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Inside this issue:

| | |
|---|---|
| New Nebraska Employee Reference Protections | 1 |
| 2012 Legislative Update | 1 |
| The State of the QIS | 2 |
| Do I Put That NLRB Poster Up or Not? | 3 |

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Long-Term Care Newsletter

New Nebraska Employee Reference Protections

By Kevin R. McManaman

Nebraska recently signed into law LB959, a bill that lets prior employers share more information to prospective employers about current and former employees with less threat of legal liability.

In a nutshell, employers will be given a rebuttable presumption of good faith when they follow the law’s specific requirements. Employers should learn the new law’s requirements and limitations before changing policies, procedures and forms.

To obtain the protections of the new law, employers must first obtain a written authorization from the employee to release the infor-

mation, and that consent must be signed and dated, in either a stand-alone document or in a conspicuous part of the employment application (in bold and larger typeface) which states:

“I, (applicant), hereby give consent to any and all prior employers of mine to provide information with regard to my employment with prior employers to (prospective employer).”

Those employers obtaining that specific consent will be given the protection for a period of six months

when providing information, including:

- Date and duration of employment;
- Pay rate and wage history on the date of receipt of written consent
- Job description and duties;
- The most recent written performance evaluation prepared prior to the date of the request and provided to the employee during the course of his or her employment;
- Attendance information;

(continued pg. 3)

2012 Legislative Update By Tammy Schroeder

While probably the biggest piece of health care related legislation to come from the 2012 Unicameral Session was LB599, the low-income prenatal care program bill, other health care related legislation was also passed.

LB541 was passed in hopes of reinforcing the State’s Medicaid program’s fiscal integrity. The law allows the Department of Health and Human Services to contract with one or more recovery audit contractors who would provide services

to:

- review provider claims and overpayment recovery;
- cost avoidance through identifying third-party liability;
- cost recovery of third-party liability through postpayment reimbursement; and
- identification and recovery of claims that were the result of accident or neglect and payable to a casualty insurer.

LB1083 clarifies permitted practices under the Nebraska Nurse Practitioner

Act as well as clarifies that licensed nurses may be hired to provide home health care to family members and friends. LB788 changes the current state statute to reflect changes in the standards adopted by the federal government and the Centers for Medicare and Medicaid Services by expanding the ability to order respiratory therapy beyond a licensed physician to include a licensed physician assistant, a nurse practitioner and a certified registered nurse anesthetists.



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**To be 70 years
young is some-
times far more
cheerful and hope-
ful than to be 40
years old.**

**Oliver Wendell
Holmes
US author & physi-
cian (1809 -
1894)**



The State of the QIS By Tammy Schroeder

This past February, the Government Accountability Office (GAO) released a report of a study it performed regarding CMS' implementation of the QIS (Quality Indicator Survey). CMS had developed the QIS to improve the efficiency, accuracy and consistency of the survey process. At the urging of Senators Charles Grassley (R-IA) and Herb Kohl (D-WI), the GAO looked into whether CMS was effectively monitoring the implementation process of the QIS. The GAO had two goals in mind: 1) evaluating whether progress is being made in the meeting the QIS objectives and 2) monitoring and facilitating the states' implementation of the QIS.

CMS intends to have QIS implemented in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands by 2018. As of September 2011, twenty-six states had trained or started training their surveyors on QIS. During the process of implementing QIS, CMS has commissioned three studies to evaluate QIS. The first two studies were to determine whether QIS could be used in the real

world setting and whether it could help to meet the objectives for which QIS was developed. Both of those studies found that the survey process could be used by state surveyors and made recommendations for changes that would help to improve QIS. The third study was completed in 2011 and identified things in the QIS process that could affect the consistency with which surveyors identified quality problems.

The issue that the GAO study found is that while CMS has taken some steps to monitor the implementation of QIS, it doesn't routinely monitor that implementation. The monitoring CMS does is mainly through quarterly telephone conferences with the state survey agencies that are meant to gather information on how each state's training is going. However, not all states are participating in the calls and if they do they don't always provide complete information on their progress.

The GAO also concluded that while the CMS has shown it is willing to make adaptations in QIS based on the commissioned studies, it hasn't adopted perform-

ance goals and measures that would allow for routine and ongoing monitoring that would tell CMS if the QIS is achieving the what CMS set out to do with the system.

The GAO recommended that CMS take three steps to achieving their goals with QIS:

- Develop a way to routinely monitor whether progress is being made in meeting the goals and objectives set in establishing QIS;
- Create a system by which CMS can routinely monitor whether the state survey agencies are making progress in implementing QIS; and
- Develop a way to gather, compile and share information from state agencies that have or are in the process of implementing QIS regarding their experiences.

In a response to the GAO recommendations, the Department of Health and Human Services on behalf of CMS stated that it agreed with the findings of the study and would work to implement ways to meet those.

No Requirement to Post Notice of Union Rights (For Now) By

Jeanelle R. Lust

The DC Circuit court of appeals enjoined the enforcement of the National Labor Relations Board's ("NLRB") rule requiring the posting of this poster: : http://www.theemployerhandbook.com/assets_c/2012/03/rights%20poster-37093.html. Basically the poster requires employers to notify employees of their rights to unionize. The very short opinion by that court can be found at this link. <http://www.chamberlitigation.com>

[/sites/default/files/cases/files/2011/NAM%20v.%20NLRB%20\(DC%20Circuit%20Injunction%20Order\).pdf](/sites/default/files/cases/files/2011/NAM%20v.%20NLRB%20(DC%20Circuit%20Injunction%20Order).pdf) In response to that order the NLRB announced that "In view of the DC Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court." <http://www.nlr.gov/news/nlr-chairman-mark-gaston->

[pearce-recent-decisions-regarding-employee-rights-posting](#) So in other words, the NLRB poster is not yet dead, but enforcement of the posting requirement has been delayed again pending court resolution. Given the extraordinary measure of enjoining enforcement pending appeal, it is also likely that the posting requirement will never be implemented.



Employee Reference Protections (continued from pg. 3)

- Results of drug or alcohol tests administered within one year prior to the request;
- Threats of violence, harassing acts, or threatening behavior related to the workplace or directed at another employee;
- Whether the employee was voluntarily or involuntarily separated from employment and the reasons for the separation; and
- Whether the employee is eligible for rehired.

Employers should not be lulled into false confidence by this new law for several reasons. The protections

are quite limited since the authorization is valid for only six months. Also, the presumption of good faith on the part of the employer does not apply if information disclosed turns out to be false and the employer either knew it was false, or acted with malice or reckless disregard for its truth.

Where particularly subjective information is shared, such as the quality of job performance, this means employers may have little actual protection from lawsuits. Finally, the good faith presumption on the part of the employer can be overcome with a finding that the employer

discriminated or retaliated because the employee "exercised or is believed to have exercised any federal or state statutory right or undertaken any action encouraged by the public policy of this state." In summary, significant risk remains, and employers should maintain caution when sharing any information about current or former employees.

Those wishing to obtain the protections of the law should examine and alter current policies and procedures with advice of counsel. Potentially conflicting legal requirements and company policies should

be considered, for example, those pertaining to drug and alcohol tests. The new Nebraska law makes no direct changes to those, and many company policies provide assurances of confidentiality. Reference release forms and applications must also be reviewed, and will most likely require alteration to be in compliance. And as before, an employer's best practice is to keep tight controls on the release of such information, with only one person in a company designated (and properly trained) to release the information.

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