



Making a Difference

Baker Donelson Long Term Care Newsletter

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OSHA Puts Nursing Homes, Residential Care Centers Under the Microscope

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Recent developments in the enforcement of federal regulations could have substantial implications for certain long term care facilities. On April 5, 2012, the Labor Department's Occupational Safety and Health Administration (OSHA) launched a three-year special emphasis program focused on nursing homes and residential care facilities. This program will investigate ergonomic concerns, exposure to blood-borne pathogens, workplace violence prevention, tuberculosis containment and workplace slips and falls, according to the agency's program directive. An inspection's scope can be expanded if other hazards, such as exposure to multi-drug resistant organisms and dangerous chemicals, are found.

The national emphasis program (NEP) covers establishments in three North American Industry Classification System categories: nursing care facilities (623110); residential mental retardation facilities (623210) and continuing care retirement communities (623311). Businesses that do not provide medical care are not included in the program.

The program will target those long term care facilities that experienced an above-average number of injuries and illnesses during 2010. If at least 10 employees in the span of that year missed one or more days of work as a result of on-the-job injuries or illnesses, that facility is eligible for inspection.

Long term care providers can prepare for these inspections by reviewing the [NEP directive](#), as well as OSHA guidelines for [ergonomic hazards](#), [blood-borne pathogens](#) and [workplace violence](#). The directive implementing the new program contains instructions intended for compliance officers that can put such facilities on notice as to what exactly those officers will be looking for during investigations. For example, the directive instructs investigators to ask certain questions related to ergonomic hazards. Among the considerations evaluated by the officers will be the decision logic for using lift, transfer or repositioning devices and how often and under what circumstances manual lift, transfer or reposition occurs; who decides how to lift, transfer or reposition residents; and whether there is an adequate quantity and variety of appropriate lift, transfer or reposition assistive devices available and operational.

The NEP will also evaluate policies regarding blood-borne pathogens. Compliance officers will analyze whether programs are in place for the immediate and proper clean-up of spills of blood and other bodily fluids; whether the home has made available to all employees with occasional exposure to blood the hepatitis B virus vaccination series and whether the entity has established specific post-exposure protocols. In addition to these concerns, the directive provides a more extensive list of how blood-borne pathogen policies will be analyzed.

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In the Trenches



Crider

Kentucky Association of Health Care Facilities:

[Christy T. Crider](#) spoke at the 2012 KAHCF Spring Training on April 17, 2012

in Bowling Green, Kentucky. Baker Donelson was proud to sponsor the event.

Long Term Care Risk Legal Forum:

Baker Donelson was a proud sponsor of the Long Term Care Risk Legal Forum meeting, June 21-22, 2012 in Chicago.



Levine

HUD Lean:

[James H. Levine](#) will moderate the Senior Living Business Interactive online conference "[HUD: LEAN](#)

[Revisited](#)" on July 19, 2012.

Continued next page

OSHA Puts Nursing Homes, Residential Care Centers Under the Microscope, *continued*

The new NEP, unlike its 2002 predecessor, also addresses workplace violence. The program recognizes that long term care workers face an increased danger of workplace violence, which is defined as violent acts directed toward persons at work or on duty. Although the NEP will now evaluate policies related to the prevention of workplace violence, the directive does not provide any long term care-specific considerations as it does with ergonomic hazards and blood-borne pathogens. To ensure compliance with OSHA regulations, employers should examine [Enforcement Procedures for Investigating Workplace Violence Incidents, CPL 02-01-052](#).

For a more complete listing of enforcement procedures and considerations related to the new program, long term care facilities should consult the [NEP directive](#). Health care facilities should also consult the attached OSHA-issued guidelines for the areas covered by the program in order to reduce their risk exposure.



JOBS Act, Tax Relief May Facilitate Access to Capital

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Because of its critical importance to job creation and economic growth, the small business community is a prized constituency in Washington, D.C. This election year is no different. Following a January 2012 survey of small business owners which ranked access to capital and tax relief as the top policy priorities of the small business community, both issues took on added importance as the 2012 election-year legislative agenda unfolded.

Responding to the adverse impact on hiring and business expansion caused by the ongoing credit crunch, the bipartisan Jumpstart Our Business Startups Act (JOBS Act) (Pub. L. No. 112-106) was signed into law on April 5. The purpose of the JOBS Act is to make it easier for emerging companies to raise capital by easing SEC registration and disclosure requirements. Additionally, the House and the Senate hope to reconcile their respective approaches to small business tax relief before adjourning for the election, although differences between the two chambers are significant.

JOBS Act. The JOBS Act could give small long term care companies an additional source of start-up funding and expansion at a time of market uncertainty. This uncertainty was caused by Centers for Medicare & Medicaid Services (CMS) policy changes and MedPAC policy recommendations regarding reimbursement of skilled nursing facilities (SNFs), the Long Term Care Hospital (LTCH) moratoria imposed by 2007 legislation and changes made by the Affordable Care Act to home health policy. Although MedPAC's March 2012 report states that SNF operators "will be able to mitigate the effects of the payment reductions and policy changes by diversifying their portfolios and increasing their private pay mix," MedPAC concludes that lending to SNFs will remain constrained in 2012. MedPAC further notes that the 2007 legislative moratoria on LTCHs may reduce "opportunities in the near future and the need for capital." And, for home health operators, MedPAC concludes that several factors "have weakened investor outlook....and made lenders more cautious in the terms they offer home health firms seeking capital."¹

Below are some of the JOBS Act provisions that might help offset these market conditions by facilitating greater access to capital:

IPO "On Ramp" Rules. Title I would make it easier for so-called "Emerging Growth Companies" to go public by exempting them from certain regulatory requirements for either five years from the initial public offering (IPO) issue date, the date it has earned \$1 billion in annual gross revenue, or the date it has a worldwide public float of at least \$700 million.

In the Trenches, *continued*

Tennessee Health Care

Association: Baker Donelson is a proud sponsor of the [THCA Convention & Trade Show](#), August 19-22, 2012 at the Chattanooga Convention Center.



Baker

Louisiana Nursing Home Association:

Thomas Baker will present "Managing Regulatory Risk" at the [LNHA Annual Meeting](#), September 24-26, 2012 in New Orleans.

JOBS Act, Tax Relief May Facilitate Access to Capital, *continued*

Changes to Regulation D's Rule 506. Title II would modify existing SEC rules seen as artificially limiting access of small companies to accredited investors.

Crowdfunding. Title III would allow small companies to issue in aggregate \$1 million shares during the previous 12-month period to an unlimited number of individual investors (whether or not accredited) through an online "funding portal" registered with the SEC. Individual investor income limits apply and companies would be required to comply with special SEC "crowdfunding" requirements designed to be less onerous than those that apply to large offerings.

Small Company Capital Formation. Title IV would increase, from \$5 million to \$50 million, the securities offering threshold for companies exempted from SEC registration under Regulation A if certain conditions are met. Because the existing \$5 million threshold has been too low to justify the cost of going public under Regulation A, the provision is intended to help small issuers gain access to funding without the costs and delays associated with the full-scale securities registration process.

JOBS Act Rulemaking Process. Before taking advantage of various provisions in the JOBS Act, the SEC must first issue final implementing regulations. Depending on the title or section of the Act, the regulatory deadlines range anywhere from three to 12 months from the date of enactment (April 5, 2012). However, the SEC has yet to complete its rulemaking obligations under the Dodd-Frank Act, thus putting the JOBS Act rulemaking deadlines at risk. The SEC's Division of Corporation Finance recently stated that the agency has added more staff and resources for JOBS Act rulemaking, but that Dodd-Frank remains a top priority. In the interim, the SEC has published detailed guidance and FAQs on its [website](#).

Small Business Tax Relief Legislation. The fate of small business tax relief legislation is far less certain because of different approaches taken by the House and Senate. The Republican-controlled House is taking a broad approach that would allow companies discretion in how the tax relief can be spent (hiring, wage increase or equipment purchases). The House-passed bill (H.R. 9) would allow companies with fewer than 500 workers in either 2010 or 2011 to deduct 20 percent of their profits in 2012. In contrast, Senate Democrats – with the backing of President Obama – support a more targeted approach (S. 2237), which would extend 100 percent depreciation on purchased equipment and provide a 10 percent tax credit for increased wages or new hires.

As the November election approaches, the prospects for compromise dim because neither party believes it to be in their best interest to make concessions when both think their respective candidates will win the White House. But with budget "sequestration" and expiration of the Bush-era tax cuts looming at year's end, some form of small business tax relief is expected to be thrown into the mix of whatever final tax and spending compromise Washington will have to reach to avoid the impending fiscal crisis.

¹ Report to the Congress: Medicare Payment Policy, Medicare Payment Advisory Commission, March 15, 2012. http://www.medpac.gov/documents/Mar12_EntireReport.pdf

Protection from RAC Audits and Governmental Actions: Commercial Insurers Respond to the Risks

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Specialty auditors from Medicare and other federal programs are in the field auditing providers' claims and, often, making overpayment determinations. These auditors are charged with reviewing provider claims on a pre- or post-payment basis, often deciding years after the date of service that the claims were incomplete, inaccurate or simply not medically necessary.

When faced with an overpayment determination, providers may defend their claims through the administrative appeal process but the funds are due back to Medicare. Although providers can put off repaying overpayment through the first two levels of appeal, by appealing the denials the amount of the overpayment continues to accrue interest at federal rates that are currently more than 10 percent. Appeals are time- and resource-consuming, particularly when attorneys or consultants, such as statisticians or clinicians, are needed to defend the claims.

With the recent increase in Medicare billing audit activity, many of our clients are concerned that an overpayment determination could be financially devastating. Recently Baker Donelson Shareholder Jonell B. Beeler sat down with Vincent R. Hau of McGriff, Seibels & Williams, Inc.

to discuss new insurance coverage available for such events.

Beeler: Medicare audit activity has been around for many years. What led McGriff, Seibels & Williams, Inc. to develop an insurance product to address audits?

Hau: The health care industry is exposed to a wide spectrum of risks



that are addressed through insurance products. Addressing the risk of fines, penalties, defense and overpayments presents challenges as well as a unique opportunity for insurers to serve health care organizations. Experience demonstrates that unfavorable audits do financially devastate organizations; however, with an effective defense, unfavorable federal audits are substantially overturned approximately 67 percent of the time.

The frequency of audits and public nature of the outcomes has allowed insurers to analytically address the risk and develop insurance products

to spread the risk. Health care organizations now have the ability to transfer the bulk of the financial risk to the insurance market.

Beeler: What protection can a health care organization expect with RAC audit insurance?

Hau: There are six products currently on the market that specifically address governmental billing recoupment and fraud and abuse actions and there are more in development. Each product varies in its coverage to some degree, but coverage typically applies as follows:

- Coverage is triggered by an event such as a governmental inquiry, a qui tam action or even self-reporting by the insured
- Policies tend to cover defense expenses, fines and penalties associated with the billing allegation
- Only one of the insurance programs on today's market extends to cover the actual overpayment, although in such cases the insured will pay a premium of more than 60 percent of the insurance limits.

Most policies also extend to provide fines, penalties and defense coverage for Health Insurance Portability and Accountability Act (HIPAA), Emergency Medical Treatment and Active Labor Act (EMTALA), the Stark Act and other

Protection from RAC Audits and Governmental Actions: Commercial Insurers Respond to the Risks , continued

governmental enforcement actions. Policies also cover shadow audits in preparation of a defense of the billing recoupment or fraudulent billing allegation. As such, the best label for this product is governmental action coverage.

Beeler: Can a provider use its own legal counsel or will the insurance dictate who counsel may be? What about consultants?

Hau: The insurers have differing positions on the use of legal counsel. All have an established panel of defense counsel. Positions on utilizing counsel of your choosing will involve pre-negotiating or

the overpayment amounts determined based on extrapolations?

Hau: The insurers providing this coverage have differing approaches to the look-back issue. The most aggressive insurers provide unlimited prior acts coverage while others provide no prior acts coverage. This is often a function of the underwriting process. A health care provider with frequent or repeated overbilling allegations is likely to have restricted or no prior acts coverage.

Underwriters do understand that many health care providers have experienced governmental inquiries and actions related to overbillings. Some underwriters even

view such activity as a positive as it heightens organizational concern and results in tight internal controls to manage the fraud and abuse allegation risk.

Beeler: Does the insurer have Risk Abatement counseling available? What steps do insurers recommend for providers to avoid liability?

Hau: Insurers have been hesitant in providing risk management services related to billing practices due to the fear of being drawn into lawsuits. However, some underwriters require an initial audit of practices prior to providing insurance coverage and will identify weaknesses in a provider’s billing program. With increasing competition as new insurers enter this market, risk management offerings are expanding.

Beeler: Is the coverage affordable? What is the basis for cost – is it per unit or

dollar-for-dollar? Is it expensive?

Hau: “Expensive” is relative. We offered coverage to a home health provider with \$200 million in revenue last year providing a \$3 million limit for a premium of \$85,000. They declined to purchase the coverage. They contacted us this year wanting to purchase coverage after several audits were initiated. Unfortunately, that is comparable to buying property coverage on a burning building.

An individual physician can purchase \$1 million of coverage for less than \$1,200. We recently quoted a hospital system with \$1.1 billion of revenue a \$5 million policy for \$135,000. The premium is variable depending on the underwriting, but based on the number of providers purchasing the coverage, premiums must be considered reasonable.

Ultimately, compared to the cost of managing an extensive audit and the potential for fines and penalties, the premiums are very reasonable.

The insurance market can provide limits as high as \$20 million and deductibles as low as \$1,000.

Conclusion

Given the constantly changing landscape of Medicare and Medicaid billing programs and the intensity of governmental scrutiny on billing practices, health care providers should consider managing this risk with insurance. Insurers providing governmental action coverage are well versed in managing these claims and possess a depth of resources and talent to help their clients successfully defend their organizations.



having the desired counsel added to the panel. One insurer allows selection of counsel, but if the insured selects their own counsel, then there is 25 percent coinsurance, meaning the insured will pay two percent of the total claim.

Beeler: One of the many concerns health care providers have is that auditors look back at three or four years of claims. Does insurance cover these prior periods? The government auditors also utilize statistically-based extrapolations. Does insurance cover repayment demands of

Free Webinar Series for Long Term Care Providers

Baker Donelson's Long Term Care Group will continue to 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.

- July 25, 2012 – 1:00 p.m. CDT: **Arbitration Trends for Long Term Care Providers.** Presented by [Christy T. Crider](#) and [Summer H. 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 T. 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 T. 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 T. Crider](#) and [Craig Conley](#)

Recordings are now available for:

- **The Truth about Tennessee Tort Reform: What Long Term Care Providers Need to Know.** Presented by [Caldwell Collins](#) and [Christy T. Crider](#)
- **Get Paid for the Long Term Care You Provide: How to Fight a Medicare Audit and Win.** Presented by [Jonell B. Beeler](#) and [Christy T. Crider](#)

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 T. Crider](#) team leader and an attorney in our Nashville office, at 615.726.5608 or ccrider@bakerdonelson.com.

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