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# Long-Term Care Newsletter

**A CLASS Act, or Not** By Tammy Schroeder

If funded, the Community Living Assistance Services and Support (CLASS) Program, would be the first federal and consumer financed long-term care program in the United States. It would be a voluntary, government-run LTC insurance program that offers participants a single benefit plan with a daily cash benefit. Beneficiaries could use the money to purchase nonmedical services for use either at home or at

their chosen residence. There would be no limit on how long a person can receive benefits through CLASS.

Word in August was that implementation of the program may be pushed back to 2013 and now there is speculation that the program may not be implemented at all. At the very least it appears that the Obama Administration has now asked the Senate Ap-

ropriations Health subcommittee to halt any funding the CLASS Act was to receive for the fiscal year 2012.

Those against the program have targeted it in deficit reduction negotiations maintaining that the program is not fiscally sustainable and would be a burden on the federal budget. Supporters maintain that modifications can (Continued on pg. 3)

**Do You Have a Social Media Policy at Your Place of Employment?** By Michael Khalili

The National Labor Relations Board recently released a report detailing the outcome of 14 NLRB cases involving the use of social media and employer’s social and general media policies. In general the report found decisions holding that:

- Except in very limited circumstances, employers can’t discipline employees who discuss workplace responsibilities and performance together online—even if the online conversation includes swearing, sarcasm or insults;
- Employers can’t discipline any employee who

seeks input online from a co-worker about a dispute at work;

- Employers can’t discipline an employee for clicking the “Like” button on Facebook;
- Employers can’t discipline an employee who continues the course of concerted activity that began in the workplace by vocalizing the sentiments of his co-workers online;
- Overly broad social-media policies are also likely to draw NLRB scrutiny for violating Section 8(a)(1) of the Act;

- Employers can’t do a blanket prohibition on the use of the Employer’s logos or photographs; and
- Employers can’t broadly prohibit employees from discussing the company, its employees or competitors (even if the comments are disparaging).

Understandably these NLRB decisions have created quite a stir. At least one of those decisions has now been overturned as well. But employers are cautioned to see the advice of legal counsel regarding their social media policies.



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**“No Act of  
Kindness, No  
Matter How  
Small, Is Ever  
Wasted”**

**Aesop, The  
Lion & the  
Mouse**

## **New Employer Posting Requirement** By Kevin R. McManaman

The National Labor Relations Board (“NLRB”) issued a Final Rule requiring most private-sector employers to notify employees of their rights under the National Labor Relations Act (“NLRA”).

The rule was posted in the Federal Register on August 30, 2011. Under the rule all NLRA covered employers must post written and in some cases electronic notice to employees informing them of their rights under the NLRA. Due to significant legal challenges the enforcement date has been pushed back to January 31, 2012.

The notice requirement applies to both union and nonunion employers. The NLRA covers most private sector employers except some agricultural employers and employers who are subject to the Railway Labor Act. Among other statements, including examples of unlawful employer and union conduct and information on how to contact the NLRB, the notice must provide that employees have a right to do the following:

1. Organize a union to

negotiate with their employer concerning wages, hours, and other terms and conditions of employment:

2. Form, join or assist a union;

3. Bargain collectively through representatives of their own choosing for a contract with their employer setting wages, benefits, hours and other working conditions;

4. Discuss the terms and conditions of employment or unionization with coworkers or a union;

5. Take action to improve working conditions by, raising complaints with their employer or government agency, seeking help from a union, or otherwise;

6. Go on strike or picket, depending on the purpose or means of the strike or picket; and Choose not to do any of the activities described above, including joining or remaining in a union.

These notices must, at minimum, be contained in an eleven by seventeen inch poster. The poster must be conspicuously placed “where notices are customarily posted.” If an employer regularly uses the internet to com-

municate other personnel rules, the NLRB link must be posted on the website.

If a particular employer’s workforce contains more than twenty percent non-English speakers an additional poster must be written in that language and posted.

These posters are now available electronically and in hard copy from the NLRB website at <https://www.nlrb.gov/poster>.

Any failure to comply with these requirements will be considered an unfair labor practice. The NLRB has specific authority to investigate cases where “knowing noncompliance” may exist.

This notice requirement raises important concerns for employers nationwide. Employers should consult with counsel regarding their compliance responsibilities under this new rule.

## Is Morbid Obesity a Disability Under the ADA? By Jeanelle R. Lust

The EEOC thinks so. On September 27, 2011, the EEOC sued BAE Systems, Inc. in Texas, alleging that a 680 pound worker, Ronald Kratz, was discriminated against because of his morbid obesity.

The EEOC alleged that Kratz could do all the essential functions of his job with reasonable accommodations but that BAE systems fired him because of his obesity. The EEOC alleges that Kratz's morbid obesity limited him in one or more major life activities, of walking, standing, kneeling, stooping, lifting and breathing.

While no decision has been made in this lawsuit yet, employers should be very cautious about dismissing any employee because of obesity as the EEOC is likely to continue to push this position.



## CMS Releases Final ACO Rule By Laura Essay

The final rule establishing a framework for accountable care organizations (ACOs) was released by the Centers for Medicare and Medicaid in October. The final rule reflects changes to the proposed rule to accommodate criticism received regarding timelines, quality measure reporting and incentives. Under the final rule, eligible providers can choose from multiple start dates in 2012 with a “rolling” application process. In addition, providers are required to report on 33 quality measures in four domains as opposed to 65 measures in five domains.

CMS also increased the financial incentives for providers. Under accountable care, providers that meet certain quality and cost-saving targets are eligible for a share of the savings. Bonuses paid to providers could reach up to \$1.9 million. ACOs are expected to save Medicare up to \$940 million over a four-year period. Overall response to the final rule reflected the desire for long-term care to be a part of the ACO mission.

## A CLASS Act or Not (Continued from pg. 1)

be made to the program to ensure that there are no tax payer dollars used to pay for it.

Originally, the Department of Health and Human Services (DHHS) stated that it would not implement the program if it is not “fiscally solvent, self-sustaining, and consistent with the statute.” DHHS then promised to release an analysis of what could be done to shore up the pro-

gram's financial structure based on a review of legal and actuarial reports.

Where does it go from here? Well, on September 22nd, DHHS said that it may not go forward with the program at all. On October 14th, DHHS Secretary, Kathleen Sebelius stated that the administration had no way to make the program work even though they'd set out a very wide search for some sort of

model that would succeed.

Most recently, on October 17, 2011, the Congressional Budget Office issued a ruling that clears the way for a repeal of the CLASS Act. A White House spokesperson came out stating that the Administration does not support repeal of the CLASS Act and that all sides should be working together to come up with ideas to address the issues related to long-term care in

the U.S.

Readers should stay tuned to industry news for ongoing updates, including subscribers to the KBRE blog at <http://www.knudsenlaw.com/our-blog/>

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