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Ten Labor and Employment Law Danger Areas for Long-Term Care Facilities

By Russell W. Gray

Just as people age and evolve, so does the law. Long-term care (LTC) facilities are well-adapted to adjust to the changing resident, but they also must be well-adapted to adjust to the changing law, including labor and employment law. So what danger areas exist for LTC providers now as a result of the evolving labor and employment law? This article explores ten of those danger areas.

1. Implementing No-Fault Attendance Policies Without Regard to the ADA and FMLA

This issue came to the forefront in a settlement between Verizon and the EEOC. That settlement was the largest Americans with Disabilities Act (ADA) settlement in the history of the EEOC. It totaled more than $20 million.

At issue in that matter was whether Verizon was counting as absences under its no-fault attendance policy absences that were caused by disabilities. A no-fault attendance policy is a policy that does not distinguish between excused and unexcused absences; employees typically receive ''points'' for all absences and are disciplined or may be terminated upon reaching a certain number of points. The EEOC took the position that Verizon should have considered accommodating persons who were missing work due to disabilities and not automatically counting disability-related absences under the policy.

This issue continues to be pressing. Numerous LTC providers, like other employers, utilize no-fault attendance policies. It is imperative in implementing those policies that LTC providers consider if disabilities are causing absences under such policies and whether they have an obligation to reasonably accommodate those disabilities. LTC providers also must consider whether absences under a no-fault attendance policy may qualify as protected FMLA leave. These attendance issues are particularly dangerous because, if an LTC provider is implementing a no-fault attendance policy unlawfully, it is probably implementing it unlawfully on a multi-employee basis and thus subjecting itself to potential class action liability.

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2. Liability and Obligations as a Joint Employer

In today's workforce, employers often contract out or ''outsource'' various tasks or functions. Such tasks or functions may include, among other things, maintenance, housekeeping and janitorial work, transportation, technology support, and administrative support. LTC providers also may utilize nurses or technicians provided through staffing agencies. Is it possible, however, that the employer that contracts out such work actually jointly employs such workers in the eyes of the law? The answer is increasingly, ''Yes.''

This issue has become particularly hot in light of the National Labor Relations Board's (NLRB) recent decision in the *Browning-Ferris Industries* case[1] In that case, the NLRB concluded that Browning-Ferris Industries jointly employed workers who worked on site through a separate staffing company. In reaching that conclusion, the NLRB expanded the definition of joint employment in federal labor law to provide that an employer need not actually exercise control over a worker or need not have direct or immediate control over a worker to employ that worker. A joint employment situation may exist where a company has even indirect control over a worker. This issue is significant because a joint employer can be held liable for, among other things, tax withholdings, wage and hour violations, im-

[1] *Browning-Ferris Indus. of Calif., Inc.*, 2015 BL 278454, 362 NLRB No. 186 (N.L.R.B. 2015).

migration law violations, employee benefits, and unlawful discrimination.

In light of this issue, it is important for LTC providers to review their agreements with contractors or labor providers and to consider how much potential control the LTC provider has over the purported contract workers (such as through hiring criteria, drug tests, training, setting wages, setting work schedules, and supervision). LTC providers should also review policies and other documents explaining potential control over purported contract workers and examine practices for exercising control over such workers. Furthermore, with respect to employees such as nurses working at a facility through a staffing agency, the LTC provider should assume that such an employee will be treated as its own employee in light of the necessary control that the provider exerts over the employee.

3. Not Recognizing and Avoiding Retaliation Issues

Employees complain, and at times those complaints create friction between the employee and the employer. Even if an employer does not take adverse action against an employee for complaining, an employee often believes that is the case.

The types and number of whistleblower laws have been expanding in recent years. More and more types of complaints are deemed as protected complaints under the law. Thus, employers must be more and more cautious about taking adverse action against complainers. Employers must, for example, carefully consider whether an employee complaint is actually a protected complaint under the law. This is particularly the case for LTC providers. Complaints, for instance, regarding patient care and billing issues, which may not be issues for other employers, may be protected. LTC providers and other employers must be sure that they are taking action against employees only for legitimate, nondiscriminatory reasons and not because the employee has engaged in making a protected complaint.

4. Improperly Requesting and Relying on Criminal Background Information

LTC providers work with vulnerable clientele and thus must take reasonable measures to ensure that they do not employ workers who will endanger the residents. Indeed, many states require LTC providers to conduct certain background checks on new hires. These obligations, however, must be balanced with federal discrimination laws. Federal discrimination law prohibits policies that have a ''disparate impact'' on a protected class such as a racial minority. Such discrimination is unlawful even if unintentional.

In recent years, the EEOC has focused on the issue of whether a policy of not hiring an applicant with a criminal conviction may create an unlawful disparate impact. The EEOC has stressed that an employer making employment decisions based on a criminal conviction must consider: (1) the nature and gravity of the offense, (2) the time that has passed since the conviction or completion of the sentence, and (3) the nature of the job held or sought. The EEOC has brought numerous class actions on this issue in recent years.

LTC providers, like other employers, must be careful in their use of criminal background information at the hiring phase. They must conduct the three-part analysis set forth by the EEOC. An LTC provider must conduct that analysis, for example, in determining whether to disqualify an office job candidate who had a domestic assault charge ten years ago.

Furthermore, in recent years, many jurisdictions have passed laws prohibiting asking about criminal background at the pre-offer stage. These laws, known as ''ban the box'' laws, typically provide a procedure for asking about criminal background only after an employer has given an offer of employment. LTC providers must check their jurisdictions to ensure that they are complying with ban the box laws.

5. Dealing With Social Media Posts

This issue has been hot in recent years and continues to be hot. LTC providers repeatedly find themselves dealing with problematic posts from employees, including complaints about supervisors, the workplace, coworkers, residents, families, and other workplace matters. The question becomes, what can an LTC provider do about problematic social media posts?

Many employers are under the false impression that all employees have a First Amendment right to speech. That is not the case. Only employees of government employers have First Amendment speech rights.

Employees in non-government jobs, however, have rights under the National Labor Relations Act (NLRA) to engage in ''concerted activities'' regarding work conditions. Because of that right, employees are generally entitled to complain even through social media about workplace conditions in an effort to change those conditions. Such complaints may be about supervisors or even wages and may at times seem offensive. Note that this right under the NLRA does not apply to complaints by supervisors or managers.

LTC providers need to carefully consider whether employee social media posts constitute protective activity under the NLRA and whether their policies would unlawfully interfere with such activity. The current NLRB has been taking an aggressive opinion as to what types of speech constitute protected speech. Furthermore, LTC Providers need to consider whether a social media post constitutes protected whistleblower activity, such as when an employee complains about a violation of the law.

LTC providers, as a general rule, need not tolerate or permit the disclosure of confidential resident information, such as medical information. In assessing the disclosure of such information, however, an LTC provider needs to consider whether the disclosure at least in part constitutes protected concerted activity under the NLRA or whistleblower activity.

6. Utilizing Overly Broad Confidentiality Policies

The NLRB has also taken an aggressive approach in deeming certain employee confidentiality policies as overly broad. In particular, the NLRB has deemed unlawful confidentiality policies that non-supervisory employees may reasonably interpret to prohibit them from discussing wages or other terms and conditions of em-

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ployment. As noted above, employees who do not constitute supervisors under the law are entitled to discuss wages or other terms or conditions with co-workers as part of protected concerted activity. LTC providers must ensure that their confidentiality policies do not inhibit such employee rights.

The NLRB also has deemed as unlawful policies and practices that create a blanket rule requiring employees to keep information relating to human resources investigations confidential. The NLRB takes the position that employees may need to discuss such investigations as part of their rights to seek changes in workplace conditions. According to the NLRB, whether non-supervisory employees must keep information regarding human resources investigations confidential must be assessed on a case-by-case basis and in consideration of such factors as whether keeping information confidential will protect particular witnesses, prevent evidence from being destroyed, prevent testimony from being fabricated, or prevent a cover-up. The employer has the burden, however, to prove that one of these factors justifies a confidentiality instruction in a particular case.

7. Failing to Account for Mobile Work

It should come as no surprise that employees in today's workforce are increasingly working remotely. They are using their computers, tablets, and mobile phones to perform various tasks away from the worksite. That includes employees such as hourly nurses who may take calls or review emails while away from the LTC facility. The question becomes whether employers are properly paying non-exempt (i.e., hourly) employees for such work.

As a general rule, an employer must pay its employees for the work that it permits them to perform. If it knows or should know that an employee is performing work and the employer lets that employee perform the work, the employer must pay for it. That general rule applies to mobile work as well.

In light of the law and the realities of today's workforce, LTC providers need to consider whether employees are working away from the worksite. They also need to consider the amount of time employees are working and the tasks they are completing away from work. Furthermore, they need to consider options for tracking mobile worktime.

8. Being Prepared for the New White Collar Regulations

The U.S. Department of Labor (DOL) has announced proposed regulations that would dramatically increase the salary required for an employee to be exempt from the minimum wage and overtime requirements under the ''white collar'' exemptions. Such a dramatic increase in the amount of the required salary will result in a substantial number of employees who are currently being treated as exempt to be no longer exempt. Chances are high that the new DOL regulations, perhaps with some changes, will go into effect during 2016.

Although no one can predict for sure when the new regulations will go into effect or what their precise terms will be, LTC providers need to consider now how the new regulations may affect them. For instance, LTC providers should begin considering which employees would not meet the new salary requirement and the various options for addressing that situation, including possibly converting them to non-exempt; increasing their salary to make them exempt; or perhaps restructuring various jobs, duties, and work schedules. The DOL may not give employers much time (perhaps 90 to 120 days) to prepare for the new regulations once the final ones are issued.

9. Recognizing and Managing Intermittent FMLA Leave

This issue has been problematic for LTC providers and other employers for years. It does not seem to be going away, even with amendments to the FMLA regulations in 2013.

Intermittent FMLA is available to employees where ''medically necessary'' for employees with a serious health condition, a family member with a serious health condition, a military caregiver, or a qualifying exigency leave. Employers all too often make the mistake of not recognizing that an employee's sporadic attendance may be due to a FMLA-protected reason. Employers who have a reason to believe that intermittent absences are possibly FMLA-protected absences generally cannot plead ignorance of the situation and deny FMLA leave.

Once an employee is on intermittent FMLA leave, it can at times be challenging for the employer to manage that leave. Employers often complain that some employees seem to be perpetually on intermittent FMLA leave. What can employers do in that situation? They have a number of options including: (1) considering requesting recertification of the need for leave,[2] (2) considering obtaining a second or third opinion on the need for intermittent leave, and (3) considering temporarily transferring the employee to an alternative position with equivalent pay and benefits.

10. Managing ADA Issues Following FMLA Leave

LTC providers all too often make the mistake of believing that once an employee exhausts his or her FMLA leave that the LTC provider no longer has any obligation to keep the employee on leave. Such an obligation, however, may exist under the ADA. The ADA may require an LTC provider to provide extended leave as part of a reasonable accommodation.

To address this problem, it is important that LTC providers consider possible disability discrimination and reasonable accommodation issues when an employee does not immediately return from FMLA leave. The LTC provider in that situation needs to clarify the amount of additional leave that the employee requests and consider the reasonableness of such request. It will need to make such analysis on a case-by-case basis rather than implement a blanket rule on the amount of time that an employee may be absent.

[2] An employer generally may request the recertification after the longer of the duration set forth in the existing certification or every 30 days in connection with an absence. It may also request recertification every six months.

Conclusion

LTC providers have numerous obligations, including complying with the evolving labor and employment laws. They need to stay apprised of labor and employment law developments and focus on continuing compliance. Failing to do so could result in very significant liability.

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