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IN THIS EDITION:

Arbitration Clauses in Long-term Care Contracts 1

Political Activities in 501(c)(3) Organizations 2

GINA: New Anti-Discrimination Law 3

Seminars 3



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ARBITRATION CLAUSES IN LONG-TERM CARE CONTRACTS

By: DAYNA E. MANCUSO, ESQ.

The utilization of arbitration clauses in nursing facility and personal care admission agreements has become somewhat commonplace. Long-term care (“LTC”) providers have increasingly turned to alternative dispute resolution (“ADR”) mechanisms, such as arbitration, in lieu of traditional litigation, to resolve disputes. This trend in the LTC industry has received resistance from consumer advocacy groups and trial attorneys (i.e., the plaintiffs’ bar) which in turn has led to proposed federal legislation.

This year, proposed legislation aimed specifically at arbitration clauses in LTC contracts has been introduced in both the House of Representatives and the Senate. The legislation, known as the “Fairness in Nursing Home Arbitration Act of 2008” (“Act”), seeks to eliminate pre-dispute mandatory binding arbitration clauses in nursing home, assisted living and other LTC facility contracts. The Act would amend the Federal Arbitration Act (“FAA”) which presumptively favors arbitration agreements. The Act would not prohibit parties from entering into agreements to arbitrate after an alleged claim has arisen or alleged injury has occurred. As currently written, the Act would only apply prospectively; it does not appear that it will have any retrospective impact. With the presidential election on the horizon, it seems unlikely that the bill will have enough momentum to be passed this year. In 2007, a broader bill called the “Arbitration Fairness Act” was introduced into Congress in an effort to make clauses in consumer, employment, franchise and medical contracts that mandate arbitration unenforceable. To date, the proposed legislation has not made much headway.

Historically, courts and legislatures have permitted arbitration clauses in consumer contracts. Pennsylvania statutory law permits the resolution of disputes by arbitration. From a health care regulatory perspective, the Centers for Medicare and Medicaid Services (“CMS”) issued a memorandum in 2003 regarding its position on binding arbitration clauses in nursing home agreements. CMS believes that under Medicare, the validity of a binding arbitration agreement is an issue between the resident and the nursing home. Under Medicaid, CMS will defer to state law as to whether binding arbitration agreements are permitted, subject to any limitations imposed by federal law or regulations.

For those LTC providers unfamiliar with arbitration, it is an alternative forum selected by parties for the resolution of a dispute. Arbitration seeks to reduce the time, formalities and cost of utilizing the court system. Instead of a judge or jury determining the outcome of a dispute, a neutral third party chosen by the parties hears all of the relevant information related to the dispute and renders a decision, which is binding on both parties. Generally, an arbitrator’s decision is final and not open to appeal. Arbitration may be mandatory or voluntary in nature. When arbitration is mandatory, it is the only legal process available to the parties. When arbitration is voluntary, the parties must mutually agree to attempt arbitration first.

If you do not currently utilize an arbitration clause or agreement, but are contemplating doing so, you should consider several issues, which include:

(See *ARBITRATION*, page 2)

(ARBITRATION, continued from page 1)

- Involve your insurance carrier – Determine whether mandatory binding arbitration that is not subject to appeal may compromise your facility’s liability insurance coverage.
- Clause or agreement – Decide whether the decision to arbitrate should be a clause in the admission agreement or a stand-alone agreement.
- Mediation – Decide whether the parties should engage in voluntary or involuntary mediation as a preliminary step.
- Organization to provide ADR processes – Select an organization that fits your needs. This decision is significant due to limitations imposed by some arbitration agencies.
- Alternative arbitration agency or arbitrator – Designate an alternative organization if the appointed organization is unable or unwilling to serve.
- Rules of procedure – Determine whether the rules of the organization providing the ADR process are sufficient.
- Allocation of costs – Decide how the costs of ADR will be allocated between the parties.
- Scope of issues – Determine what issues should be subject to arbitration.
- Rescission clause – Determine whether to grant a right of rescission to residents and their authorized representatives.

The utilization of arbitration clauses or agreements has been challenged by consumers. Unconscionability, lack of authority, and lack of capacity are a few of the legal challenges presented by consumers in an effort to avoid arbitration clauses or agreements. Unconscionability in Pennsylvania is a two-prong determination whereby an arbitration clause or agreement must be determined to be both procedurally and substantively unconscionable. Procedural unconscionability typically refers to contracts of adhesion, in which one party has all of the “negotiating leverage” and offers the contract on a take-it-or-leave-it basis. Substantive unconscionability focuses on the content of the arbitration agreement itself to determine if the terms “unreasonably favor” the party with the greater bargaining power. Another challenge raised by consumers is that the party who executed the admission agreement lacked the authority to bind the resident. Also, consumers have sought to invalidate arbitration agreements by claiming that the resident lacked the capacity to knowingly execute the agreement. Even though a consumer may raise these challenges, a properly drafted and implemented arbitration clause or agreement should withstand judicial scrutiny.

If you are contemplating using an ADR mechanism, or would like assistance in revising your arbitration clause or agreement, please contact Kimber L. Latsha or Dayna E. Mancuso.



POLITICAL ACTIVITIES BY 501(c)(3) ORGANIZATIONS


By: DOUGLAS C. YOHE, ESQ.

As the presidential election heats up, it is important for 501(c)(3) organizations to understand the rules they must follow with respect to political activity. Under the Internal Revenue Code, a 501(c)(3) organization is prohibited from directly or indirectly participating or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. If the IRS finds a 501(c)(3) organization engaged in prohibited campaign activity, it could lose its federal tax-exempt status and be subject to an excise on the amount of money spent on that activity. Whether a 501(c)(3) organization is engaging in prohibited political campaign activity depends upon the circumstances in each case.

The Internal Revenue Code does not prohibit 501(c)(3) organizations from encouraging people to participate in the electoral process or from having contact with a campaign. The organization may also sponsor debates or forums with political candidates, distribute voter guides and conduct voter registration or get-out-the-vote drives. However, such activities cannot show a preference for or against a candidate or political party. A 501(c)(3) organization may even invite political candidates to speak at an event without jeopardizing its tax-exempt status if the organization takes steps to ensure that:

- it provides an equal opportunity to other political candidates seeking the same office;
- it does not indicate any support of or opposition to any candidate; and
- no political fund-raising occurs in conjunction with the speech.

The prohibition on political campaign activities applies only to the organization, not to the activities of any individual in his/her private capacity. Thus, management and other employees of the organization may speak for themselves regarding a candidate, and are not prohibited from speaking about important issues of public policy. However, management of 501(c)(3) organizations cannot make partisan comments in official organization publications or at official organization functions.

Douglas C. Yohe is available to discuss any questions that your organization may have regarding political activities. 



GINA: NEW ANTI-DISCRIMINATION LAW

By: ANDREA E. DEAN, ESQ. AND ANGELA L. THOMAS, ESQ.

Ihe Genetic Information Nondiscrimination Act of 2008 (“GINA”) became law on May 21, 2008. GINA prohibits discrimination based on genetic information in relation to health insurance eligibility and employment. Once GINA becomes effective, employers must view genetic information in the same way as any other protected characteristic.

An employer may not discharge or refuse to hire any employee or discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because of the employee’s genetic information. GINA also makes it unlawful for an employer to limit, segregate or classify its employees so that employees are deprived of employment opportunities or their status is affected adversely because of their genetic information.

GINA further prohibits employers from requesting, requiring or purchasing genetic information regarding an employee or family member with certain exceptions. Generally, the exceptions are where the employer (1) inadvertently requests or requires medical history of the employee/family member; (2) offers health or genetic services; (3) requests family medical history to comply with certification provisions of the Family and Medical Leave Act; (4) purchases documents that are commercially and publicly available; (5) intends to use the information for genetic monitoring of biological effects of toxic substances in the workplace; or (6) conducts DNA analysis for law enforcement purposes.

Additionally, GINA requires genetic information to be maintained on separate forms and in separate medical files and be treated as a confidential medical record. It is sufficient for

genetic information to be maintained with and treated as a confidential medical record under the Americans with Disabilities Act. Finally, GINA prohibits retaliation against anyone who has opposed any act or practice unlawful under GINA or who has made a charge, testified, assisted or participated in an investigation, proceeding or hearing under the provisions of GINA.

In passing GINA, Congress also tacked on an amendment to the Fair Labor Standards Act, the federal wage and hour law, increasing penalties for child labor violations. Employers now face penalties up to \$50,000 for the death or serious injury to a minor employee and \$11,000 (previously \$10,000) per worker for other child labor violations. GINA also defined “serious injury” to mean:

- permanent loss or substantial impairment of one of the five senses or of the function of a bodily member, organ or mental faculty (including limb); or
- permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

GINA’s employment provisions become effective 18 months after the enactment date, while its insurance provisions become effective one year after the enactment date. The new penalties for child labor violations, however, apply to all deaths or serious injuries that occur post-enactment (May 21, 2008).

Glenn R. Davis and Angela L. Thomas are available to answer any questions regarding GINA or any other employment-related questions. 

SEMINARS

PHCA/CALM Annual Convention	September 24, 2008	“Arbitration Clauses in Admission Agreements”	Kimber L. Latsha, Esq.,
PHCA/CALM Annual Convention	September 25, 2008	“PC/AL’s Top 10 Deficiencies – AL”	Kimber L. Latsha, Esq.
Kairos Health Systems, Inc.	October 2, 2008	“Aging in Place”	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	October 14, 2008	“Privacy Issues in the Workplace”	Angela L. Thomas, Esq. & Glenn R. Davis, Esq.
Society for Human Resource Management–Williamsport Chapter	November 12, 2008	“Fair Labor Standards Act”	Angela L. Thomas, Esq.
Juniata Valley Advisory Council	March 31, 2009	“Workplace Monitoring”	Angela L. Thomas, Esq.