Making a Difference

Baker Donelson Long Term Care Newsletter

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Volume 2012, Issue 1

Social Media Policy Considerations for Long Term Care Providers – A Sword or A Shield?

Angie Davis, 901.577.8110, angiedavis@bakerdonelson.com

A single photo of a resident's decubitus ulcer on Facebook and/or YouTube is perhaps one of a long term care facility's worst nightmares. However, an unsolicited posting praising the facility for the outstanding care and treatment of someone's family member is marketing that facilities cannot buy. Employers cannot ignore social media and its impact on the workplace. Employees tweet, text, instant message, blog and post status updates and photos on Facebook faster than employers can monitor them. Employers are increasingly focused on how they can use social media as a marketing tool while at the same time trying to control the information their employees post. Protection of residents' privacy rights, HIPAA considerations and nursing home malpractice claims pose unique challenges to the long term care industry. This article highlights some of those unique challenges and offers suggested trouble shooting in drafting the social media policy for your facility.

Policing of Employee Postings – Is it Possible?

Policing of employees' postings is possible, perhaps, in very limited instances. Certainly an employer can control employee use of its computer resources during work time. In fact, many employers block all employee access to Facebook and YouTube on their employees' computers. Employers can certainly retain the right to prevent employees from using work time for such activities – whether it be on a personal handheld device such as a Droid or iPhone or on company computers. Work time is for work.

Employers also can discipline employees for misuse or abuse of work time just as they would discipline them for spending excessive time on personal phone calls or sleeping on the job. However, according to recent guidance from the National Labor Relations Board, employers should be wary of mandating what employees can post about their company on their own time. Specifically, the National Labor Relations Act protects employees who are engaging in "concerted activity," which is an exercise of their right to speak out about the terms and conditions of their employment. This applies to all employees, regardless of whether a workforce is unionized. So, yes, your employee can post on his or her Facebook page that your facility is understaffed, thereby making them feel overworked and/or underpaid. Or even worse, your employee can complain about your tyrannical management style to all 2,347 of her closest "friends." Unfortunately, if those "friends" happen to include family members of residents or even prospective clients, the impact on your business can be devastating.

Continued next page

In This Issue:

In the Trenches

Smith

Edney

Gunn

Reed

Defense Verdict in Nursing Home Trial: Brad Smith, La'Verne Edney, and Clay Gunn (with the trial assistance of Bill Reed) recently obtained a defense verdict in Bolivar County, Mississippi, in a week-long nursing home case. This was a very difficult case involving a long term nursing home resident who sustained a sizable pressure wound during the last months of her life. Notwithstanding very graphic photographs and experienced plaintiff's counsel, our team was able to establish that the resident's condition and death were due to her underlying medical conditions rather than neglect and abuse as claimed by the plaintiff.

Continued next page

Social Media Policy Considerations for Long Term Care Providers, *continued*

So What Can An Employer Do?

There are certain policies that an employer can put in place to control social media chaos. Below is a list of suggested best practices.

1. Require employees who identify themselves as employees of your facility to include a disclaimer on their social media page that states that any postings are their sole opinion and not the opinion of the facility where they are employed. (See a sample disclaimer below).

2. Draft a policy, mandate training and obtain a signed acknowledgement from each employee stating that he/she understands his/her obligations to keep the residents' confidential protected health information private, which includes refraining from posting specific status updates, comments or photos that could disclose this information. The policy should warn that violations will result in disciplinary action up to and including termination. (See a sample acknowledgement below).

3. Posts should never include any health information that could reasonably be used to identify a patient such as a first or last name, age, photo, locations, unique health conditions or any other personal or identifiable patient health or financial information.

4. Employees must refrain from posting information about residents that would disclose a resident's identity or health condition in any way. This could include the obvious photo where an employee intends to post a photo of a resident's decubitus ulcer or post-fall bruising or the not-so-obvious-posting of a photo of a resident at a company-sponsored party or event wherein the resident has his arm in a cast. This lesson is hard to understand for some employees who think that as long as they do not include the resident's full name, date of birth or social security number, then they are not disclosing "confidential" or "protected" health information.

5. Training should also include a suggestion that employees refrain from friending residents, clients or residents' family members. Remind employees that any postings may become public as they cannot control the dissemination after something has been posted on the internet.

6. Advise employees that the company's confidentiality and nondisclosure agreement or policy extend to social media in that they are not to disclose confidential, proprietary, trademarked or other non-public information. Doing so will result in disciplinary action up to and including termination.

7. Advise employees that they do not have permission to use the company's logo, graphics, trademarks, trade names or corporate slogans when posting online or elsewhere.

8. Prohibit employees from downloading shareware and freeware on company computers or hardware as they have the potential to seriously affect company network performance or cause an outage.

9. Remind employees to consider the impression that they create about themselves and the company when they post information relating to or identifying the company or its employees, residents or residents' family members on any electronic medium.

Continued next page

In the Trenches, *continued*


Young


Trent

Tennessee Health Care Association: During the month of December, Ed Young and Steve Trent made presentations to the Tennessee Health Care Association (THCA) in Nashville, Memphis and Knoxville on "The Election Results and Their Continuing Impact on the Workplace: What to Expect from the NLRB."

Baker Donelson was a proud sponsor of the THCA Legislative Conference, March 27-28, 2012 at the Sheraton in Nashville.

Kentucky Association of Health Care Facilities: Baker Donelson recently joined the Kentucky Association of Health Care Facilities (KAHCF). Baker Donelson is a proud sponsor of the 2012 KAHCF Spring Training April 16-18, 2012 at the Holiday Inn-University Plaza in Bowling Green, Kentucky. The Firm's attorneys licensed in Kentucky are now actively handling nursing home litigation throughout the state.


Crider

ACI's "Preventing and Defending Long Term Care Litigation" Christy T. Crider was a member of the panel, "Securing and Enforcing Arbitration Agreements in the Face of Emotional and Legal Roadblocks Specific to Long Term Care" during the American Conference Institute's Second Annual Conference on "Preventing and Defending Long Term Care Litigation:

Continued next page

Social Media Policy Considerations for Long Term Care Providers, *continued*

Failure to act responsibly may have a detrimental effect on the company, its employees or others.

10. Remind employees that they have no expectation of privacy in information sent over company email, internet or phones.

11. Advise employees that harassing, discriminatory or defamatory conduct involving coworkers, residents' family members, residents, vendors or any other person associated with the facility will not be tolerated regardless of whether it is spoken, in print or posted online. Disciplinary actions noted in the company anti-harassment or discrimination policy apply to all social media.

12. Finally, remind employees that the company may monitor blogs or other electronic media. If the employee fails to abide by the above guidelines or the company's other policies while online, the employee may be subject to legal or disciplinary action by the company up to and including termination.

Company Facebook Page – A Do or A Don't?

Many long term care companies participate in online communities to promote better communication with their customers, the general public, staff, personnel, volunteers and other industry colleagues in a non-traditional, but ever popular medium. If your facility has its own Facebook page or blog, you should assign a management level employee to monitor postings (to remove offensive or inaccurate postings) and to post informative or other helpful information on behalf of the company. These duties should be part of a written job description which should require such monitoring at least once every 24 hours. Company-sponsored online pages can be a useful and low-cost marketing tool. Many facilities have their own Facebook pages where they can post upcoming events or activities and articles regarding topics that would be of interest to family members, residents and potential customers. The employee should monitor non-company sponsored postings such as comments from "friends" to ensure that they are not harassing, defamatory or discriminatory in nature.

Once your facility's page is up and running, remind employees that postings and comments about the company shall be ethical, honest and accurate. Reserve the right to remove/delete spam and other inappropriate content on the company's page. Consider linking to other websites, such as the American Healthcare Association's site, that may be helpful or interesting resources for your readers.

If your facility chooses to post photos of residents enjoying various events, be sure to have either the resident or his/her guardian sign a disclosure statement allowing you to post their photos in the media.

Whatever you do online, DON'T GIVE MEDICAL ADVICE. Employees must refrain from giving medical advice or answering medical questions posted on the company social media site, as doing so could lead to possible malpractice claims.

Sample Acknowledgement:
I _____ understand that I am obligated to keep residents' confidential protected health information private, which includes refraining from posting specific status updates, comments or photos on social media websites, including but not limited to Facebook, Twitter, MySpace and LinkedIn, that could disclose this information. My failure to adhere to this policy may result in disciplinary action, up to and including termination.

Sample Disclaimer:
The views and opinions expressed here are my own and do not represent the views of the _____ company. They may not be used for advertising or product endorsement purposes.
DISCLAIMER: This is a personal website, produced in my own time and solely reflecting my personal opinions. Statements on this site do not represent the views or policies of my employer, past or present, or any other organization with which I may be affiliated.

In the Trenches, *continued*

Expert Risk Mitigation and Defense Strategies for Nursing Home and Assisted Living Facility Providers," January 31 - February 1, 2012 in Miami, Florida.


Collins

Tort Reform: Caldwell Collins and Christy T. Crider presented a one-hour CLE titled, "The Ethics of Tennessee Tort Reform" to 70 attorneys at the Nashville Council of Health Care Attorneys meeting on January 10, 2012.

Movie Commentator: Christy T. Crider recently served on a panel at Lipscomb University to review the film "Hot Coffee" chronicling the effects of tort reform.

Taking a Bite Out of Long Term Care Liability Exposure: Avoiding Liability for Injuries Caused by Facility Pets

Jill M. Steinberg, 901.577.2234, jsteinberg@bakerdonelson.com
Julia M. Kavanagh, 901.577.8267, jkavanagh@bakerdonelson.com

Many nursing homes and assisted living facilities have dogs or other pets who either live at the facility or accompany facility employees to work. Dogs can provide much needed enjoyment and companionship to residents and employees alike. It is important to recognize, however, the potential risks a facility may face if a dog bites or otherwise injures someone on facility premises. A dog owner may be civilly liable for injuries caused by his or her dog, especially where the dog has a history of biting or other aggressive behavior. In fact, some states, including Tennessee and Florida, have enacted statutes which provide that a dog owner may be strictly liable for injuries caused by a dog even if the dog has shown no dangerous propensities in the past. Although these statutes speak in terms of liability of a "dog owner," it is conceivable that a facility could be liable where a dog owned by an employee or resident causes injury. It is important to be aware of "dog bite" statutes in your state. Even if your state does not have a dog bite statute, liability can still exist under common law negligence principles. The relevant statutes in various states in Baker Donelson's footprint are summarized below.

Alabama:

The Alabama law provides that a dog owner shall be liable only if the person injured is on property owned or controlled by the dog's owner at the time the bite or injury occurs or when the person had been on such property immediately prior and had been pursued by the dog. The statute also provides that the dog must bite or injure the person without provocation for liability to attach. Ala. Code § 3-6-1.

Florida:

In Florida, a dog owner is liable for damages suffered by a person bitten by a dog, regardless of whether the

dog has shown any viciousness in the past or knowledge by the owner of any viciousness, where the dog bites the person in a public place or when the person is lawfully in a private place, including the dog owner's private property. The statute provides that the owner will not be liable, except to children under the age of six, and except where the dog owner acted negligently, if the owner displays an easily readable sign in a prominent place on his property, including the words "Bad Dog." Fla. Stat. 767.04

Georgia

A person who owns or keeps a "vicious or dangerous" animal and who carelessly manages the animal or allows the animal to "go at liberty" is liable to a person injured by the animal so long as the person does not provoke the injury by his own actions. An animal is considered to have a "vicious propensity" if the animal was not at heel or on a leash when required to be so by ordinance. A dog owner may be liable for injuries inflicted by the dog under two circumstances: (1) the dog was dangerous and vicious, the owner had knowledge of this and the owner either carelessly managed the dog or allowed it to "go at liberty;" or (2) the animal was required by ordinance to be at heel or on a leash (a "leash law") and was not, and the owner carelessly managed the animal or allowed it to go at liberty. This second ground does not require any knowledge of dangerousness or viciousness by the owner. Ga. Code Ann. § 51-2-7.

Louisiana:

In Louisiana, a dog owner is liable if he knew or should have known that his animal's behavior would cause damage, that the damage could have been prevented by acting reasonably, and that he failed to act reasonably to prevent such damage. An owner is strictly liable for damages or injuries caused by the dog which could have been prevented by the owner and which did not result from provocation of the dog by the injured person. La. Civ. Code

Continued next page

Taking a Bite Out of Long Term Care Liability Exposure: Avoiding Liability for Injuries Caused by Facility Pets, *continued*

Ann. art. 2321. Courts have interpreted this statute to mean that the dog must pose an unreasonable risk of harm for strict liability to attach. *Pepper v. Triplet,* 864 So.2d 181 (La. 2004).

Tennessee:

A dog owner is liable for injuries caused by a dog that is not kept under reasonable control and is "running at large" if the injury occurs in a public place or while the injured person is lawfully on the property of another. The Tennessee statute does not require that the dog has shown any dangerous propensities in the past. The statute contains a number of exceptions including that:

- the injured person was trespassing upon the private, nonresidential property of the dog's owner;
- the injury occurred while the dog was protecting the dog's owner or other innocent party from attack by the injured person or a dog owned by the injured person;
- the injury occurred while the dog was securely confined in a kennel, crate or other enclosure; or
- the injury occurred as a result of the injured person enticing, disturbing, alarming, harassing or otherwise provoking the dog.

If the injury occurs while the person is on residential, farm or other noncommercial property, and the dog's owner is the owner of the property, or is on the property by permission of the owner or as a lawful tenant or lessee, the owner shall only be liable if the dog's owner knew or should have known of the dog's dangerous propensities. Tenn. Code Ann. § 44-8-413.

Although the laws in each state are different, there are certain precautions that facilities in every state can consider to reduce the chance of liability:

1. Be vigilant about the dog's disposition and behavior; if the dog displays aggression, consider replacing it with a more docile animal.
2. If the dog must be in a public area, keep the dog on a leash or in a kennel.
3. To the extent possible, keep dogs out of areas of the facility that are open and accessible to the general public.

By being aware of the reality of "dog bite" liability and taking certain precautions, facilities can minimize the risk of civil liability in this area without removing pets from the facility altogether.

Free Webinar Series for Long Term Care Providers

Baker Donelson's Long Term Care Group will present a series of free webinars created for long term care providers throughout the upcoming months. To RSVP for any of the webinars below, please email rsvp@bakerdonelson.com and include the title of the program in the text of the email.

- April 3, 2012 – 1:00 p.m. CDT: **Tennessee Tort Reform for Long Term Care Providers – What Do You Need To Be Doing Now?** *Presented by Christy Crider and Caldwell Collins*
- May 22, 2012 – 1:00 p.m. CDT: **Getting Paid For The Care You Provide – How To Handle Audits for Long Term Care Providers.** *Presented by Christy Crider and Donna Thiel*
- July 25, 2012 – 1:00 p.m. CDT: **Arbitration Trends for Long Term Care Providers.** *Presented by Christy Crider and Summer McMillan*
- September 25, 2012 – 1:00 p.m. CDT: **Quality Improvement Committees for Long Term Care Providers – Are You Taking Good Care of Your Most Sensitive Documents?** *Presented by Christy Crider and Heidi Hoffecker*
- November 13, 2012 – 1:00 p.m. CST: **Big Verdict Trends for Long Term Care Providers – How Do We Prevent Them?** *Presented by Christy Crider and Brad Smith*
- January 15, 2013 – 1:00 p.m. CST: **Setting Realistic Expectations with Families on Admission to Long Term Care Facilities.** *Presented by Christy Crider and Craig Conley*

Executed Arbitration Agreement Unenforceable for Alabama Wrongful Death Claims

Stephen K. Pudner, 205.250.8318, spudner@bakerdonelson.com
Catherine Long, 205.244.3858, clong@bakerdonelson.com

A recent federal court opinion from Alabama may impact the enforceability of arbitration agreements in wrongful death actions. Long term care facilities are well-advised to reassess their potential exposure to punitive verdicts awarded by juries.

Alabama's treatment of wrongful death actions is unique. First, punitive damages are recoverable upon a showing of simple negligence, and no other damages are recoverable (although other damages may be recoverable for a separate tort claim if it was timely filed before the decedent's death). Second, the wrongful death cause of action "is vested in the personal representative" of the decedent's estate, and neither the estate itself, nor the decedent, ever has any enforceable interest in the wrongful death action. See *Holt v. Stollenwerk,* 56 So. 912, 912-13 (Ala. 1911).

There are some positive results of these unique attributes. For example, the level of pain and suffering is technically irrelevant to the calculation of wrongful death damages, and no Medicare liens attach to a wrongful death judgment, making settlement efforts less complicated. However, the fact that only the personal representative of the decedent's estate has a vested interest in a wrongful death action raises some concerns, particularly in light of a recent Alabama federal court opinion denying a motion to compel arbitration of a wrongful death lawsuit.

A recent federal court opinion from Alabama could have implications for long term care facilities in the state. In *Entrekin v. Internal Medicine Associates of Dothan, P.A.*, the court denied a nursing home's motion to compel arbitration of a wrongful death action and forced the nursing home to litigate this claim in the courts. The nursing home based its motion to compel arbitration on an arbitration provision in the facility's admissions agreement that was executed by the deceased upon her admission. The court first explained that the arbitration provision was generally enforceable under the Federal Arbitration Act but then proceeded to deny the motion to compel arbitration.

In denying the motion, the court explained that, under Alabama law, "wrongful death claims do not belong to a decedent," and therefore that the decedent had no authority to consent to arbitration for the wrongful death claim. Accordingly, the decedent's valid signature on the otherwise enforceable arbitration agreement did not bind the personal representative of the decedent's estate to arbitrate the wrongful death claim. In contrast, any non-wrongful death tort claims filed prior to the decedent's death and which survived the death would have been subject to mandatory arbitration based on the decedent's signature, because these tort claims belonged to the decedent prior to his death.

In *Entrekin*, the court also analyzed other possible scenarios regarding the enforceability of arbitration agreements in a long term care facility's admissions packet. The court explained that if the personal representative had executed the arbitration agreement during the admissions process, that individual would likely be bound to arbitrate subsequent wrongful death claims. This result apparently would not change even if the personal representative did not sign the agreement in his or her role as personal representative. The *Entrekin* court also explained that it remains unsettled under Alabama law whether an arbitration agreement is enforceable against a personal representative in a wrongful death action if the agreement was executed on behalf of the decedent by a family member possessing power of attorney.

In light of *Entrekin*, **long term facilities (and other medical facilities) should always require more than just the resident's signature on arbitration agreements.** At a minimum, facilities should require a family member with a demonstrated power of attorney to execute the agreement in addition to the resident, although even this may turn out to be

Continued next page

Executed Arbitration Agreement Unenforceable for Alabama Wrongful Death Claims, *continued*

insufficient. Better yet, if possible, facilities should determine the identity of the anticipated personal representative of the resident's estate and should require that person to sign the arbitration agreement. Of course, even this is not foolproof because the identity of the personal representative is not settled until a person dies and the person's will is probated.

While there are many hurdles to enforcing arbitration provisions in wrongful death actions, Alabama long term care facilities are well-advised to draft the best possible arbitration agreements and put in place specific procedures regarding the execution of these agreements in order to most effectively protect themselves against potential runaway verdicts awarded by Alabama juries in wrongful death lawsuits.

Upcoming Events

Please check out the events page on the Baker Donelson website for a comprehensive list of events on a variety of topics that may be of interest to you: **www.bakerdonelson.com/events/**.

Making a Difference is edited by Heidi Hoffecker, an attorney in our Chattanooga office, who can be reached at 423.209.4161 or hhoffecker@bakerdonelson.com. For more information about our **Long Term Care Industry Service Team**, please contact Christy Crider, team leader and an attorney in our Nashville office, at 615.726.5608 or ccrider@bakerdonelson.com.