JULY 2016

p.s.

SHORTS ON LONG TERM CARE

Poyner Spruill LLP's International Award-winning Newsletter for the North Carolina LTC Community

Say It Ain't So!

By Ken Burgess

Just when you thought things couldn't get much worse for skilled nursing facility (SNF) providers in terms of civil money penalties and other survey sanctions, it did. All of a sudden, we've noticed in our practice a marked uptick in the number of providers wanting to challenge deficiencies via the Informal Dispute Resolution (IDR) process.

Let's be honest - for many years, providers who escaped an annual or complaint survey with a handful of D-level deficiencies figured they had a good day at the office. The occasional G or "actual harm" tag rankled some of our clients enough to challenge it, but most providers just sucked it up and took a G, especially if it didn't come with a CMP attached. That seems to be changing and I wondered why. So, I did some digging with clients, and here's what I found:

1. Back in April of this year, CMS quietly announced to the state survey agencies that it was doing away with the "chance to correct" concept, also known as the "double G" rule. Under the old double-G rule, facilities that had a G or actual harm deficiency on their current survey (and had no higher-level deficiencies at the jeopardy level), but had not experienced a G or higher-level deficiency on the previous recertification survey or any intervening complaint survey, were given a chance to correct the deficiency without imposition of a CMP or other sanction. That chance to correct is described in Section 7304.2.1 of the State Operations Manual. Now, CMS has announced a change in policy and advised state survey agencies to start imposing survey sanctions for even an isolated G deficiency, even if the facility otherwise did not meet the double-G rule. CMS has not yet issued survey guidance in writing, but that is anticipated. Officials of the NC Survey Agency have notified providers of this change via email.

2. As for the second reason more providers want to IDR deficiencies, well, it's all about the stars. CMS's "Five-Star Quality Rating System," which seems to be undergoing constant review (and criticism), is also driving providers to challenge even low-level deficiencies. I recently asked a longtime client who rarely challenged anything but an IJ, "Why are we IDRing four D-level tags?" He said, "Well, Ken, each D is assigned 4 points and 4 x 4 is 16. Heck, I'd only get 20 points if I had a G." And, he's right. The "Health Inspection Score" component of the Five-Star Quality Rating System assigns 50 points to each J deficiency (isolated immediate jeopardy), 20 points to each G deficiency (isolated actual harm) and 4 points to each D deficiency (no actual harm with potential for more than minimal harm that's not immediate jeopardy). The five-star system also ranks providers arbitrarily by requiring that only the top 10% of facilities in the state (i.e., the 10% with the lowest number of demerit points) receive 5 stars; the middle 70% are ranked 2, 3 or 4 star (23.3% get 2 stars, 23.3% get 3 stars and 23.3% get 4 stars) and the bottom 20% get 1 star. This system is forcing providers to really consider challenging deficiencies they believe are unfounded, far more than CMPs or other survey sanctions. It also creates a somewhat perverse situation where, sadly, the worse the other guys do, the better you look.

continued on page 7

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FOR NURSING & HOMES

United States Department of Labor Publishes Overtime Final Rule

By Steve Rowe

On May 18, 2016, the United States Department of Labor (DOL) published its Final Rule updating overtime regulations under the Fair Labor Standards Act. The DOL proposed a Final Rule in June 2015 and asked for public comment regarding the salary threshold for white collar overtime exemptions and whether changes should be made to the duties tests for those exemptions. The Final Rule changed salary thresholds but made no changes to the duties tests.

The Final Rule increases the minimum salaries necessary to satisfy the executive, administrative, professional, and highly compensated employee exemptions as follows:

1. The minimum salary to satisfy the executive, administrative, and professional exemptions is $913 per week, or $47,476 annually, an increase from the current minimum weekly salary of $455 ($23,660 annually). This salary is based on the 40th percentile of earnings of full-time salaried workers in the lowest wage Census region, which is currently the south.
2. The total annual salary required for highly compensated employees is $134,004 (an increase from the current minimum of $100,000), the annual equivalent of the 90th percentile of full-time salaried workers nationally.
3. The Final Rule includes a mechanism for automatically updating the salary levels every three years to maintain the levels at the above percentiles.

The Final Rule also revises the salary basis test to permit employers to use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the new minimum salary level.

The effective date of the Final Rule is December 1, 2016. The minimum salaries will then be automatically updated every three years, beginning January 1, 2020.

Although the effective date is not until December 1, 2016, employers need to take certain actions now in order to ensure compliance with the Final Rule. Initially, employers should determine if their employees classified as exempt under the current white collar or highly compensated employee exemptions satisfy the new minimum salary requirements. If those employees do not meet the minimum salary requirements, employers will need to decide whether to raise salaries or convert the employees to non-exempt status. When setting the hourly rates for previously exempt employees, employers should take into consideration anticipated overtime and the overtime hourly rate.

Steve Rowe *regularly advises clients on employment issues and is a frequent speaker on employment law topics. He may be reached at srowe@poynerspruill.com or 252.972.7108.*

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HB2 and You: A Short Guide for North Carolina Employers

By Kevin Ceglowski

Any North Carolinian not living under a rock has seen or heard something about North Carolina House Bill 2 by now. But what does this law, also known as the Public Facilities Privacy & Security Act, mean for private employers in North Carolina when it comes to managing employees? Not as much as you might think. Let's dig into it.

HB2 does not affect private employers' harassment, discrimination or EEO policies

Private employers in North Carolina may keep any existing harassment, discrimination, or EEO policies they have. Private employers are free to revise such policies or adopt new ones – including policies preventing harassment or discrimination based on sexual orientation or gender identity.

HB2 does not supersede the EEOC's position on sexual orientation and transgender discrimination or harassment

Employers with 15 or more employees (private employers and also federal, state, and local government employers) are covered by Title VII of the Civil Rights Act of 1964, which prohibits, among other things, discrimination based on sex. The Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII, interprets Title VII to prohibit harassment or discrimination based on sexual orientation or transgender status. This includes a requirement that employers allow a transgender employee to use the restroom that corresponds to the gender with which the employee identifies. Employers that fail to allow restroom use in this way – or that allow employees to be harassed or discriminated against based on their sexual orientation or gender identity – risk being sued by the EEOC or by individual employees under Title VII. We previously wrote about the EEOC's position on transgender issues here:

http://www.poynerspruill.com/publications/Pages/TransgenderIssuesintheWorkplace.aspx

HB2 eliminates a North Carolina state law wrongful termination cause of action

Before HB2, a North Carolina employee who was fired because of his or her race, religion, color, national origin, age, sex, or disability could sue his or her previous employer under a state law "wrongful discharge in violation of public policy" claim. These claims could be filed without an accompanying Title VII claim, which allowed a plaintiff to avoid having the case removed to federal court, ensuring his or her case would be litigated in state court. This type of state law claim did not have Title VII's 180-day deadline to file an administrative complaint, but instead had a three-year statute of limitations. Also, this state law claim did not have Title VII's cap on maximum damages, but damages were instead theoretically unlimited. HB2 eliminates the possibility of a terminated employee going forward with a "wrongful termination in violation of public policy claim" based on an argument that the employee was illegally fired based on his or her race, religion, color, national origin, age, sex, or disability. Plaintiffs will now have to pursue such claims only under Title VII.

Although HB2 has other provisions and effects, employer-employee relationships for private employers are little changed. Employers with questions about HB2's effect on the workplace should contact employment counsel for specific, detailed advice.

Kevin Ceglowski *represents employers in many areas of labor and employment law, including race, age, gender, religion, national origin, and disability employment discrimination claims, wrongful discharge claims, and wage and hour claims. He may be reached at kceglowski@poynerspruill.com or 919.783.2853.*

NLRB Continues to Target Employers' Social Media Policies

By Robert Meyer

In recent years, the National Labor Relations Board has placed increasing scrutiny on employers' social media policies. The NLRB has specifically focused on whether such policies unlawfully interfere with employees' rights under Section 7 of the National Labor Relations Act (NLRA) to engage in "protected concerted activities" for the purpose of their mutual aid and protection. This issue was addressed yet again in the case of *Chipotle Services LLC*. In a decision issued on March 14, 2016, the NLRB administrative law judge concluded that Chipotle's social media policy, and its application of that policy toward an employee who posted tweets on social media regarding wages and working conditions, violated the NLRA. Because Section 7 applies to all employers meeting the jurisdictional requirements of the Act (not just unionized workplaces), the impact of the Chipotle case is potentially far reaching.

The case concerns the activities of Chipotle employee James Kennedy, who worked as an hourly food server at the company's Havertown, PA, restaurant. Kennedy posted tweets about a news article regarding hourly workers having to work on snow days when other employees were off and public transportation was shut down. His tweet sarcastically addressed Chipotle's communication director Chris Arnold by name, stating: "Snow day for 'top performers' Chris Arnold?" In response to a customer who tweeted "Free chipotle is the best thanks," Kennedy tweeted: "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?" Kennedy also tweeted in response to a customer about guacamole: "it's extra not like #Qdoba [referring to Chipotle's competitor], enjoy the extra $2."

Chipotle's national social media manager read the tweets and requested area management to ask Kennedy to delete them and discuss the company's social media policy with him. Kennedy agreed to remove the tweets. Interestingly, the social media policy shown to Kennedy at that time was an outdated version that had already been replaced by the company and was no longer in effect. The outdated policy included language which stated: (1) employees may not share "confidential information" online or anywhere else, and (2) employees may not make "disparaging, false, misleading, harassing, or discriminatory statements" about Chipotle or its employees.

The NLRB judge found that the provision in the policy prohibiting disclosure of confidential information could "easily lead employees to construe it as restricting their Section 7 rights" because the term "confidential" was undefined and vague. Therefore, that provision violated the NLRA. The judge further concluded that the policy's prohibition against making disparaging, false or misleading statements about Chipotle or its employees also violated the NLRA because: (1) false and misleading statements must be malicious in order to lose the Act's protection, and (2) disparaging language "could easily encompass statements protected by Section 7, and the board has found rules prohibiting derogatory statements to be unlawful." However, the judge found that the policy's prohibition against harassing or discriminatory statements did not violate the NLRA.

As for Chipotle's request that Kennedy delete the tweets, the judge concluded that the company violated the NLRA by making that request – even though Kennedy was not specifically directed to do so or disciplined as a result of his tweets. The judge found that the company's request "amounted to an order from a higher level manager," and that it "implicitly directed [Kennedy] not to post similar content in the future." The judge cited board case law holding that an employer violates the NLRA when it maintains a work rule that "reasonably tends to chill employees in the exercise of their Section 7 rights."

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The remaining issue concerned whether Kennedy's tweets, which did not involve any interaction directly with coworkers, could even rise to the level of protected and concerted activity for the purpose of those employees' mutual aid and protection under Section 7. The judge found that Kennedy's individual social media activity was concerted because his tweets were "visible to others" and had the purpose of "educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific." The judge further concluded that Kennedy's tweets were for the mutual aid and protection of employees because they concerned "the workplace or employees' interests as employees."

The Chipotle case clearly reflects the NLRB's aggressive stance toward employer use of social media policies in the workplace. Given the board's willingness to broadly construe the meaning of "protected and concerted activity" and to grant protection under Section 7 to a wider range of employee statements on social media, employers must exercise caution in how such statements are now addressed. Social media policies should be specific as to the nature of confidential or proprietary information which should not be discussed by employees on social media, while also being more tolerant of views that may be negative and perhaps even derogatory of the employer and its employees. Given the emerging trend toward greater scrutiny of such policies, which can result in back pay liability and other remedies under the NLRA, employers are advised to seek legal counsel for assistance in implementing or revising its work rules regarding social media.

Robert Meyer's *practice focuses on the representation of management in multiple areas of labor and employment law, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Worker Adjustment and Retraining Notification Act, and the National Labor Relations Act. He may be reached at rmeyer@poynerspruill.com or 704.342.5347.*

A Huge Success

Fifth Annual Jessie F. Richardson Foundation Golf Tournament for Nicaraguan Elders

Special thanks to the over 100 long term care providers and members who joined us on Thursday, May 5, at the Rock Barn Golf Club & Spa for the 5th Annual Jessie F. Richardson Golf Tournament for Nicaraguan Elders. With your help we raised nearly $90,000 and had a record number of teams and players. More important, we had a great day of fun and fellowship, renewing old friendships and helping indigent seniors in Nicaragua.

The proceeds of this year's tournament will be used for multiple projects at the *hogare de ancionos*, or "home of the ancients," in Jinotepe, Nicaragua, which is now a national training center for elder care. Projects include equipment for the training room, completion of a suite of care-based training videos for staff and others, installation of a grey water system, furniture replacement, and a variety of capital improvements. I'm always so amazed how many of our clients and friends come to this tournament and by those who donate even when they can't make it. It's rare that I bump into a client or friend at a convention or elsewhere when I'm not asked, "How's the project in Nicaragua?"

You guys have really taken this project and these people into your hearts, and that constantly warms mine. Several folks have asked me when our next trip to Nicaragua is going to be, and the answer is most likely early 2017. I like to go, and take our North Carolina supporters when we can, every couple of years to see the amazing progress at the center and reconnect with our Nicaraguan friends. I wish I could take all of you with me so you could feel firsthand the love and appreciation the Nicaraguan people – from staff to residents to local officials – feel for their North Carolina brothers and sisters. Thank you again for all you do! ~ *Ken*

W-2 Phishing Scams: Don't Take the Bait

By Mike Slipsky

In recent weeks, hundreds of businesses around the country have been hit by an email phishing scam that is both brilliant in its exploitation of workplace power dynamics and potentially devastating in its effects. This particular scam, which includes widely reported cases involving the Milwaukee Bucks and Snapchat, generally works as follows:

An employee in the targeted company's HR department receives a "spoofed" email, which superficially appears to come from a high-ranking member of management.

The spoofed email asks the employee to respond with electronic copies of the previous year's W-2 earnings statements (which will include employees' Social Security numbers, compensation information and home addresses) for all of the targeted company's employees.

The employee, believing that he or she is being responsive to a request from senior management, replies to the spoofed email with the requested tax information.

While all "social engineering" scams seek to find and exploit human weaknesses in order to gain access to sensitive information, this scam is brilliantly cynical: it exploits the imbalance of power between senior management and subordinate personnel by inducing a sense of urgency and desire to please with the goal of overwhelming the subordinate's ability to think critically about the information request. Like any good card trick, the spoofed email creates a psychological distraction that blinds the recipient to the sleight of hand that's taking place right before his or her eyes.

The consequences of a successful W-2 phishing scam can be extremely serious for the targeted company. Data breach notification laws will almost certainly require delivery of notices to affected employees, government agencies, credit reporting

agencies and/or the media. The company will also need to report the incident to local and federal law enforcement agencies as well as the IRS. Additionally, management will need to be prepared to receive questions from the affected employees about how they should protect themselves and their credit in the wake of the incident. In short, it will be a costly, time-consuming, distracting and morale-draining experience to deal with the aftermath of a W-2 phishing scam.

Given the stakes, companies should focus on strengthening their defenses against potential social engineering attacks. Implementing regular and mandatory data security training for all employees is a critically important defensive measure. Training will not only provide employees with assistance in identifying phishing scams, but will also raise overall awareness and create a company-wide sense of vigilance and preparedness. An appropriately selected and enforced training program can act as a bulwark against potential liability in any post-breach litigation.

Poyner Spruill's Privacy and Data Security Law practice group advises companies who have experienced data security breaches and can also work with clients in the selection of data security training programs and the preparation of incident response plans.

Mike Slipsky *focuses his practice on mergers and acquisitions for companies across a broad range of industries. He also counsels clients on a variety of privacy and information security matters, including HIPAA compliance and data breach prevention and responses. Mike may be reached at mslipsky@poynerspruill.com or 919.783.2851.*

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New Resource for Advance Directives Information/Training

By Ken Burgess

For the past several years, I've been involved with an organization known as the NC Partnership for Compassionate Care (NCPCC), which is designed to be an umbrella organization that brings together the many groups in North Carolina, such as SNFs, health care trade associations, hospices and hospitals, that have been working on end-of-life health care planning initiatives. This year, the North Carolina Bar Association Health Law Section partnered with NCPCC and with Hospice and Palliative Care in Winston-Salem to hold advance directives clinics in 21 North Carolina counties, where citizens could come, learn about living wills and health care powers of attorney, and actually execute those documents.

At each site we had providers, medical professionals, lawyers and notaries, and sometimes clergy, to answer questions and help people create advance directives. Our plan is to host these clinics in April of each year, around National Health Care Decisions Day, and our goal is for every North Carolina county to have a clinic opportunity. I'd like to encourage our readers to become involved with this wonderful project, either by volunteering or by helping host a clinic in your area. While we are trying to focus the clinics around April, we can also make them happen throughout the year with advance notice. One client recently offered to bring together families and staff of three neighboring SNFs for an event, and we said, "Absolutely, we'll be there."

I also want to provide you with a link to the NCPCC website that contains a lot of wonderful information about advance care planning, including a copy of the new simplified advance directive form that is now widely used in North Carolina and is accepted by most of the major hospital systems. That form combines the living will and health care power of attorney into one fairly short document. That website is www.gotplans123.org. You will also find useful videos there, and many of the resources and tools have been translated to Spanish.

I hope you'll find this useful in your ongoing efforts to educate residents and families about the critical importance of advance health care planning. We'd also love to help you host a clinic and have your organization join as a member of the NCPCC.

Say It Ain't So!

continued from page 1

So I say somewhat tongue in cheek, after years of seeing the IDR practice decline, it looks like we're back in business. And that's unfortunate for our clients because they have so many other important things to deal with like Medicaid reform; quality measure improvements that should reflect improved survey outcomes, but often don't seem to; and an industry that is changing so fast it makes your head spin.

I was also recently asked what I thought about the "revised" IIDR (Independent Informal Dispute Resolution) process, and my answer was then, and remains, "Not much." To me, the opportunity to present your case in person, here in North Carolina, to both survey and provider members of an IDR panel who at least know something about your facility and reputation, is a huge advantage over a review of papers seen by a group of out-of-state surveyors who know nothing about you and never get to see your face or hear your arguments. No offense intended, but it's just not the same. Others may disagree, but that's been my experience.

So, sadly, I'll probably be hearing from some of you more frequently than in the past few years 'round about annual survey time. And I'm sure I'm gonna hear that thang y'all love to say to me when we meet at the NCHCFA winter and summer conventions: "Ken, we love ya, but we sure hate to have to call ya."

Y'all come back now, ya hear?

Ken Burgess, *Editor of Shorts, has over 30 years of experience advising clients on a wide range of regulatory, litigation, compliance and operations issues. His practice focuses heavily, but not exclusively, on issues affecting long term care and acute care providers. He may be reached at kburgess@poynerspruill.com or 919.783.2917.*

Ken's Quote of the Month

"Life is like a mirror.
Smile at it and it smiles back at you."

~ Peace Pilgrim

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Congratulations to Ken Burgess

By p.s. Marketing

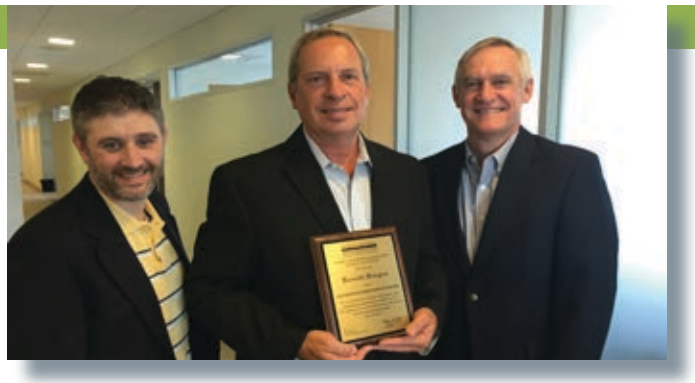
Ken Burgess was honored with the North Carolina Bar Association's (NCBA) 2016 Health Law Distinguished Service Award "in recognition of his lifelong achievements and outstanding contributions to health law, and his exemplary service to health care professionals, the bar, and the general public." The award was presented during the section's annual meeting in April.

The Health Law Distinguished Service Award was created in 1993 and has only been awarded 11 times (including Ken) in the past 23 years.

Ken has served as a health care lawyer, with over 30 years of experience, and as a community volunteer. He has long been an advocate for educating North Carolina families on the importance of having honest discussions about end-of-life health care decisions. This passion, over many years of leadership and service, helped lead to the collaboration between the NCBA and the North Carolina Partnership for Compassionate Care on the "Got Plans" (formerly known as "A Gift to Your Family") initiative. This is now a statewide effort to help advance end-of-life health care planning for individuals.

Ken has been recognized by *Chambers USA*, *The Best Lawyers in America®* and *Super Lawyers* magazine in health law. He's also served on numerous boards and committees in the health care and legal fields, including twice serving as president of the North Carolina Society of Health Care Attorneys, the N.C. Medical Society Ethical and Judicial Affairs Committee, the North Carolina Autism Society board, the Future Care Foundation board and the American Health Care Association National Legal Committee, and has worked with the Jessie F. Richardson Foundation serving indigent elders in Nicaragua, for which he was named the organization's 2008 National Volunteer of the Year.

At Poyner Spruill, Ken has advised hospitals, skilled nursing facilities, assisted-living communities, and related long term care vendors on licensure, certification, survey, fraud and abuse, operations, risk management, certificate of need, and business issues. He previously served as senior counsel to the national long term care trade association in Washington, D.C., where he was responsible for administering the association's legal assistance litigation fund, and overseeing all regulatory, facility operations and clinical staff of the association. In addition, he served as general counsel to ALFA (Assisted Living Federation of America), the national assisted living trade association in Washington, D.C.



Matt Fisher, Ken Burgess and Todd Hemphill

Other Notable Accomplishments

Chambers USA, America's Leading Lawyers for Business, has ranked five practice areas and 14 Poyner Spruill attorneys as leaders in their respective fields. We received rankings, which identify the firm as a leader in North Carolina for outstanding work in health care, banking & finance, bankruptcy/restructuring, environment, and general commercial litigation. Attorneys from the health law section recognized by Chambers USA include Ken Burgess, Wilson Hayman, Todd Hemphill, and Steve Shaber.

David Broyles was honored by East Carolina University at the 2016 40 Under 40 Leadership Awards for his impact as an attorney and as a volunteer and leader across the state. David was a four-year, Division 1 men's soccer letter winner, an ECU and Conference USA Scholar Athlete, as well as recipient of the distinguished Tinsley A. Yarborough Political Science Scholar Award.

Iain Stauffer was named to the North Carolina Bar Association's Health Law Council, the governing body for the Health Law Section, for a three-year term beginning this Fall.