

EDITORS: GLENN R. DAVIS, ESQ. & STEVEN M. MONTRESOR, ESQ.

LATSHA DAVIS YOHE & MCKENNA, P.C.

ATTORNEYS AT LAW

- Mechanicsburg, PA
(717) 620-2424
- Exton, PA
(610) 524-8454
- Mt. Laurel, NJ
(856) 231-5351
- Maryland
(410) 727-2810



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RECORD RETENTION POLICIES *By: ANGELA L. THOMAS, ESQ.*

Employers have affirmative obligations to retain certain personnel records under state and federal laws. In this article, we summarize some of the major recordkeeping requirements with respect to personnel records. Employers must be aware of these requirements in drafting their record retention policy. This summary only highlights major requirements.

- **Title VII of the 1964 Civil Rights Act** (“Title VII”): In addition to its anti-discrimination provisions, Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for one year from the date of making the record or the personnel action involved, whichever is later. Title VII further requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action. Employers with 100 or more employees are required to file an EEO-1 report each year with the Equal Employment Opportunity Commission. A copy of the most recent EEO-1 report filed must be retained.
- **Americans With Disabilities Act** (“ADA”): The ADA mandates that records be kept in accordance with Title VII requirements for a one year period. Any records related to an employee’s request for accommodation under the ADA are considered relevant personnel records and must be retained for one year. The biggest ADA recordkeeping issue of which employers need to be aware relates to medical confidentiality concerns under the ADA. Any records containing medical information must be kept in a separate, confidential medical file; they cannot be kept in an employee’s personnel file.
- **Age Discrimination and Employment Act** (“ADEA”): In addition to prohibiting discrimination against employees or applicants who are 40 years of age or older, the ADEA contains recordkeeping requirements. Payroll or other records containing an employee’s name, address, date of birth, occupation, pay rate and compensation earned per week must be kept for a minimum of three years and be readily available. All personnel or employment records relating to job applications, promotion, demotion, transfer, training, discharge, employment tests, or job advertisements must be kept for at least one year after the personnel action is taken. Records relating to employee benefit plans and written seniority or merit rating systems must be kept while the plan or system is in effect, plus one year after its termination. Finally, personnel records relevant to any enforcement action brought against an employer under the ADEA must be kept until final disposition of the action.
- **Fair Labor Standards Act** (“FLSA”): The FLSA has very broad recordkeeping requirements. Specified records must be kept two or three years, depending on the type of record. Some of the most important provisions of which an employer must be aware are the records mandated for exempt and non-exempt employees. For all employees, an employer must keep records containing the following information: employee name and identifying number/symbols; home address and zip code; date of birth, if under 19; gender; and occupation in which employee is employed. For non-exempt employees, employers must also keep records containing: time of day and day of week that work week begins; pay rate; hours worked each work day and week; total daily and hourly straight time earnings; total overtime earnings; total additions/deductions to/from wages

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each pay period; total wages each pay period; date of payment and pay period covered by payment; and any retroactive wage payment information. These records must be made available within 72 hours following notice from the Department of Labor for inspection and transcription.

- **Equal Pay Act (“EPA”):** The EPA adopts the basic recordkeeping requirements set forth under the FLSA. In addition, it requires employers to retain records made in the regular course of business which relate to wages or other matters that describe or explain the basis for payment of wage differentials to employees of the opposite sex in the same establishment; for example, records relating to wage payments, wage rates, job evaluations, job descriptions, and merit or seniority systems. The records must be kept for at least two years and for all employees regardless of their exempt or non-exempt status. Records relevant to any enforcement action under the EPA must be kept until final disposition of the action.
- **Family and Medical Leave Act (“FMLA”):** For every employee, employers must retain the following for three years: records pertaining to compliance with FMLA’s leave requirements, basic payroll information and identifying employee data, pay rate, compensation terms, daily and weekly hours worked per pay period, additions/deductions to/from wages and total compensation paid. In addition to the basic records, employers must maintain certain records for eligible employees for three years: dates of FMLA leave taken by employee, hours of leave, if taken incrementally, copies of written employee notices given to the employer, copies of all general and specific notices given to employees by the employer, all documents describing employee benefits or employee policies and practices relating to paid and unpaid leave, premium payments of employee benefits and records of any disputes between employer and employee about designation of leave as FMLA.
- **Information Reform and Control Act (“IRCA”):** Per the IRCA, employers must complete an INS Form I-9 for each employee. The employer must keep the completed INS Form I-9 for three years after date of hire or one year after the termination of an employee, whichever is later. Although not required, an employer is well-advised to keep copies of the documents produced by an employee to verify his or her work eligibility. Employers often overlook the most critical recordkeeping requirement under the IRCA: the INS Form I-9 must be kept separate from employee personnel files.
- **Pennsylvania Recordkeeping Requirements:** Pennsylvania contains recordkeeping requirements for all employers under Pennsylvania’s Minimum Wage Law, Equal Pay Law, and Child Labor Law. Under the Minimum Wage Law, an employer must keep records containing the following information, for three years from the date of last entry: employee name and identifying number or symbol; home address including zip code; regular hourly pay rate; occupation; time and day that work week begins; number of hours worked daily and weekly; total daily or weekly straight time wages; total overtime excess compensation; total additions/deductions to/from wages; allowances, if any claimed as part of minimum wage; total wages each pay period; date of payment and pay period covered

by payment; and special certificates for students and learners. Under the Equal Pay Law, an employer must keep and maintain the following records for one year: records of employees wages and wage rates, job classification and other terms and conditions of employment. For Pennsylvania employers who employ individuals under the age of 18, the Child Labor Law requires an employer to keep an employment certificate for each minor.

- **Additional Considerations:** As is clear from the summary above, the type of personnel records that must be kept and the time periods for which they must be kept by employers widely differ based upon the statute involved. Employers should give some additional consideration to other laws that may impact the keeping of personnel records. In addition to bringing claims for statutory violations, employees often sue employers for common law claims such as breach of contract or an action based in tort (e.g., negligence, assault and battery, or invasion of privacy). The statute of limitations for such claims are four and two years, respectively. Pennsylvania has an additional catch-all statute of limitations period of six years; any claims not covered by another statute of limitations may generally be brought six years following the date that the cause of action arises. It may be wise for employers to consider maintaining personnel records for a period at least equal to the longest statute of limitations period. An employer would not want to find itself in a place where an action has been brought against it and it has no or a limited ability to defend itself because the relevant documentation has already been destroyed.

If you have any questions on these recordkeeping requirements or other employment law obligations, please contact Angela Thomas or Glenn Davis. ➡

INSIDE THE FIRM

Glenn R. Davis and Angela L. Thomas presented a session discussing “**The Exempt Status of Loan Officers**” to the Central Pennsylvania Mortgage Bankers Association.



Kimber L. Latsha presented a session entitled “**Drafting a CCRC Residency Agreement**” at the American Health Lawyers Association 2006 Annual Meeting.

MA REIMBURSEMENT— THE GROUND RULES CHANGE

By: STEVEN M. MONTRESOR, ESQ.

The Department of Public Welfare recently changed the way case-mix rates will be calculated for nursing facility providers participating in the Medical Assistance Program. These changes will be effective beginning with the FY 2006-2007 rate setting year. Significant changes include:

- Removal of the county nursing facilities from the case-mix payment system. The county homes will be reimbursed separately from non-public nursing facilities under a new payment system. However, for the next two fiscal years (FY 2006-2007 and FY 2007-2008), the county facility data will be used to set rates for non-public nursing facilities. As a result, there should be no adverse impact on peer group prices.
- Resident acuity information for all residents, regardless of payor source, will now be collected on each of the four picture dates. While DPW initially proposed to average the total facility CMI for all four picture dates in order to arrive at an annual CMI, DPW has now agreed to use this data for purposes of analysis only. In addition, DPW now requires nursing facilities to submit the initial MDS record for each resident admitted to the facility within seven calendar days of the completion of the assessment record.
- Inclusion of a budget neutrality factor in the rate setting process. The budget neutrality factor will be based on the annual appropriation for nursing facility services. The Department will determine the budget neutrality factor using the same method that it utilized to set provider payment rates for FY 2005-2006. Rates will essentially be “capped” or “limited” based on budgetary appropriations from the legislature.

DPW also intends to further revise the MA payment regulations by FY 2008-2009. Among the proposed changes to be discussed are alternative placement mechanisms, bed hold payments, phase out of county costs in the rate setting process, and increases to the per bed limit for fixed assets. The revisions will be reviewed by the Independent Regulatory Review Commission (“IRRC”) and the Standing Committee of the General Assembly. The trade associations will have an opportunity to review and comment on DPW’s impact analysis and the proposed regulations prior to submission to the IRRC or the Standing Committee of the General Assembly.

If you have any questions regarding the revisions to the methodology used by DPW to set provider payment rates or any other payment issues, please contact David Marshall or Steven Montresor.

OUTSTANDING TAX-EXEMPT DEBT: REFUNDING AND REFINANCING RECORDKEEPING

By: LORIE A. TAYLOR, ESQ.

Tax-exempt debt issued to finance property owned and operated by 501(c)(3) organizations is subject to the private business tests under the IRS Regulations. The private business tests consist of a private business use test and a private security or payment test. Generally, any use of the property by the organization that is not related to its exempt purpose is considered a business use. Such use could result in the financing becoming taxable instead of tax-exempt.

In the past, the IRS Regulations did not address how the private business tests applied to debt that was issued to refinance or refund tax-exempt bonds. Specifically, the IRS Regulations did not address whether the use of property financed by tax-exempt bonds prior to the date the refunding obligation was issued should be considered to determine if the refunding obligation can qualify as tax-exempt bonds. On December 19, 2005, the United States Treasury published “Refunding Regulations.” These regulations generally provide guidance on tax exempt bonds sold on or after February 17, 2006 that either (a) refund an obligation issued on or after May 16, 1997, or (b) refund an obligation issued before May 16, 1997 if the refunding bonds have a weighted average maturity that is longer than the weighted average maturity of the obligation being refunded.

If the Refunding Regulations apply, 501(c)(3) organizations are responsible to account for the private business use of the bond-financed property. To determine the amount of private business use

of an organization refinancing its tax-exempt debt, the organization must review all contracts, leases and other arrangements relating to the use of tax-exempt financed property for a considerable time period (no earlier than May 16, 1997) to establish the nature and amount of the use, and whether there is any private business use. The results of such a review will then be represented by the organization in a Federal Tax Certificate or Tax Compliance Agreement that the issuer or the organization signs when the refunding obligation is issued.

Under the Refunding Regulations, the refinancing of tax-exempt debt will most likely result in an organization producing records that document the cost, location and use of bond-financed property to show that the property is used for an exempt purpose. In light of the Refunding Regulations, an organization that does not retain appropriate records regarding the costs, location and use of bond-financed property will have a difficult time refinancing its tax-exempt debt on a tax-exempt basis if it is not able to confirm that the property was not used for a business purpose. Thus, an organization should keep records that account for all arrangements regarding the use of bond-financed property if any tax-exempt debt issued on its behalf remains outstanding. Organizations should consider developing specific policies and procedures that track the use of any property financed with tax-exempt bonds.

If you have any questions regarding the Refunding Regulations, please do not hesitate to contact Doug Yohe or Lorie Taylor.



LATSHA DAVIS YOHE
& MCKENNA, P.C.

ATTORNEYS AT LAW

1700 Bent Creek Boulevard, Suite 140
Mechanicsburg, PA 17050

2006 SEMINARS

Pa. Association of Community Bankers Annual Conference	September 9, 2006 San Diego, CA	"Protecting Your Company's (Other) Assets"	Glenn R. Davis, Esq., and Angela L. Thomas, Esq.
Mortgage Bankers Association	September 21, 2006 Philadelphia, PA	"Six Deadly Sins: Common Employer Mistakes"	Glenn R. Davis, Esq., and Angela L. Thomas, Esq.
PHCA CALM 2006 Annual Convention	September 26, 2006 Seven Springs, PA	"Six Deadly Sins Employers Can Commit"	Glenn R. Davis, Esq., and Angela L. Thomas, Esq.
PHCA CALM 2006 Annual Convention	September 27, 2006 Seven Springs, PA	"Non-Compliance Nightmare – Are You Prepared?"	David C. Marshall, Esq.
AAHSA 2006 Annual Meeting & Exposition	November 4, 2006 San Francisco, CA	Fair Housing Preconference	Kimber L. Latsha, Esq.
AAHSA 2006 Annual Meeting & Exposition	November 8, 2006 San Francisco, CA	"Best Practices in Employment Decisions"	Glenn R. Davis, Esq., and Angela L. Thomas, Esq.