Legal Issues and Updates

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New Maryland Laws

Rose M. Matricciani
SB 849

- Requires Maryland Board of Nursing to establish a Rap Back Program
- Rap Back Program (Begins 1/1/2015)
  - Criminal Justice Information System Reports
    - All new & additional criminal history information
    - Involves applicants who have been fingerprinted for a criminal history records check
SB 849

- Other Provisions
  - Addresses inactive status and medical condition
  - Clarifies surrender of license – final and public order
  - Adds disciplinary actions – practicing on expired or lapsed license; misappropriation of property
  - Clarifies reinstatement for suspended, revoked, surrendered license
  - Defines “Certificate Holder” and disciplinary actions for Certificate Holders
  - Authorizes cease & desist orders, injunctive relief and civil penalties for specified violations
- Effective 10/1/14
HB 399

- Medicaid Program – medical record
- Person in Interest - No more than $20 – 100 pages or portion thereof
- Adjusted annually for inflation
- Exception – attorney appointed by person in interest
- Effective 10/1/14
SB 483/HB 710

- Pertains to nursing homes licensed for 45 or more beds
- Addresses workplace safety – prevention of physical assault or threatening behavior against an employee
- Requires an appropriate Committee to:
  - Conduct an annual assessment of workplace safety issues; and
  - Make recommendations to the Nursing Home for reducing workplace injuries.
SB 483/HB 710

- In conducting the annual assessment, the Committee shall consult with geriatric Nursing Assistants and other employees who are involved in assisting residents in activities of daily living.

- Effective 10/1/14
HB 298

- HSCRC
  - Beginning 10/1/14 and every 6 months thereafter
    - Submit a report to the Governor and others – status of all-payer model contract
  - Develop guidelines for global budgets for each facility under all-payer model contract
  - Establish rates and rate increases
  - Promote and approve alternative methods of rate determination and payment
  - Effective 7/1/14
SB 102

- Authorizes the use of alternate care sites by licensed health care facilities
  - To provide health-related services during an emergency
  - If the facility has access to an emergency electrical power generator
HB 295

- Increases the minimum wage:
  - $8.00/hr. – 1/1/15 for 6 mos.
  - $8.25/hr. – 7/1/15
  - $8.75/hr. – 7/1/16
  - $9.25/hr. – 7/1/17
  - $10.10/hr. – 7/1/18
- Establishes a certain wage for certain employees under the age of 20
- Effective 7/1/14
HB 1026

- Employer
  - Employs 15 but not more than 49 individuals in the State for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year

- Eligible Employee
  - Employed for a 12-month period & worked 1,250 hours during the previous 12 months
  - Entitled to 6 work weeks of unpaid parental leave during any 12-month period for:
    - Birth of child of employee; or placement of child with employee for adoption or foster care
  - May be restored to same position after leave or an equivalent position
  - Restoration to position may denied under certain circumstances
HB 1026

- Employer Denial of Leave
  - Necessary to prevent substantial & grievous economic injury to operations
  - Must notify employee before employee begins taking leave
- Employer providing paid leave may require the eligible employee or eligible employee may elect, to substitute paid leave for part or all of the parental leave
- Employer may require written notice of intention to take leave at least 30 days before
- Eligible employee may begin leave without prior notice
  - Premature birth
  - Unexpected adoption
  - Unexpected foster placement
- Effective 10/1/14
2014 Employment Law Trends

Although the Year is Young
Trends Are Emerging

Steven E. Bers
Major Trends In 2014

- Agencies Maxed-Out with Enforcement Responsibilities / Regulatory Development Responsibilities / Proactive Politics
  1. Obama-Care Requiring an inordinate amount of record-keeping and information retrieval
  2. EEOC taking months to start reviewing cases, and years to complete investigations
  3. Executive Orders to Agencies, Upstaging traditional employment law development paths
  4. Proactive NLRB – Going Outside Union Regulation
1. Obama-Care Implementation

- **Required Enforcement Data** -
  - What Policy Does the Employer offer – is it minimally sufficient?
  - Are 70% (2015) or 95% (2016) offered coverage?
  - What are employees required to contribute?
  - Is there a single employee for whom the employee-paid premium is greater than 9.5% of the employee’s income?
  - Determined on a monthly basis
2. EEOC Discrimination Claim Enforcement

- EEOC established in 1964 to theoretically accelerate enforcement compared to courts
- Employer usually required to respond within 30 days, but unlikely to hear for 6 months
- Investigation takes years
- Investigatory paperwork is consistently inaccurate
- Politically untouchable
3. Pro-Active Executive Orders As To Labor Matters

- **Executive Order to make more employees eligible for Overtime (3/13/2014)** – “Updating and Modernizing Overtime Regulations”
- **Executive Order to Allow Discussion of Wages (4/8/2014)** – “Non-retaliation for disclosure of wage Information”
4. National Labor Relations Board
Going Beyond Unions

- Very Pro-Active and Politicized 5 member Board
- NLRB Founded in the 30’s as Union-focused agency. Protecting Collective Bargaining
  - Abandoning Traditional Scope
  - “Legislation by NLRB General Counsel’s Enforcement Policies”
- Regional Cases Now sent to National General Counsel for Direction.
4. Examples of NLRB Pro-Active “Legislation”

- Has Pounced upon “Social Media” issue
  - Right of employees to “bad-mouth” supervisors
  - Right of employees to say anything related to employment
  - Right to use Intra-net negatively
  - Overbroad rules unlawful
- Prohibition of “at will” handbook statements
- Prohibition of investigatory silence requests
- “Weingarten” re-examined - rights to co-worker present in disciplinary discussion - even if no union
It’s My Money, and I Want It NOW!

Jonathan E. Claiborne
LeadingAge Maryland Annual Conference
April 30, 2014
Many CCRC admissions have a significant deposit/refund component
Former residents, their estates and beneficiaries expect deposits to be refunded within a reasonable time, probably 3-6 months.

With passage of time, they desire payment, want to close estates, and become impatient.
Deposit generally paid only after previously occupied unit is resold and occupied

Time to sell a particular vacated unit to a new CCRC resident may increase

Can take 1-3 years for vacant unit to sell
Preemptive strikes – head off litigation

- Be certain contract language discussing refunds is clear and in conformance with statutes and regulations
- Be attentive to inquiries concerning refunds
  - Keep interested parties informed of general status and efforts to sell
  - Provide realistic estimates of timing of future sales
- Avoid informal responses to inquiries about deposits – funnel questions to central person
Keep records of all marketing efforts

- General marketing efforts – print and other media marketing, discounted fees and other promotions, open houses, etc.
- Specific marketing efforts for a particular unit – refurbishing unit, ads for particular unit, number of times shown to prospective residents, etc.
Keep records of all sales

- Track dates when units become available and when sold
- Track units by type and characteristics, e.g., size, location, age, type of refund being paid, etc.
- Be prepared to explain why some units sell more quickly than others
If litigation is filed

- Breach of contract; covenant of good faith and fair dealing
- Retain attorney quickly
- Provide attorney with contract documents, sales data, and marketing information – general and specific
- Consider outside forces which have affected sales – economy, local issues, etc.
- Consider whether to seek dismissal of claim
  - Expense of filing motion
  - Chances of success
  - Timing of likely future sale of unit
Settlement generally not an option
Stay the course with sales efforts on all vacant units
Compliance with the Fair Housing Act in Social Media

Thomas J. Whiteford
Social Networking is On the Rise in the 65+ Population

Age 74+ is the fastest growing demographic among social networks

Credit: Erica Campbell Byrum, Director of Social Media at Dominion Homes Media
Do’s & Don’ts of Advertising

- Fair Housing law makes it unlawful to indicate a preference or discriminate because of race, color, religion, national origin, sex (gender), familial status, or handicap (disability) in advertising for housing.

- **DO**
  - Show people of ethnic and cultural diversity (reasonably represent the minority and majority groups in surrounding areas.)
  - Show people with disabilities
  - Wise idea to have FHA logo on page

- **DON’T**
  - Cater to one group, stereotype, or typecast
  - Use words such as “exclusive, traditional, active, independent”
For Example…

- Responsible for maintaining page and ensuring compliance
- Who will be posting content?
  - Employees
  - Residents/Visitors
- Social media policy – how to handle inappropriate posts
  - Employees’ posts must comply or be deleted
  - Preserve right to take down content posted by residents
  - As moderator of page, can reject inappropriate comments
Social Media Policy - Photos

- **Business posting pictures**
  - All photos used as part of commercial marketing must show diversity under FHA
  - When posting pictures of residents, have a model release signed and keep it forever
    - When the use of photos (videos) showing people is for commercial purposes (rather than, for example, a news story), those people have rights such as publicity and privacy.
    - Model release = document used to get permission from a person of whom you have taken a photo (or video) so that you can use that photo (or video) in any way – printing it, posting it on your website or using it in social media.

- **Residents posting pictures**
  - Your terms and conditions for residents to post to your social media site should include that they have permission from anyone shown in the photo to in fact post such photos.
Recommended Elements of a Social Media Risk Management Program

- Governance structure - establish clear roles and responsibilities whereby management determines how using social media contributes to the strategic goals of the institution and shapes the institution's policies in this regard.
- Policies and procedures regarding the use and monitoring of social media and compliance with applicable law. Such policies and procedures should incorporate methodologies to address risks from online postings, edits, replies, and retention.
- An employee training program for official, work-related use of social media, and potentially for personal use of social media.
- An oversight process for monitoring information posted to proprietary social media sites administered by (or on behalf of) an institution.
- A plan for responding to security events such as a data breach or account takeover through social media or otherwise.
- A process to ensure ongoing compliance with internal policies and procedures and applicable law.
FHA and Business Liability for Social Media Postings

  - Held that “[plaintiffs] can identify many targets to investigate...and can collect damages from any landlord or owner who engages in discrimination[; but,] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."
  - Thus, the “publisher” of violative content won’t be responsible for discriminatory content it does not author.

- Still a good idea to address the FHA in your social media policy and require that all resident posts comply!
- Take down all posts that do not comply with FHA.
FHA and Business Liability for Social Media Postings

- **Takeaway**: A business might not be liable for a poster to the business Facebook site who posts discriminatory content because the business did not author such content.
- **BUT** if the business authors such content then the fact that it is electronic communication will not insulate it from liability under the FHA.
- “If it wasn’t legal in print before, it’s not legal in print now. If it wasn’t legal in print before, it’s not likely to be legal on social media.” – Nadeen Green, senior counsel at For Rent Media Solutions
Update - Compliance with the Americans with Disabilities Act

Thomas J. Whiteford
2010 ADA Standards

- New requirements were adopted effective March 15, 2011, when the Department of Justice adopted the 2010 ADA Standards for Accessible Design.
- Public accommodations and commercial facilities must follow the requirements of the 2010 Standards.
- Compliance date is March 15, 2011.
- However, March 15, 2012, is the compliance date for using the 2010 Standards for new construction, alterations, program accessibility, and barrier removal.
The compliance date for the 2010 Standards for new construction and alterations is determined by:

- the date the last application for a building permit or permit extension is certified to be complete by a State, county, or local government;
- the date the last application for a building permit or permit extension is received by a State, county, or local government, where the government does not certify the completion of applications; or
- the start of physical construction or alteration, if no permit is required.

If that date is **on or after March 15, 2012** = new construction and alterations must comply with the 2010 Standards.

If that date is **on or after September 15, 2010, and before March 15, 2012** = new construction and alterations must comply with either the 1991 or the 2010 Standards.
2010 ADA Standards – Safe Harbor

By deferring the required compliance date to March 15, 2012, the DOJ provided a “safe harbor” for certain existing construction. You should be aware of how this “safe harbor” interacts with the following categories:

1. old construction that is compliant with the 1991 requirements
2. possible future alterations/remodeling, and
3. a few areas where there is no safe harbor because those items were not considered in the 1991 requirements.
2010 ADA Standards As Applied to Construction and Alterations

- New construction – obviously must be in compliance with 2010 Standards
- Old construction that *was in compliance with the 1991 Standards* does not need to be redone to be in compliance with the 2010 Standards
- However, if you plan on making alterations, the altered portions are subject to the 2010 Standards
  - Example: The 2010 Standards require one van accessible space for every six accessible spaces whereas the 1991 Standards require one for every eight. If your parking lot was striped pre-March 2012 in compliance with 1991 Standards, then it is okay to retain that striping under the “safe harbor.” However if you choose to alter elements that were in compliance with the 1991 Standards (i.e. choose to restripe the parking lot today, April 21, 2014) then the striping must reflect the 1:6 ratio not the 1:8 ratio.
- Alteration = “remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions.”
  - Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility.
Examples of Areas Not Subject to Safe Harbor

- Certain elements are *not* subject to the safe harbor because these elements were not addressed in the 1991 Standards – these need to be updated immediately (on or after March 15, 2012) if not already compliant
  - Exercise machines and equipment - requires 30” x 48” minimum clear floor/ground space
  - Fishing piers/platforms – requires clearance space, railings and edge protection
  - Golf facilities – requires accessible grounds; 48” wide routes; accessible gaps in curbs at intervals (maximum of 75 yards between); clear ground space in weather shelters
  - Saunas and steam rooms – no more than 5% but no less than one room must have a bench and sufficient turning space
  - Swimming pools, wading pools, spas – requires at least 2 accessible means of entry, i.e. pool lifts, capable of unassisted operation, that submerge below the stationary water level; clear space near the pool lift seat; ramps/slopes must be 24-30” below the stationary water level and must have two handrails.
  - Bowling lanes – at least 5% must be on handicap-accessible route