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Long Term Care Providers Take Note: The Top Five Employment Law Mistakes to Avoid

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Americans love top ten lists. In that love-for-lists spirit, and in an effort to be informative, we list below the top five employment law mistakes that long term care employers need to avoid.

1. Implementing a No-Fault Attendance Policy Without Regard to the Americans with Disabilities Act (ADA). No-fault attendance policies are fairly common among long term care employers. Recently, the EEOC has pursued employers that implement no-fault attendance policies without considering if an absence counted under that policy may constitute a disability that the employer must reasonably accommodate under the ADA. An employer that has reason to know that an employee is missing work due to a medical condition needs to consider whether such medical condition may constitute a disability. Then, the employer must consider possible reasonable accommodations for such disability rather than simply counting the employee's absences under a no-fault attendance policy.

2. Not Recognizing Retaliation Issues. The long term care industry presents a potentially ripe environment for unlawful retaliation claims. Employees, for instance, may engage in protected activities by complaining either internally or externally (even if ultimately without global revision merit) about resident care issues, alleged billing irregularities or alleged discrimination. Long term care employers must ensure that they take adverse employment action against an employee only for legitimate, nondiscriminatory reasons and that they can support such termination through sufficiently documented evidence. Such measures will significantly reduce the risks associated with retaliation claims.

3. Failing to Provide Proper Notices and Information under the Family and Medical Leave Act (FMLA). The FMLA sets forth specific requirements for providing certain notices to employees about their FMLA rights and how employers must designate leave as FMLA leave. Despite specific instructions from the Department of Labor (DOL) in that regard, long term care employers all too often fail to meet those requirements at times because of untrained employees at the facility level. Long term care employers need to ensure that their managers understand the FMLA and its notice requirements. The training should include how to provide proper FMLA notices and information, such as the DOL form WH-381 and WH-382, to their employees.

4. Failing to Count Workers' Compensation Leave as FMLA Leave. The FMLA regulations make clear that leave for a workers' compensation injury and FMLA leave can run concurrently if the workers' compensation injury constitutes a "serious health condition." Long term care employers, however, at times fail to designate workers' compensation leave as FMLA leave. Such failure can result in an employee returning from a lengthy workers' compensation leave and then immediately taking FMLA leave for another reason or claiming that the employer did not reinstate him or her, properly maintain his or her benefits or otherwise meet the requirements of the FMLA as applied to the workers' compensation leave. Long term care employers should implement procedures and provide proper training to ensure that they are properly designating workers' compensation leave as FMLA leave.

5. Engaging in Improper Pay Practices for Meal Periods. The DOL takes the position that nonexempt employees must be "completely relieved from duty" during meal periods. According to the DOL, if an

employee is interrupted for work during his or her meal period, the employer must pay the employee for the entire meal period. Certified nursing assistants may be particularly vulnerable to meal period interruptions due to the nature of their job duties and meal practices. Long term care employers must take an active role to ensure that nonexempt employees are not performing work duties during an unpaid meal period.