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Preserving dignity through knowledge and compassion

Client Alert – Electronic Monitoring in Long-Term Care Facilities to Be Allowed as of January 1, 2016

On January 1, 2016, Illinois will join New Mexico, Oklahoma, Texas and Washington in allowing residents, or families of residents, in long-term care facilities to install cameras or other electronic monitoring devices. The The Authorized Electronic Monitoring in Long-Term Care Facilities Act (Act), which was signed into law by Governor Bruce Rauner on August 21, 2015, is likely the most significant change to the long-term care industry in Illinois in the past 10 years. What does this new law mean for the owners and operators of long-term care facilities?

WHO IS AFFECTED?: According to the definitions provided in it, the Act covers: (1) intermediate care facilities for the developmentally disabled licensed under the ID/DD Community Care Act that have 30 beds or more; (2) long-term care facilities for individuals under age 22 licensed under the ID/DD Community Care Act; and facilities licensed under Illinois' Nursing Home Care Act.

WHAT DOES THE ACT REQUIRE?: In short, a facility must now allow a resident or his or her family to electronically monitor the resident's room. This would be video monitoring of some sort. The Act expressly does not allow for still photographs and nonconsensual monitoring.

WHO CAN REQUEST THE MONITORING?: The resident or his or her legal guardian, or the "resident's representative" as defined by the Nursing Home Care Act, may request monintoring. Any resident with a roommate must also gain the roommate's permission.

WHAT ARE THE REQUIREMENTS FOR THE MONITORING INSTALLED?: The monitoring device must be placed in a conspicuous location. Notices must also be posted regarding the monitoring.

WHO PAYS FOR THE MONITORING?: The resident must pay for the monitoring. If the monitoring device requires internet access, the resident must make arrangements for it and pay any associated charges.

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Hinshaw & Culbertson LLP partners, **David Alfini, Thomas Mandler, Jennifer Ballard**; and associate **Adam Guetzow** will participate in a discussion entitled, **"Effective Claims Handling: A Proactive Approach to Identifying and Minimizing Risks in Senior Living Facilities,"** during the 2015 Senior Living Conference.

For more information or to register for this event, please visit the **LeadingAge Illinois** website.

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The Illinois Department of Public Health intends to create an "assistance program," which will be a scholarship program to provide financial grants to residents receiving medical assistance under Article V of the Illinois Public Aid Code.

The facility may not charge for the monitoring.

WHAT ARE THE FACILITY'S DUTIES?: Under the Act, the facility must make a "reasonable attempt" to accommodate the resident's request for monitoring and any installation needs. The Act does not define "reasonable attempt" but the term would likely encompass efforts such as changing the rooms of those who have requested the electronic monitoring. This is an important point because a facility has the burden of proving that a requested accommodation is not reasonable. Additionally, the facility must document the request by the resident or guardian.

PENALTIES: The facility can be held liable for intentionally retaliating or discriminating against any resident for his or her having consented to authorized electronic monitoring or for preventing the installation or use of an electronic monitoring device. A violation of this section of the Act is a business offense punishable by a fine of up to $10,000.

HOW MAY THE INFORMATION FROM THE MONITORING DEVICE BE USED?: The resident owns the data gathered by the monitoring device. The facility has no right to the footage. The Act expressly provides that the information "may only be disseminated for the purpose of addressing concerns relating to the health, safety, or welfare of a resident or residents." This would expressly include litigation.

Importantly, the Act provides that the information obtained may be "admitted into evidence in a civil, criminal, or administrative proceeding." However, the information cannot have been "edited or artificially enhanced and the video recording includes the date and time the events occurred."

What to Do Going Forward

Regardless of one's opinion of the Act, it is clear that the Act will change the way that long-term care facilities are managed. Policies and procedures will need to be updated to comply with the Act. Specifically:

- Revisions to resident rules and regulations to allow for the electronic monitoring consistent with the logistical issues presented by the particular facility.
- Education of patients and their families as to this new law.
- Education of the clinical and non-clinical staff regarding the new electronic monitoring.
- Logistical training for those working around the electronic monitoring devices to prevent damage and injury.
- Development of policies and procedures for addressing complaints centering on the electronic monitoring devices.

OSHA Inspection Guidance for Inpatient Health Care Settings

The Occupational Safety & Health Administration (OSHA) recently published a memorandum that it sent to its Regional Administrators entitled "Inspection Guidance for Inpatient Healthcare Settings" (Inspection Guidance). The Inspection Guidance identifies seven hazards that will be the focus of OSHA inspections of healthcare facilities, regardless of the original reason for the inspection.

The causes of musculoskeletal disorders are the first hazards addressed in the Inspection Guidance. OSHA inspectors will determine the extent of patient handling hazards and assess the incidence and severity rates of injuries. They will review an employer's rules and guidelines regarding the use of assistive devices, versus the manual lifting, transferring, and repositioning of patients and residents. Employers will be held responsible for ensuring that the appropriate quantity and types of assistive devices are available, and that employees have been trained regarding hazards associated with lifting, transferring, or repositioning, including the proper techniques to avoid injuries.

Workplace violence is the second hazard identified in the Inspection Guidance. OSHA inspectors will analyze and identify potential and existing hazards, and review workplace violence prevention training programs to ensure that employees recognize

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signs of violence, and know how to defuse a situation, and defend themselves against violence.

Regarding the third hazard, tuberculosis, OSHA inspectors will determine whether a suspected or confirmed tuberculosis case has occurred within the prior six months. They will also check employer's procedures to promptly manage the care of suspected or infected patients or residents.

The fourth hazard, bloodborne pathogens, will involve a review of the employer's exposure control plan, including the employer's training program. Personal protection equipment should be exposure-free, and a post-exposure treatment plan should be established.

Slips, trips and falls are identified as the fifth hazard. OSHA inspectors will review the employer's policies regarding the cleanup of spills, and check for slippery floors, uneven surfaces or unguarded openings. They will also check the employer's policies and practices to ensure that employees wear appropriate footwear.

Regarding the final two hazards, exposure to multi-drug resistant organisms and exposure to hazardous chemicals, OSHA inspectors will review whether any employee may be exposed, and the efforts to reduce or eliminate exposure, including providing worker training, warning labels and access to Material Safety Data Sheets.

The bottom line is that hospitals, nursing homes, and residential care facilities should carefully review their policies and practices in light of the above hazards, so that they are better prepared for likely increased inspections by OSHA.

Arbitration Provisions in Resident's Contracts: A Facility's Defense to the Illinois Nursing Home Care Act?

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As many are aware, long-term care facilities in Illinois are generally subject to the statutory framework found within the state's Nursing Home Care Act (NHCA). Those most familiar with the NHCA, and particularly those individuals and entities responsible for defending actions brought under the act, are painfully aware of the NHCA's fee-shifting provision. Under this provision, if a resident-plaintiff is successful at trial in establishing a violation of his or her rights under the NHCA, the facility becomes responsible for paying the actual damages *and* costs and attorneys' fees to the resident. The existence of this fee-shifting provision, coupled with the compassion from jurors which often may exist in matters brought to trial under the NHCA, can make for a dangerous and costly combination from the defense perspective, particularly because the NHCA provides no guidance on how to calculate fees or any requirement that fees awarded be proportionate to the verdict. *See Rath v. Carbondale Nursing and Rehabilitation Center*, 374 Ill.App.3d 536 (2007).

The various advantages afforded to residents, families and their attorneys under the NHCA beg the question of what, if anything, NHCA-governed facilities can do to mitigate the costs and uncertainty accompanying litigation under the NHCA. Until relatively recently, the response from defense attorneys immersed in this industry has often been "very little." However, over the past few years, the pendulum has made some swings in favor of additional protection for facilities, namely by way of the Illinois Supreme Court's ruling in *Carter v. SCC Odin Operating Co.,* 237 Ill. 2d 30 (2010) whereby the Court authorized Illinois facilities to include arbitration clauses in resident contracts. Of course, not only does

the right to arbitration remove the unpredictable compassion factor found with jurors, but it also provides for an often faster and less expensive alternative to litigation.

Importantly, while the option to include arbitration provisions in resident contracts provides at least one alternative for facilities to evade costly litigation under the NHCA, such an option is not absolute. Specifically, the Illinois Supreme Court's ruling in *Carter* has promulgated recent progeny analyzing those situations where an arbitration provision should not be upheld. Likewise, recent cases have also begun to interpret what must be included in the arbitration provision to be enforceable.

As with any contract, the defenses of fraud, duress and mental capacity (in order to form a valid contract, both parties must be of sufficient mental ability to appreciate the effect of the contract) are available to any party seeking to avoid the repercussions of an executed arbitration provision. Not surprisingly, within the long-term care context, the defense of mental capacity has been routinely used by plaintiffs' counsel to argue that the resident did not have the appropriate mental capacity at the time of contract execution. Moreover, if a resident is acting on his or her own behalf, any facility seeking to use an arbitration provision as part of its resident contract must ensure that the resident has mental capacity to execute a valid contract. Thus, to assist with any future enforceability defense, a facility should, upon execution, ensure that the resident has mental capacity to execute a valid contract. Any defense to enforceability can be strengthened by the use of witnesses, including family members or a notary, and also strengthened by proof of the provision of adequate time for the resident to read and comprehend the arbitration provision.

In addition, as with any contract, the arbitration agreement must have mutual consideration. Thus, facilities must be cognizant that it too must agree to arbitrate and forego its right to sue. *See Aste v. Metropolitan Life Insurance Co.,* 312 Ill. App. 3d 972, 975 (1st Dist. 2000) (finding that a mutual promise to arbitrate is sufficient consideration to support an arbitration agreement).

Finally, facilities must also be cognizant of the fact that while family members often may sign documents for residents, nonsigning nursing home residents are only bound by an arbitration agreement if the individual who signed had actual authority to sign on behalf of the resident as the resident's agent. Mere familial relation is not sufficient. Rather, written agreements or power of attorneys must be present in order to validate any agreement signed on behalf of a resident. *See Curto v. Illini Manors, Inc.*, 405 Ill.App.3d 888 (3d Dist. 2010).

The use of arbitration provisions is most definitely a tool by which facilities can attempt to minimize the costs and strengthen the predictability of claims brought under the NHCA. That said, facilities must be cognizant of the limitations of these provisions while at the same time put into place policies and procedures governing the execution of arbitration provisions to provide the best possible defense to any attack on enforceability.

Who's the Boss? — The NLRB Significantly Expands Definition of "Joint Employer"

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Long-term care employers frequently utilize temporary workers and contract out certain services such as housekeeping and food service. Alternative workforce arrangements do not fit the classic definitions of employment and can create confusion as to who is legally responsible for temporary or contract workers. Long-term care employers may not consider these workers to be their own employees, but the application of various state and federal laws may result in a different conclusion. A long-term care employer may be found to be a "joint employer" along with the company that provided the staff, imposing liability on both companies for legal issues such as violations of wage and hour laws, workplace safety violations, and claims of discrimination and harassment.

On August 27, 2015, the National Labor Relations Board (NLRB) issued a landmark ruling that redefines its test for determining joint-employer

status. In a highly anticipated split decision, the NLRB concluded that Browning-Ferris Industries is a "joint employer" of employees of a contract staffing firm within one of its recycling plants whom the union petitioned to represent. In issuing its decision, the NLRB articulated a new standard for determining joint-employer status. Now, an entity can be deemed a joint employer if it exercises direct or indirect control over the essential terms and conditions of employment of workers who are not on its payroll. Additionally, an entity's unexercised, reserved authority to control working conditions is now relevant to the analysis. This is a significant departure from the former standard, which required an entity to exercise "direct and immediate control " over another company's employees in order to establish a joint-employer relationship. The NLRB said that the new standard is intended to keep pace with the changes in the current workforce which encompass a full range of employment relationships.

This decision potentially may have a large impact on how long-term care employers do business, because joint-employer liability could be found simply through the existence of a contractual agreement between a long-term care employer and its contractor that impacts terms and conditions of employment. This change means that even routine business decisions will be more closely scrutinized in light of how they affect union organizing efforts. The new standard also means that when joint-employer status is established, both employers can be liable for collective bargaining obligations and the other's unfair labor practices, including unlawful discipline or discharge under the National Labor Relations Act. Conceivably, the new standard may also allow unions the right to strike or picket at any location of either employer, thus necessitating a reexamination of the NLRB's rules on secondary strikes, boycotts and picketing.

Although not required, it is possible that the NLRB's new joint-employer standard will be adopted by other federal agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), and the Occupational Safety & Health Administration (OSHA). As a result, it is imperative that long-term care employers carefully review their current policies and practices, as well as their contracts with contractors and staffing agencies. We recommend the following analysis be implemented to minimize an argument for imposing joint-employer liability against a long-term care employer:

1. **Review Contracts** with staffing agencies, service providers or subcontractors for a determination of the extent to which the long-term care employer controls or impacts the terms and conditions of the service providers' employees. Contracts with staffing agencies, service providers and subcontractors should include affirmative statements setting forth that the long-term care employer is not the employer of the other company's employees and has no control over personnel decisions or the terms and conditions of employment of the other company's employees. Additionally, the long-term care employer should include an indemnity provision in its contracts explicitly setting forth that the staffing agency or outsourcing company assumes all responsibility with respect to employment liabilities.
2. **Adopt Policies and Procedures** that avoid actual and perceived control over another entity's workers. Long-term care employers must be careful not to intrude on the essential employment decisions involving temporary or contract workers. Long-term care employers should not be involved in decisions regarding hiring, firing, discipline, scheduling, setting wages or establishing working conditions of non-employees.
3. **Train Managers and Supervisors** regarding how they should (and should not) interact with the temporary and contract workers. Generally, managers and supervisors should only give directions to the other entity's management, not the workers themselves. Even though your contracts may pass muster, the day-to-day operations and directions from your supervisors may pose problems.
4. **Investigate** staffing agencies and outsourcing companies to determine whether they can be relied upon to comply with and enforce the federal and state employment laws.

Conclusion

Arrangements with third-party contractors are drawing increased scrutiny by the NLRB. When considering an outsourcing relationship, the key is for long-term care employers to structure the relationship in way that allows for as little direct involvement with the outside contractor's employees as possible.

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