withholdings.

Three criteria must be met in order for employers and employees to utilize this exclusion. First, the athletic facilities must be located on the employer's premises. "Premises" includes property owned or leased by the employer. To meet this criterion, it is sufficient that the employer pays a reasonable rent, even if the employer is not named specifically on the lease. The exclusion does *not* apply when the athletic facilities are for residential use, like at a resort.

Next, the employer must operate the athletic facilities either through its own employees or through contracting with another person or organization to do so. If the athletic facilities are operated by more than one employer, then the facilities are considered to be operated by each employer.

Finally, substantially all of the use of the athletic facilities during the calendar year must be by the employees of the employer, the employees' spouses, and the employees' dependent children. This rule is important where employers make athletic facilities available to their clients or the general public. The exclusion does *not* apply to the provision of memberships in a country club or similar facility, unless all of the criteria discussed above are met.

In 2006, Congress proposed legislation to further clarify this income exclusion. The proposal sought to expand the exclusion by including fees or membership expenses up to $900 paid by an employer to an athletic or fitness facility on behalf of most employees as part of the athletic facilities exclusion from employees' gross income. Until adoption of the proposal, the income exclusion remains fairly limited.

If you have any questions on this or any other employment law matter, please contact Angela Thomas or Glenn Davis at (717) 620-2424.

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2007 SEMINARS

LDY&M Health Care Practice Group Seminar	April 24, 2007 Lancaster, PA	"The Deficit Reduction Act: Admission Agreements, Applications and Policies"	Kimber L. Latsha, Esq. Steven M. Montresor, Esq.
PACB Leadership Conference	April 27, 2007 Camp Hill, PA	"Equal Pay and Compensation Issues"	Angela L. Thomas, Esq.
Pa. Coalition of Charter Schools	April 29-May 1, 2007 Philadelphia, PA	2007 Annual Conference	Kevin M. McKenna, Esq. Patricia A. Hennessy, Esq. Mark G. Morford, Esq. Nicole D. Snyder, Esq. Joshua E. Pollak, Esq.
PACAH Spring Conference	May 1, 2007 State College, PA	"Who, What, When & Where? (Conducting Effective Workplace Investigations)"	Glenn R. Davis, Esq. Angela L. Thomas, Esq.
LDY&M 2007 Employment Law Practice Group	May 3, 2007 Cambridge Springs, PA	2007 Annual Employment Law Seminar	Glenn R. Davis, Esq. Angela L. Thomas, Esq. Andrea E. Dean, Esq.
PACB HR Conference	May 10, 2007 Camp Hill, PA	"Who, What, When & Where? (Conducting Effective Workplace Investigations)"	Angela L. Thomas, Esq. Glenn R. Davis, Esq.
HR 101 Conference	May 11, 2007 Harrisburg, PA	"Recruitment & Retention"	Angela L. Thomas, Esq.
SE-PANPHA	May 25, 2007 Rosemont, PA	"Act 169: What You Need to Know About End of Life Decisions"	Kimber L. Latsha, Esq. Tanya Daniels Harris, Esq.
NJANPHA Annual Conference	May 31, 2007 Atlantic City, NJ	"Who, What, When & Where? (Conducting Effective Workplace Investigations)"	Glenn R. Davis, Esq. Angela L. Thomas, Esq.
PANPHA Annual Conference	June 28, 2007 Hershey, PA	"The Deficit Reduction Act: Implementation and Related Developments"	Kimber L. Latsha, Esq. Steven M. Montresor, Esq.
PANPHA Annual Conference	June 29, 2007 Hershey, PA	"Personal Care/Assisted Living Issues Forum"	Kimber L. Latsha, Esq. Tanya Daniels Harris, Esq. Nick Luciano
PANPHA Annual Conference	June 29, 2007 Hershey, PA	"Real Estate Tax Exemption Issues for CCRCs and Healthcare Providers"	Kimber L. Latsha, Esq. David C. Marshall, Esq.
Council on Education in Management	July 27, 2007 Philadelphia, PA	"Recruiting in a Tight Employment Market: Innovative & Aggressive Strategies that Are Both Successful & Legal"	Angela L. Thomas, Esq.
PA Marketing Society	November 15, 2007 Mechanicsburg, PA	TBD	Kimber L. Latsha, Esq.