

April 30, 2008

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Long-Term Care Newsletter

Nebraska Legislative Update for 2008

By Jocelyn W. Golden

Several bills affecting health care and long-term health care issues have been passed in 2008 during the Second Session of the 100th Legislative Session of Nebraska, which ended this month. Some of the bills that may affect long term health caregivers are summarized below, but the bills themselves should be consulted for any further details.

LB 185: Prohibition of Practice Due to Revoked License

This bill was passed on March 8, 2007 and relates to numerous statutes pertaining to the Department of Health and Human Services. One applicable section of the bill provides that a licensed registered nurse (RN) or licensed practical nurse (LPN) who has had his/her license revoked, sus-

pending, or voluntarily surrendered may not act as a nursing assistant in a nursing home. Such a person also may not act as a medication aide at any health care facility. A person's registration as a nursing assistant or medication aide becomes null and void on the date that he/she becomes licensed as an RN or LPN.

LB 157: Prohibition of Prosecution for Leaving a Child at a Hospital

This law passed on February 7, 2008, makes Nebraska the last state in the United States to enact a safe haven law. The bill was originally proposed to prevent prosecution of anyone leaving a child that was 72 hours old or younger with a hospital employee or firefighter, with immunity to

such individuals that act in good faith to comply with the law. However, the law as enacted prohibits prosecution of anyone leaving any child, without specifying the age, in custody of an employee on duty at a hospital licensed by the State of Nebraska, with no immunity provisions for those individuals attempting to comply with the law. This does not apply to other health care facilities other than hospitals.

LB 395: New Nebraska Clean Indoor Air Act

On February 22, 2008, a new Nebraska Clean Indoor Air Act was passed, and was signed into law on February 26, 2008.

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Spending of Resident's Assets Does Not Necessarily Make a Family Member Liable for Unpaid Nursing Home Bills By Jeanelle R. Lust

The Wisconsin Court of Appeals recently held that a woman who served as her grandmother's agent under a power of attorney is not responsible for her grandmother's unpaid nursing home bill, even though she helped spend the money, in [Methodist Manor Health Center Inc. v. Py et al., No. 2007AP736, 2008 WL 123923 \(Wis. Ct. App. Jan. 15, 2008\)](#).

The grandmother had told the nursing home that she would reserve money to pay for her care. However, the grandmother subsequently spent nearly all of her assets with the help of her granddaughter, power of attorney

holder, and had no funds left to pay the nursing home. The nursing home sued both the grandmother and granddaughter.

On appeal, the court found that the granddaughter had simply followed her grandmother's instructions by giving her the money that the grandmother had requested. The court also found no evidence that the granddaughter had taken money or wrongly diverted funds intended for her grandmother's care.

The nursing home had argued that it could hold the granddaughter liable under [Methodist Manor of](#)

[Waukesha Inc. v. Martin, 255 Wis. 2d 707 \(Wis. Ct. App. 2002\)](#), which held that a nursing home could hold a resident's son liable for an unpaid bill under the theory of conversion. The Wisconsin Court distinguished that because there was no evidence that the granddaughter did anything other than follow her grandmother's instructions. The granddaughter's primary obligation was her fiduciary duty to her grandmother under the power of attorney. Consequently, the granddaughter simply fulfilled this duty by following her grandmother's instructions regarding her financial affairs.



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Nursing Home Whistleblower Claim Denied

By Kevin McManaman

Carol Skare sued her former employer, Extencicare under the Minnesota whistleblower statute claiming she was retaliated against for reporting various alleged violations of laws, regulations, and company policies. Extencicare operates nursing homes in several states. Skare was originally a nursing director and was appointed a regional nurse consultant several years into her employment. Four years later, she was appointed an interim nursing director at one particular Extencicare facility after that facility's director of nursing was terminated.

Her Complaints

After she was appointed as an interim nursing director, Skare complained about her responsibilities and informed her supervisors that the facility did not have a legally required full-time nursing director and a licensed administrator. She also denied admission to a potential resident, because she believed the facility could not accommodate and care for a 900 pound person. While she was on vacation, however, the company approved the resident's admission without her knowledge. When she com-

plained, Skare claimed she was ridiculed and afterwards that her supervisor requested "hugs" from her on three separate occasions. She also complained about company policy which expedited the admissions process for new residents if they had certain enumerated diagnoses.

Subsequently, she was made the full-time nursing director at that facility. During that time she raised concerns about the lack of physician certifications and re-certifications, discrimination in favor of Medicare patients, and concern that the facility was holding beds open for such patients while unlawfully denying beds to others.

She was also cited by the State Board of Nursing due to allegations of facility neglect during her tenure as the nursing director. Subsequently, her employer allegedly did not provide her with an attorney for the defense of her license that she believed had been promised, although she suffered no discipline as a result of the license inquiry.

During her employment, she never filed any complaints with any government agencies or the

company's compliance hotline that the employees were encouraged to use for reporting violations of law.

In Court

Skare alleged that her reassignment as a nursing director was a demotion from her nursing consultant position, in retaliation of a report she had made regarding the company's violations of the law. She also claimed that her employer had created an unbearable work environment with the intent to force her to resign. The trial court dismissed the case.

On appeal, the 8th Circuit Court of Appeals held Skare had not established her case as a whistleblower because her job duties as nursing director and regional nurse consultant required her to ensure compliance with applicable laws and to expose unlawful behavior internally. Consequently, she did not become a whistleblower by "merely exercising her duties to report compliance problems at her facilities".

NORTH DAKOTA SENATOR PUSHES BILL FOR AMERICAN INDIANS' HEALTHCARE

By Jeanelle Lust

North Dakota Democratic Senator Byron Dorgan introduced a bill designed to improve health care for American Indians. The Indian Health Care Improvement Act, introduced in the Senate on January 22, 2008, would provide grants to Indian reservations and establish programs to provide long-term health

services. The bill addresses needed health care facilities, such as alcohol and substance abuse treatment centers for reservations. It also encourages American Indians to enter the Health Care field by providing scholarships and financial aid packages.

The legislation would make permanent a number of fed-

eral programs providing services to Indians in long-term health care, diabetes prevention, and other areas. "This bill has the potential to make a significant difference in the lives of a lot of people, and I'm not going to stop pushing until we get this done," Senator Dorgan said.

Congress Contemplates Act Aimed at Protections for Nursing Home Residents

By Tammy Schroeder

The \$75 billion spent on nursing home facilities through Medicare and Medicaid led Senators Herb Kohl, D-Wis., and Chuck Grassley, R-Iowa, to introduce the Nursing Home Transparency and Improvement Act on February 14, 2008, stating that it is Congress' responsibility to expect high quality of care for residents and accountability by nursing homes. Sen. Grassley states that, "Improving nursing home care requires constant vigilance. More transparency, enforcement and staff training are all needed."

Part of the bill's aim is to provide consumers with more information about facilities, partially through the expansion of the Centers for Medicare and Medicaid Services Nursing Home Compare website. The website would ex-

pand to include ownership information of nursing homes, including members of the groups that own them, an outline of their organizational structure and all affiliated entities. The website would also provide staffing data and a standardized form for reporting complaints and links to facility inspection reports.

The Department of Health and Human Services would be required to come up with a national monitoring program to oversee multi-state and large intrastate nursing home chains and would monitor those chains' compliance with state and federal regulations and analyze their management structures, distributions of expenditures and nursing staff levels. Penalties for violations would also increase.

Finally, the bill would ask the Government Accountabil-

ity Office to conduct studies of various issues affecting the nursing home industry.

At this time, this legislation is in the first step of the legislative process and will be going to committee for deliberations. To monitor this bill you may log into www.govtrack.us.



Arbitration contracts between residents and nursing homes are becoming more prevalent and great care should be used in drafting and executing such a contract.

"Improving nursing home care requires constant vigilance. More transparency, enforcement and staff training are all needed." Senator Charles

Grassley, R-IA

Trends in Resident Arbitration Contracts

By Kevin McManaman

Residents increasingly sign arbitration agreements upon admission to long-term care facilities, requiring them to submit future disputes to private binding arbitration, rather than to a court of law. Arbitration has become an appealing option because it is thought to be faster and less expensive than traditional litigation. New federal legislation may soon end this trend.

The Centers for Medicare & Medicaid Services (CMS) weighed in on the question several years

ago saying that so long as quality of the care was not compromised, the issue was a matter between resident and nursing homes. As a result, enforcement is left to the courts who are instructed by the Supreme Court to enforce arbitration agreements as they would any other contract. Courts typically enforce arbitration agreements in the long-term care setting, when well drafted and properly executed.

On April 9, 2008, U.S. Senators Mel Martinez (R-FL) and Herb

Kohl (D-WI) introduced the [Fairness in Nursing Home Arbitration Act](#), seeking to prohibit enforcement of these agreements under federal law.

Before developing an arbitration agreement option for incoming residents, providers should carefully monitor the bill in Congress, and should seek experienced counsel to educate themselves about the nuances and new developments in the law.



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Legislative Update 2008 (continued)



The Act prohibits smoking in any place of employment, bars, and restaurants. Exemptions are available for (1) private residences, (2) guestrooms and suites, (3) retail tobacco outlets, and (4) areas used as part of a research study on the health effects of smoking. There are no explicit exemptions for long-term care facilities. Local governments cannot opt out of the Act. The Act will be operative on June 1, 2009. Iowa recently passed a similarly expansive smoking ban on April 8, 2008, with an exemption for gambling floors of casinos.

LB 575: Sales Tax Exemption for Nonprofit Assisted Living Facilities

On April 7, 2008, the Nebraska revenue code was amended to

include tax exemptions for nonprofit assisted living facilities, which is already provided to other nonprofit health care facilities such as hospitals, hospices, home health agencies, and intermediate care facilities since 1992. Assisted living facilities were originally recognized in Nebraska's statutes in 2000.

LB 765: Clarification Regarding Certificates of Need for Long Term Care Facilities

On April 7, 2008, the Legislature passed this bill to clarify certificates of need as applied to long-term care beds and rehabilitation beds. The amendments state that no health care facility can increase long-term care beds by ten percent of the total long-term care bed

capacity (not the total bed capacity of the facility) or ten beds, whichever is less, over a two year period without applying for a certificate of need. The same applies to rehabilitation beds in a health care facility. A certificate of need is required for initial establishment of long-term care or rehabilitation beds through conversion of existing beds if the total is more than ten or more than ten percent of the total bed capacity, whichever is less, over a two year period. The new law simply codifies the Department of Health and Human Services' interpretation of the statutes since their passage in 1997.

Please feel free to contact our firm for legal opinions on how these bills may affect your ongoing operations.