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Long-Term Care Newsletter

DHHS' Claim for Medicaid Benefits Reimbursement

By Katherine Vogel

The Nebraska Supreme Court recently issued an important opinion affecting Medicaid *In re Estate of Cushing*, 283 Neb. 571 (2012). In this case the Court emphasized that DHHS' claim for reimbursement for Medicaid benefits paid out during the life of a recipient is subject to the time limitations set forth in Neb. Rev. Stat. § 30-2485(a) (Reissue 2008) which outlines when claims arising

prior to the decedent's death must be filed. In Nebraska, a creditor has two-months to file a claim if the creditor was given proper notice of the decedent's death. However, a creditor that does not receive proper notice of the decedent's death has three years to present a claim.

In *Cushing*, the Department of Health and Human Services (DHHS) paid out \$78,594.15 for

medical assistance for Cushing. When she died and an estate was opened and notice of the informal probate was published in an Omaha paper on July 2, 2010. The notice listed September 2, 2010 as the deadline for filing a claim. On September 14, 2010, DHHS filed a request for notice and on January 18, 2011, filed its claim to recover Medicaid benefits received (continued pg. 3)

Rehab Claims Scrutinized By Laura Essay

Medicare & Medicaid Services is currently focused on Medicare Part A fraud, and rehab claims are being looked at very closely. Several steps can be taken to ensure compliance with MDS 3.0 requirements.

A leading MDS 3.0 expert emphasized the importance of substantiating each minute of rehab therapy delivered in a skilled nursing home. According to Leah Klusch, RN, BSN,

FACHA, the ability to verify all of the rehab therapy delivered in a facility protects the facility from increasingly common audits and surveys.

It is recommended that therapists are trained on the rules, timelines and definitions included in the MDS 3.0 manual. The manual contains definitions and directions for coding minutes of therapy to be included on the MDS. If therapists are properly trained, the fa-

cility will have confidence that the minutes of therapy are correct and reflect program definitions. In addition to substantiating each minute of rehab services delivered, every skilled nursing facility employee who bills minutes to rehab services must be able to verify that he or she has read all of the updated to the RAI Manual.

The majority of post-payment audit activity is focused on documentation (continued pg. 3)



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**“One’s dignity
may be as-
saulted, van-
dalized and
cruelly
mocked, but
cannot be
taken away
unless it is
surrendered”**

**Michael J. Fox, in
“Saving Milly” by
Morton Kondrake**

Can an Employee Be Disciplined for Engaging in Political Speech in the Workplace By Michael Khalili

Election season will be in full swing in a few short months, as in any election, there is a strong possibility that the contentious world of politics may spill into the workplace. If this happens, most of the time, it will likely be harmless banter among employees. However, there is always the risk that things may get out of control and impede smooth operation. Employers should be mindful of what they can and can’t do when politics enters the workplace.

When decoding whether an employee has a valid claim for being disciplined when engaging in political speech in the workplace, the first critical question is whether it is a public or a private employer. If the employer is a public entity, courts will engage in a three part test to determine if the employee has a valid claim against the employer. If an employee’s speech is related to a matter of public concern, passes the court’s “balancing test”, and was not made pursuant to his or her official duties, the employee will have a claim against the public

employer.

If an employer is a private employer, the analysis in the paragraph above goes out the window. As a general rule, private employees have no federal constitutional protection when making political speech in the workplace. Private employers can generally discipline an employee for making political speech on the job.

Like most rules, there are some exceptions. All employers need to keep in mind that anti-discrimination laws still apply to speech based disciplinary actions, thus employers need to ensure their political speech policies do not discriminate based on sex, national origin, religion or other protected areas. Also, some states have laws and local ordinances that prohibit an employer from disciplining an employee for engaging in behavior, such as political speech, that is protected by that state’s constitution. Such laws are few and far between, and most of these statutes do not apply to political speech that occurs in the workplace, but human

resources departments should look at the statutes and case law in their particular state when developing and enforcing such policies .

While private employees have no federal constitutional protection and very little state constitutional protection, private employees do have one major avenue of protection when it comes to workplace speech: the National Labor Relations Act (“NLRA”). The protections for employee speech provided by the NLRA apply to both union and non-union employees. The National Labor Relations Board which reviews such cases says that employee speech is protected by the NLRA if it is (1) concerted, (2) about a work related object, and (3) protected. Employee speech is concerted if it is “engaged in, with or on the authority of other employees and not solely by and on behalf of the employee himself.” Note that this does not require official union activity or even talk of collective bargaining. Employee (continued pg. 3)

Political Speech (continued from pg. 2)

speech is about a “work related object” if it is intended for mutual employee aid or related to wages, hours or other terms of employment.

Even if employee speech is concerted and about a work related object, it must also be “protected”. Employee speech will not be “protected” if the employee’s actions are unlawful or overly disruptive. Employers have to jump a relatively high hurdle to establish that an employee’s actions are not protected, however, and rudeness is not enough. In most cases, political speech in-

volving elections will not be protected by the provisions of the NLRA but it is a good idea to keep it in mind.

Of course, employers should also consider issues such as employee morale and the feasibility of enforcement when crafting a policy on workplace political speech. Employer policies should balance workplace efficiency with employee freedom. For example, in most circumstances a policy could include a prohibition on political speech in areas within view or earshot of customers and

limit the size and permissible locations of political buttons and posters.

In sum, most employers should familiarize themselves with the differing legal restrictions depending on whether they are public or private employers, and all should avoid restraining speech protected by the NLRA or local law. Consulting with legal counsel is recommended before taking adverse employment actions based on political speech.



Rehab Claims (continued from pg. 1)

from therapy records. The MDS 3.0 process demands resident-specific plans, documentation, and summaries for rehab services. Thus, rehabilitation documentation must be resident-specific and progress to goals should be stated in terms of skilled service and the resident’s actual progress. Ensure that the documentation is specific to a resident’s diagnosis and situation, and reflects sufficient and accurate information in the event that claims are questioned.

DHHS Claim for Medicaid Benefits (continued from pg. 1)

by Cushing. After the estate disallowed the claim, DHHS filed a petition for allowance of the claim and argued that it was not given proper notice, which meant it had 3 years from Cushing’s death to file its claim. The Court agreed.

The Court first determined that a claim for Medicaid benefits is a claim that arises during the life of the recipient and is therefore subject to the probate notice time limitations. The next question was whether a claim is subject to the two-month

limitations period, or the three-year period. One Nebraska law required that the estate send notice directly to DHHS if the decedent was 55 or older at the time of death, or resided in a medical institution. Another section required the estate to mail notice to known and interested parties within five days after the first publication of notice. In prior cases, the Court had determined that failure to comply with these two sections subjected the creditor to the three-year period. In *Cushing*, because the estate did not

mail notice directly to DHHS within five days of July 2, 2010, the date the notice to creditors was first published, the estate failed to comply and the three-year limitations period applied. Thus, DHHS had three-years to present its claim.



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