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Long Term Care Newsletter

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Issue 1, 2014

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Employers of Home Care Workers to Begin Paying Overtime in January 2015

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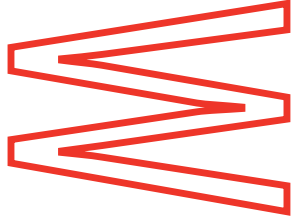
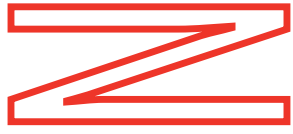
The United States Department of Labor issued a final rule, extending the protections of the Fair Labor Standards Act (FLSA) to home health care workers who provide care for the sick, disabled or elderly, otherwise known as “companionship services.” Beginning in January 2015, employers will be required to pay these workers both minimum wage and overtime, and maintain records of the hours that they work. The rule was issued on September 17, 2013.

The FLSA was enacted in 1938 and, among other things, provides minimum wage and overtime protections for workers. In addition to workers employed in a traditional workplace setting, the FLSA also protects workers employed in “domestic service” by a household in a private home (such as cooks, housekeepers and maids) and employers of these domestic service workers must pay minimum wage and overtime. However, under the FLSA Amendment of 1974, “domestic service employees employed” to provide “companionship services” for persons unable to care for themselves were exempt under the FLSA. Under the prior DOL regulations, it was not clear as to whether all individuals who provided companionship services in a private home were also considered exempt.

The question of whether this exemption applied to home health care workers employed under third-party contracts was considered by the United States Supreme Court in *Long Island Care at Home, Ltd. v. Coke*. 127 S.Ct. 2339 (2007). While the Court noted that the regulations governing these workers were conflicting, it ultimately deferred to the DOL’s interpretation that its regulations exempted these workers from coverage and they were, consequently, not entitled to minimum wage or overtime under the FLSA. Since that time, labor advocates have pressed the DOL to bring these workers within the ambit of the FLSA.

The final regulations now define the tasks that comprise exempt companionship services more narrowly. The new definition of “companionship services” means that many workers employed within the home to care for the sick or elderly, such as certified nursing assistants, home health aides, personal care aides and other caregivers, will now fall under the FLSA’s protections.

Importantly, the regulations make clear that the exemptions for companionship services and live-in domestic service employees may only be claimed by individuals or families and not by third-party employers such as home health care agencies. In other words, they distinguish between workers who are employed through a home care agency or other third party employer as opposed to those who are employed directly by the elderly or ill person or his or her family. Families often use home care agencies or other third party companies to identify and hire quality individuals to care for their loved ones and to take on the administrative tasks of an employer, such as conducting background checks, training,



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scheduling and payroll. The family simply pays the agency’s invoice for the services provided. The new rules take aim at these agencies and require that they pay at least the federal minimum wage and overtime to any direct care worker they employ, regardless of the employee’s duties.

Given that these workers are typically scheduled on eight to 12-hour shifts, there is little question that home health care agencies and third-party providers who provide services to the sick or elderly in the home will be reevaluating how they schedule these workers, which will, in turn, implicate continuity of care issues and the affordability of care in the home. The DOL has offered some preliminary statistics on the projected monetary impact on the home health care industry, but these regulations will unquestionably have a ripple effect on other industries.

Nursing Home Reporting of Reasonable Suspicion of a Crime

[Danielle Trostorff](#), 504.566.5224, dtrostorff@bakerdonelson.com



Nursing facilities, skilled nursing facilities, hospices that provide services in long term care facilities and independent living facilities that provide services for the developmentally disabled (“facilities”) are required to report suspected crimes by defined “covered individuals” to the state survey agency and local law enforcement under the Affordable Care Act (ACA).¹ “Covered individual” includes an owner, operator, employee, manager, agent or contractor of the facility.² Any facility that received at least \$10,000 in federal funding during the preceding year is subject to the statute.

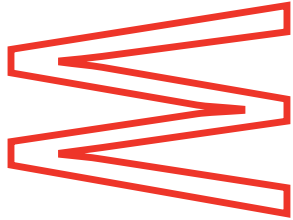
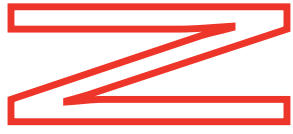
To ensure compliance, facilities should be aware of the following:

- facilities must develop policies and procedures for compliance with the statute;
- facilities must notify covered individuals of their reporting requirements by posting a notice for employees, and such notice should specify the employees’ rights, including the right to file a complaint under the statute and how to file a complaint;
- facilities should document, on an annual basis, notice provided to covered individuals of their reporting obligations;
- covered individuals are subject to civil monetary penalties and exclusion sanctions for failure to timely meet the reporting requirements;
- facilities may not retaliate against an individual who lawfully reports suspicion of a crime; furthermore, facilities are subject to civil money penalties and exclusion sanctions for retaliation against an employee making a valid report;

¹ Section 1150B of the Social Security Act, as established by section 6703(b)(3) of the Patient Protection and Affordable Care Act of 2010 (ACA).

² Agent and contractor agreements should address the reporting requirements.

Continue on next page



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Nursing Home Reporting of Reasonable Suspicion of a Crime, *continued*

- facilities employing excluded covered individuals (due to failure to meet the reporting requirements) will be ineligible for federal funds;
- facilities may be subject to an immediate jeopardy tag or other survey violations for failure to comply with the statutory requirements.

There are two applicable time frames with respect to the reporting obligations under the ACA. First, a covered individual must report reasonable suspicion of a crime that results in serious bodily injury to a resident within two hours of the event giving rise to the suspicion. Second, all other reasonable suspicions of a crime must be reported within 24 hours. The report must be made to both the state survey agency and local law enforcement.

The covered individual’s reporting requirements differ from a facility’s obligation to report incidents involving allegations of mistreatment, neglect or abuse, including injuries from an unknown source and misappropriation of resident property. These incidents are reported immediately (not to exceed 24 hours after discovery) to the administrator of the facility and to other officials under state law (including to the state survey and certification agency). Further, the results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with state law (including to the state survey and certification agency) within five working days of the incident. Corrective action also must be taken if the alleged violation is verified.

In certain instances, such as in the case of physical or sexual abuse of a resident, the facility and the covered individual may have the obligation to report the event to the appropriate authorities – the facility reporting the incident itself and the covered individual reporting the reasonable suspicion of a crime.

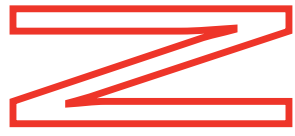
CMS has provided guidance to State Survey Agency Directors on this topic in a policy memo referenced as S&C: 11-30-NH, Revised 01.20.12.

Mitigating Successor Liability in Long Term Care Acquisitions

Mary O’Kelley, 423.209.4143, mokelley@bakerdonelson.com

As in any business acquisition, purchasers in the long term care industry can encounter potential liability due to employment claims, seller violations of representations and warranties under the purchase agreement, tort actions, tax claims and the like. Unlike most other business parties, however, purchasers of skilled nursing facilities (SNFs) and assisted living facilities (ALFs) encounter a minefield of potential liability stemming from their participation in Medicare and Medicaid and the nature of the business of geriatric care. Buyers of SNFs and ALFs should be aware of the risks inherent in acquiring an operating SNF or ALF and should consider what strategies may be available to mitigate their successor liability risk in any given transaction.

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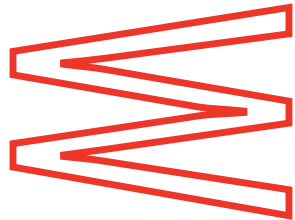
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Mitigating Successor Liability In Long Term Care Acquisitions, *continued*



Sources of Successor Liability. Pursuant to 42 C.F.R. 489.18(c), upon a change of ownership (CHOW) of a SNF, the existing operator’s Medicare provider agreement is automatically assigned to the new operator, unless the new operator rejects the existing provider agreement and applies for a new agreement, a path that few purchasers elect to take since their Medicare payments are cut off until the new provider agreement is in place. To obtain a new

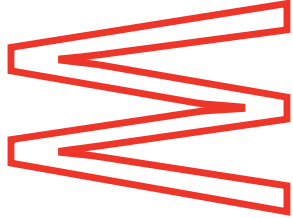
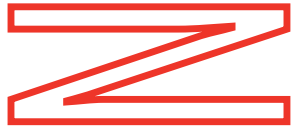
provider agreement, a purchaser must fulfill all requirements for Medicare participation, including a full, unannounced survey. The Centers for Medicare & Medicaid Services (CMS) actively encourages purchasers to accept assignment of existing provider agreements by prohibiting State Survey Agencies (SSAs) from conducting the required unannounced survey until the SSAs have completed all of their higher priority workload. Moreover, according to a 2013 CMS directive, CMS looks with suspicion on any survey conducted shortly after a CHOW and speculates that any such prompt survey may have been announced to the new owner.



Two landmark legal cases demonstrate the rationale behind CMS’s efforts to encourage purchasers to accept the automatic assignment of provider agreements. The Fifth Circuit held in *United States v. Vernon Home Health Care, Inc.*, 21 F.3d 693 (5th Cir. 1994) that an overpayment to the prior owner of a home health agency could be offset by CMS against Medicare payments to the new owner of the same home health agency. In *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100 (8th Cir. 2000) the Eighth Circuit held that civil monetary penalties imposed on a prior operator of a nursing facility can be asserted against the new operator. Thus, a purchaser accepting assignment of an existing Medicare provider agreement can be open to full liability for any overpayments and civil monetary penalties against the prior owner under the same Medicare provider agreement.

Similarly, depending on the laws of the applicable state, a new operator can be subject to successor liability arising under the prior operator’s Medicaid provider agreement. Moreover, purchasers are increasingly exposed to liability for overpayments made by both Medicare and Medicaid to prior operators and discovered through RAC, MAC, ZPIC and state-level audits. Such liability can extend for up to four years following a CHOW, and the sums at issue can be sizeable, due to the auditor’s power of extrapolation.

One additional potential source of liability arises from tort claims by so-called “straddle residents.” The residents inhabiting the SNF or ALF on the last day of a seller’s tenure will be the same residents occupying the facility on the first day of a purchaser’s ownership. In many cases, if one of these residents asserts a tort claim for an adverse event that occurred during the seller’s ownership of the facility, both the seller and the purchaser will be named in any resulting lawsuits. At a minimum, the purchaser can expect to incur attorney’s fees to extricate itself from such proceedings.



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Mitigating Successor Liability in Long Term Care Acquisitions, *continued*

Strategies for Mitigating Successor Liability. While the specter of successor liability in the long term care industry can loom large, purchasers can consider several strategies to mitigate their potential exposure. As in any business transaction, a purchaser should insist on comprehensive representations and warranties from the seller as to compliance with a full range of health care and non-health care laws and regulations. Purchasers also should be wary of limiting survival of these representations and warranties and attempt to negotiate for survival through the term of the relevant statute of limitations.

Another point of negotiation in most purchase agreements is indemnification for breaches of representations and warranties and other potential sources of liability. Most sophisticated sellers strive to limit their indemnities through the inclusion of caps and baskets, and purchasers should assess potential liability exposure in determining what limits to accept. The purchaser also should consider requesting indemnities from a parent entity of the seller and/or individual seller principals, a post-closing escrow or letter of credit, or a holdback of some portion of the purchase price in an amount and for a time period sufficient to mitigate potential successor liability exposure, particularly in instances where the seller is a single-asset entity that is selling its only asset to the purchaser. When a liability is easily quantifiable and likely to occur, purchasers may seek to negotiate a purchase price reduction.

Conclusion. In acquisitions of long term care facilities, a purchaser will be wise to assess sources of potential successor liability stemming from acts and omissions on the part of the seller and seek, to as great an extent as possible, to quantify any such potential liability. In most transactions, purchasers will need to negotiate a combination of the strategies highlighted above for mitigating liability with a goal of shifting most of the exposure for pre-closing liability back to the seller.

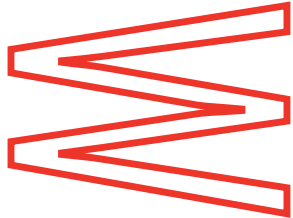
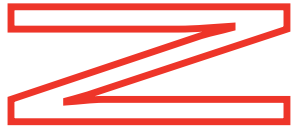
Long Term Care Construction Opportunities

[Vincent Nelan](mailto:vnelan@bakerdonelson.com), 423.209.4143, vnelan@bakerdonelson.com



Based on the long term care projects with which we have recently been involved, there appears to be great opportunity for growth in the construction of long term care facilities. This is attributed to the ever-growing aging population and a general rebound in the market post-recession. The difference in new construction (versus existing long term care facilities) is the demand for projects with higher degrees of quality and specialization. Developers must be careful in the management of long term care construction projects to accommodate these requirements.

Continue on next page



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Long Term Care Construction Opportunities, *continued*

Ageing Population. It is no secret that the U.S. population is shifting toward an older demographic. Longer life spans and aging baby boomers are largely cited for the shift. The implications of this on long term care construction are obvious; however, some additional statistics put the potential into perspective:³

- 70 percent of people age 65 or older are expected to use some form of long term care;
- Every day for the 20 years following January 1, 2011 about 10,000 people will celebrate their 65th birthday;
- In 2012 the population age 65 or older was 43.1 million;
- In the next 25 years the population of people age 65 years or older will grow to 72 million;
- By 2030 the older demographic will account for 20 percent of the population;
- By 2060 the population age 65 or older is expected to reach 92 million people.

Increased Number of Projects. To accommodate this demographic shift, construction of long term care facilities appears to be moving forward as follows:⁴

- Construction starts and ongoing projects for long term care have almost returned to pre-recession levels;
- From 2012 to 2013 there has been an increase of 24 percent in units/beds construction;
- Third quarter 2013 long term care units/beds under construction were up 39 percent over the previous year;
- In the top 100 metropolitan markets there were 21,462 units/beds under construction as of March 2013;
- In the top 100 metropolitan markets 23,479 units/beds started construction in 2013.

Changed Development. Traditionally, long term care facilities were constructed to model a medical facility. This trend appears to be ending since long term care facility residents have different desires and needs than patients of traditional medical facilities, and rightfully so. The changes are not merely aesthetic, but may result in an improved experience of long term care facility residents. Some of the differences between traditional medical facilities and long term care facilities that residents are demanding are as follows:⁵

- Sleep with noise abatement and exposure to daylight;
- Mobility with diverse architecture and use of colors for orientation;
- Access to natural light and the outdoors;
- Social interaction with intimate public spaces and carpeting in private areas;
- Physical activity with indoor and outdoor facilities;
- Safety with changes to flooring and lighting.

³ <http://longtermcare.gov/the-basics/who-needs-care/>; <http://news.morningstar.com/articlenet/article.aspx?id=564139>; <http://www.census.gov/newsroom/releases/archives/population/cb12-243.html>; Centers for Disease Control and Prevention. The State of Aging and Health in America 2013. Atlanta, GA: Centers for Disease Control and Prevention, US Dept. of Health and Human Services; 2013.

⁴ National Investment Center for the Seniors Housing & Care Industry, Seniors Housing Construction Trends Reports 2013.

⁵ <http://www.healthdesign.org/chd/research/health-promotion-design-long-term-care-settings>.



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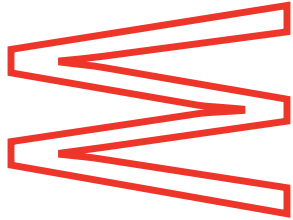
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Long Term Care Construction Opportunities, *continued*



What can you do? Due to the economic downturn, there has been consolidation and loss of contractors and specialty subcontractors with the experience to bring a long term care project to completion on time and on budget. As the market improves one must be mindful of the experience that the contractor has with specialized long term care facility construction. In addition, because of the uniqueness of the facilities, a design professional must have experience to address the needs of the ultimate users of the finished project. Good projects with a strong prospect of success can be easily undercut by an inexperienced contractor, specialty subcontractor or design professional attempting to deliver the unique requirements of a long term care facility.

Some of the items a developer should consider before and during construction, in addition to reducing risk and protecting their own interests, include:



- Negotiating a fair contract with contractors and design professionals;
- Engaging design professionals and contractors with experience in long term care construction;
- An understanding of the uniqueness of the projects and the required finished result;
- An accounting for governmental regulations;
- Requiring fees be a negotiated lump sum and not tied to the costs of the project.

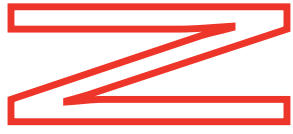
In the Trenches

[Andrea Barach](#) has joined Baker Donelson’s Nashville office as a shareholder and a member of the Firm’s Business Department. Ms. Barach represents clients in a range of business transactions including acquisitions, dispositions and financings across several industries including health care, long term care, real estate development and finance. A major component of her practice has been the representation of long term care providers in their efforts to obtain financing with very favorable economic terms under FHA insured loan programs. Ms. Barach has also represented clients in tax exempt bond transactions and other types of financing. She has extensive experience in the acquisition and disposition of facilities such as hospitals, nursing homes, behavioral health facilities, and entire companies, many of which are in the health care industry.

Baker Donelson’s Long Term Care Industry Service Team leader [Christy Crider](#) was selected to lead the Firm’s Women’s Initiative. [The Tennessean](#) recently interviewed Ms. Crider about the importance of promoting women in the profession.

[Christy Crider](#) was a moderator for the panel, “In-House Think Tank Session I: Proactively Spotting Costly Litigation Red Flags and Managing Pre-Suit Challenges” during [ACI’s Third Annual Forum on Preventing and Defending Long Term Care Litigation](#), January 28 – 29 in Miami, Florida.

Continue on next page



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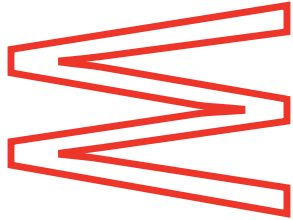
In the Trenches, *continued*

[Rich Faulkner](#), head of the LTC Transactional team, was a panelist for the program, “Transfers of Distressed LTC Facilities” at the [2014 American Health Lawyers Association’s Long Term Care](#) and the Law Program in Las Vegas February 19 – 21, 2014.

Baker Donelson was proud to be a sponsor of the [THCA’s Legislative Conference](#), March 12 – 13 in Nashville, Tennessee.

The article, “[Ten Tips to Lower Your LTC Litigation Costs](#),” authored by Christy Crider was published by McKnight’s on December 13, 2013.

Christy Crider will present, “Ten Tips to Keep Your Litigation Costs Under Control” during the [Kentucky Association of Health Care Facilities \(KAHCF\) Quality Summit](#) in Bowling Green, Kentucky, April 29 – 30.



Moody Obtains Summary Judgment Victory in Nursing Home Case

[Brad Moody](#) obtained a summary judgment victory in a nursing home case handled for client in Mississippi. In this case, the plaintiff alleged that the nursing home’s negligence caused a resident to develop a stage IV pressure ulcer, which allegedly resulted in the resident’s death from sepsis.

Birmingham Team Wins Summary Judgment in Nursing Home Case

[Floyd Gaines](#), [Paige Casey](#) and [Marianne Combs](#) won summary judgment in a nursing home negligence case in Alabama. In their case, a plaintiff sued the Firm’s client for allegedly neglecting a resident who purportedly died from a boil she developed at the nursing home. After significant effort (and years of litigating), our lawyers won summary judgment on proximate cause.

LTC Team Closes Nursing Home and Assisted Living Acquisitions

The LTC Transactional team represented a nursing home chain based in the Midwest in the acquisition of a nursing home and assisted living facility in Kansas in November.

In November, the LTC Transactional team also represented a client in the acquisition and financing of an assisted living facility located in Alabama. In a related transaction, the Firm represented the client in a loan transaction with a regional bank. Team members on the transaction included [Rich Faulkner](#), [Mary O’Kelley](#), [Susan Rich](#), Claire Tuley and [Dennis Nabors](#).

LTC Transactional Team Has Blitz at Year End

The LTC Transactional team concluded a blitz of closings at the end of the year.





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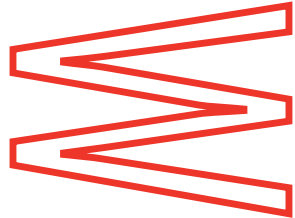
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In the Trenches, *continued*

The Firm helped a client successfully close on the operations of six skilled nursing facilities in the Southeast. This multi-layered transaction involved agreements with the former operator and HUD lender. The team worked tirelessly to negotiate almost 150 documents involved in the closing. The acquisition was led by [Amy Mahone](#) and assisted by [Rich Faulkner](#), [Ken Beckman](#) and [Philip Whitaker](#). The Firm also represented the skilled nursing facility operator in a multi-site accounts receivable financing transaction. [Philip Whitaker](#), [Amy Mahone](#) and [Rich Faulkner](#) represented the client in this financing transaction.



The Firm represented a client in the lease of a Kentucky skilled nursing facility from a nonprofit health care owner. [Mary O'Kelley](#) and [Rich Faulkner](#) represented the new operator in this transaction.



The Firm represented an assisted living provider on two closings in December. The first was a sale-lease back transaction with a publicly-traded REIT, involving an assisted living facility in Wisconsin. The Firm also helped the client finalize a separate joint venture agreement with the REIT involving a second assisted living facility. [Ken Beckman](#), with assistance from [William Richardson](#), represented the client.

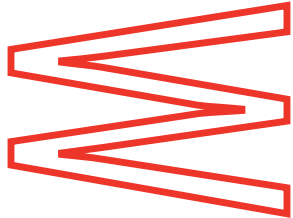
Talk about blitz! A client acquired a skilled nursing facility located in the Midwest with the Firm's assistance in 12 days (including Christmas), concluding the acquisition on the December 31 deadline. [Claude Czaja](#), with [Rich Faulkner](#) and [Jason Strain](#), all logged hours during nights and weekends to close the acquisition. The Firm also represented the skilled nursing facility purchaser in negotiating two loans.

The LTC Transactional team also represented a client in the accounts receivable financing of three skilled nursing facilities in Tennessee. [Philip Whitaker](#), [Rich Faulkner](#) and [Amy Mahone](#) represented the client in the transaction.

The LTC Transactional team represented a Georgia-based nursing home operator in acquiring the operations of two skilled nursing facilities. [Ken Beckman](#), [Meg Gossett](#) and [Jim Levine](#) represented the client.

The LTC team helped a newly-created group purchasing organization (GPO) focused exclusively on mid-sized nursing home operators finalize its operating agreement and start to accept subscriptions in December. [Ken Beckman](#), [Mary O'Kelley](#), [Meg Gossett](#), [Rich Faulkner](#) and [William Richardson](#) represented the GPO.

The HUD financing team within the LTC Transactional team also wrapped up a record calendar year in 2013 in which they closed approximately 90 loans throughout the nation. Those included lender and borrower representation on several loan closings in December for long term care and senior housing facilities in Illinois, Michigan and Maryland. Representing the clients in those transactions were [Jim Levine](#), [John McGehee](#), [Ross Schram](#) and [William Richardson](#). The value of the lender-representation transactions in 2013 totaled well over \$250 million.



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Join Us For Our Monthly Long Term Care Webinar Series

- 5.13.2014:** REITs and Long Term Care Facilities
presented by [Ken Beckman](#) and [Rich Faulkner](#) with special guest panelists
- 6.10.2014:** Understanding New Department of Labor Regulations Relating to Home Health Worker Pay, presented by [Phyllis Cancienne](#) and [Russell W. Gray](#)
- 7.8.2014:** Discussion of Apology Laws and Setting Realistic Expectations
presented by [Joshua Powers](#) and [Jill Steinberg](#)
- 8.12.2014:** Pharmacy and the LTC Facility: Legal and Business Considerations
presented by [Michael R. Hess](#) and special guest panelists
- 9.9.2014:** Are You Compensating Your LTC Employees Correctly?
presented by [Whitney Harmon](#)
- 10.14.2014:** Nurse Practitioners and Physician Assistants: Opportunities for LTC Facilities
presented by [Rich Faulkner](#) and Dr. Randy Heisser
- 12.9.2014:** What's New in Federal Guidelines Governing LTC Corporate Compliance and Ethics Plans, presented by [Tom Baker](#) and [Alisa Chestler](#)
- 1.13.2015:** Navigating the Bermuda Triangle of FMLA, ADA and Worker's Compensation
presented by [Jenna Bedsole](#) and [Davis Frye](#)

To receive information about the webinar series or to register, email rsvp@bakerdonelson.com.

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