

LeadingAge[®] PA

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FALL FINANCE CONFERENCE

TOP 10 REGULATORY AND EMPLOYMENT ISSUES FACING PROVIDERS IN 2023 AND BEYOND

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INTRODUCTION

- Long Term Care providers are now living in the “post-COVID” world, and the industry is seeing the effects and changes from the pandemic
- In 2023, providers are confronted with short-term and long-term issues that will significantly affect their operations and the health of the organization itself
- Today, we want to focus on both the “macro and the micro”; the “big picture” and the “detail” on regulatory and employment issues that are of significant importance to providers

TOP 5 REGULATORY ISSUES FOR LTC PROVIDERS



ISSUE 1: RESTRUCTURING, REPOSITIONING AND RIGHT-SIZING POST-COVID AND FOR THE FUTURE

- Big picture question for all providers: Are you positioned to not only succeed today, but to continue operations in the future?
- As an organization, you should be considering the following issues:
 - Can this organization survive as it is currently structured or positioned?
 - Are we going to try to expand operations, or are we more likely to affiliate with a larger organization?
 - Do we need or want to consider a “rebranding” of the organization?
 - Do we need or want to consider “right-sizing” our campus and its facilities (IL, PCH/AL, NF)? Does this mean adding or dropping beds?
 - Do we need to refinance our debt?
 - Are we “primed” for a change in leadership?



ISSUE 1: RESTRUCTURING, REPOSITIONING AND RIGHT-SIZING POST-COVID AND FOR THE FUTURE

- It is easy to get bogged down in the day-to-day operations and keeping up with constant regulatory changes, but these are important discussions that ownership and/or the Board of a provider should have
- Reminder that nearly all of these actions require notification to various regulatory/governmental agencies at a minimum, and in some cases, approvals before closing any of the “transactions”:
 - DOH – NF, HHA, Home Care, Hospice
 - DHS – PCH/ALR, Medicaid
 - PID – CCRC
 - OAG – “Fundamental Change” for nonprofits



ISSUE 2: IMPLEMENTATION OF AND COMPLIANCE WITH NEW PA DOH LICENSURE REGULATIONS

- The bulk of DOH's new nursing facility licensure regulations went into effect on July 1, 2023.
- The following are “new requirements” imposed under the regulations:
 - Updated Reporting Requirements and Facility-Wide Assessments (201.14)
 - Duty to timely pay undisputed vendor bills (201.14(g))
 - Monthly meetings with “Governing Body” and 30-day notice requirement for changes in “Governing Body” (201.18)
 - Updated personnel recordkeeping requirements (201.19)
 - Updated staff training requirements (201.20)
 - Arrangements with outside vendors must be in writing, either through contract or invoices (201.21)



ISSUE 2: IMPLEMENTATION OF AND COMPLIANCE WITH NEW PA DOH LICENSURE REGULATIONS

- The following are “new requirements” imposed under the regulations:
 - Updated orientation, documentation and resident agreement requirements applicable to the admissions process (201.24)
 - Updated resident right provisions and notice/posting requirements (201.29)
 - Updated medical director duties and responsibilities (211.2)
 - Updated dietary services/menu posting requirements (211.6)
 - Updated pharmacy policy requirements (211.9)
 - Required hiring of full-time social worker, with some exceptions (211.16)

ISSUE 2: IMPLEMENTATION OF AND COMPLIANCE WITH NEW PA DOH LICENSURE REGULATIONS

- Survey experience to date:
 - Because the new regs were implemented 7/1, there has not been much information published regarding the top citations thus far
 - ❖ August and September 2023 Survey Information posted on the DOH Website
 - Review of the survey information posted shows frequent citations of 211.12(f.1)(2) for deficiencies related to staffing ratios [almost 90 facilities cited for staffing issues in September's survey posting]
 - 211.12(f) is frequently cited as the only deficiency, sometimes in cases where DOH clears a facility of a complaint, but during the complaint survey the surveyors find issues with staffing ratios
 - Also there appears to be an increase in citations based on issues with accurate resident assessments, and development and implementation of resident care plans
 - DOH has not posted any sanction information for surveys post 7/1, at this point, it is not clear the nature/type of sanctions that DOH is issuing for the deficient practices related to staffing



ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Federal and state governments have a renewed emphasis on ensuring non-discrimination in admissions, and have recently focused on several matters:
- Opioid Use Disorder
 - OAG's position is that denial of NF admission to an individual based on an Opioid Use Disorder ("OUD"), or the need for medications to treat, is a violation of the ADA, the PHRA and the PA Unfair Trade Practices and Consumer Protection Law.
 - OAG cites to changes in federal law that eliminated the need for a waiver for physicians to prescribe treating medications for OUD; so to the OAG, a NF cannot argue that its physicians are not able to prescribe/oversee OUD residents



ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Opioid Use Disorder
 - OAG has imposed Agreements of Voluntary Compliance on providers, which require the facility to:
 - ❖ Revise admission policies to make clear that applicants will not be denied admission based on an OUD diagnosis or the need for treating medications
 - ❖ Work with physicians and pharmacies to ensure prescription and dispensing of OUD treating medications
 - ❖ Notify discharging hospitals of updated admission policies
 - Important to discuss this issue with admission staff, Medical Director, and treating physicians

ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Senior Housing/FHA/Reasonable Accommodations
 - Resident brought suit against a CCRC alleging that the CCRC's denial of her request to have her son stay in her apartment 24/7 during the pandemic and indefinitely thereafter as a live-in aide constituted a violation of the FHA's requirement to provide reasonable accommodation.
 - Consent Decree Resolution of Case required development of policies:
 - ❖ That enable residents to requests reasonable accommodations and the procedure to do so;
 - ❖ That enable the CCRC to obtain and document information in support of the request and to meet with the resident regarding the request; and
 - ❖ That require the facility to document its decision regarding the request and to provide the Resident with an opportunity to appeal the decision.
 - ❖ CCRC was required to develop a private duty personnel policy that outlined the requirements for review and approval of the use of private duty personnel, including the qualification for a 24/7 live-in aide, and the conditions under which a live-in aide will be permitted if requested as a reasonable accommodation.
 - CCRC was required to revise its Resident Agreement and Resident Handbook to address the reasonable accommodation policy and procedure.
 - The CCRC paid \$215,000, inclusive of attorney's fees and damages, in exchange for a global release and settlement of any and all claims.



ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Section 1557 Updates
 - On July 25, 2023, the Biden Administration published a proposed rule updating the Section 1557 anti-discrimination provisions, as follows:
 - ❖ Reinstates the scope of Section 1557 to cover HHS' health programs and activities.
 - ❖ Clarifies the application of Section 1557 nondiscrimination requirements to health insurance issuers that receive federal financial assistance.
 - ❖ Aligns regulatory requirements with Federal court opinions to prohibit discrimination on the basis of sex including sexual orientation and gender identity.
 - ❖ Makes clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including "pregnancy termination."
 - ❖ Ensures requirements to prevent and combat discrimination are operationalized by entities receiving federal funding by requiring civil rights policies and procedures.



ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Section 1557 Updates:
 - Requires entities to give staff training on the provision of language assistance services for individuals with limited English proficiency (LEP), and effective communication and reasonable modifications to policies and procedures for people with disabilities.
 - Requires covered entities to provide a notice of nondiscrimination along with a notice of the availability of language assistance services and auxiliary aids and services.
 - Explicitly prohibits discrimination in the use of clinical algorithms to support decision-making in covered health programs and activities.
 - Clarifies that nondiscrimination requirements applicable to health programs and activities include those services offered via telehealth, which must be accessible to LEP individuals and individuals with disabilities.
 - Interprets Medicare Part B as federal financial assistance.
 - Refines and strengthens the process for raising conscience and religious freedom objections



ISSUE 3: ADMISSION AND ANTI-DISCRIMINATION ISSUES

- Sept. 7, 2023, Biden Administration issues proposed rules to further address anti-discrimination provisions based on disability under Section 504 of the Rehabilitation Act of 1973:
 - Ensures that medical treatment decisions are not based on biases or stereotypes about individuals with disabilities, judgments that an individual will be a burden on others, or beliefs that the life of an individual with a disability has less value than the life of a person without a disability;
 - Clarifies obligations for web, mobile, and kiosk accessibility;
 - Establishes enforceable standards for accessible medical equipment;
 - Clarifies requirements in HHS-funded child welfare programs and activities;
 - Prohibits the use of value assessment methods that place a lower value on life-extension for individuals with disabilities when that method is used to limit access or to deny aids, benefits, and services.
 - Clarifies obligations to provide services in the most integrated setting appropriate to the needs of individuals with disabilities.



ISSUE 4: USE OF MEDICAL MARIJUANA

- Conflict between Federal Law and Pennsylvania Law with respect to classification of Marijuana and enforcement activity
 - Is currently a scheduled drug from a Federal perspective
 - Permissible (medically, not recreationally) in PA pursuant to Medical Marijuana Act
 - Federal AG hints that the schedule could change, and that enforcement where there is a corresponding state law permitting use is not a priority
- What do lenders have to say about permitting the use of an “illegal” drug (from a federal perspective) at the campus?



ISSUE 4: USE OF MEDICAL MARIJUANA

- DHS has issued guidance for use by residents in PCH/AL setting on January 2, 2020.
- DHS Bulletin States:
 - DHS won't cite a PCH/AL for storing or administering medical marijuana so long as consistent with PA law
 - Administering staff would have to qualify as a "caregiver" under the PA Act
 - Providers can permit use at facility without allowing it to be stored on premises or without allowing staff to administer to resident
- DOH has yet to issue guidance in NF setting



ISSUE 4: USE OF MEDICAL MARIJUANA

- Policy Considerations:
 - Who will be authorized to administer?
 - How will facility verify that resident has a legal prescription, and the caregiver is authorized to administer? (ID cards, registration, background checks)
 - How will facility confirm that resident has no more than the legal amount allowed (e.g. 30 day supply)
 - What storage requirements will facility implement?
 - Limitations on wheelchair/scooter use?
 - Will facility limit “form” of allowed marijuana (e.g. no “vaporization”)
- These are issues re: resident usage; Facilities also need to develop policies for usage of medical marijuana by staff.



ISSUE 5: STAFFING

- Staffing presents the most important challenge to the long term care industry, both from a micro and macro perspective, and cuts across several disciplines, as we'll see here
- Mandatory Staffing Ratios
 - PA DOH imposed its minimums in the July 1, 2023 regulations
 - ❖ 2.87 (7/1/23) and 3.2 (7/1/24)
 - ❖ On August 25, 2023, DOH posted guidance on calculating staffing ratios on the Nursing Home Message Board
 - ❖ We are already seeing facilities limit admissions and temporarily close wings due to staffing shortages and the inability to meet these ratios
 - ❖ Trade Associations are gathering information and experiences from members at the request of DOH to evaluate the impact of the ratios



ISSUE 5: STAFFING

- Mandatory Staffing Ratios
 - On September 1, 2023, CMS proposed the following national staffing standards:
 - ❖ 0.55 hours per resident day for RNs and 2.45 hours per resident day for nurse aids;
 - ❖ a requirement to have an RN onsite 24 hours a day, seven days a week;
 - ❖ enhanced facility assessment requirements
 - The proposed rule also includes a staggered implementation approach and possible hardship exemptions for select facilities.
 - ❖ Phase 1 would require facilities located in urban areas to comply with the facility assessment requirements 60 days after the publication date of the final rule;
 - ❖ Phase 2 would require facilities located in urban areas to comply with the requirement for an RN onsite 24 hours and seven days/week two years after the publication date of the final rule; and
 - ❖ Phase 3 would require facilities located in urban areas to comply with the minimum staffing requirements of 0.55 and 2.45 hours per resident day for RNs and NAs, respectively, three years after the publication date of the final rule.
 - ❖ Rural facilities get three years from publication to comply with the 24/7 RN rule and five years to comply with the staffing minimums



ISSUE 5: STAFFING

- Proposed Updates to Facility Assessments:
 - Facilities must use evidence-based methods when care planning for their residents, including consideration for those residents with behavioral health needs;
 - Facilities must use the facility assessment to assess the specific needs of each resident in the facility and to adjust as necessary based on any significant changes in the resident population;
 - Facilities must include the input of facility staff, including, but not limited to, nursing home leadership, management, direct care staff (i.e., nurse staff), representatives of direct care staff, and staff who provide other services; and,
 - Facilities must develop a staffing plan to maximize recruitment and retention of staff consistent with what was described in the President's April Executive Order on Increasing Access to Higher Quality Care and Supporting Caregivers.



ISSUE 5: STAFFING

- Proposed Hardship Exemption:
 - Workforce unavailability based on facility location, as evidenced by either a medium (that is, 20 percent below the national average) or low (that is, 40 percent below national average) provider-to-population ratio for the nursing workforce, as calculated by CMS, by using the Bureau of Labor Statistics and Census Bureau data, or the facility is located at least 20 miles away from another LTC facility (as determined by CMS); and
 - Good faith efforts to hire and retain staff through the development and implementation of a recruitment and retention plan; by documenting job postings, and job vacancies, including the number and duration of vacancies, job offers made, and competitive wage offerings, and
 - A financial commitment to staffing by documenting the total annual amount spent on direct care staff.



ISSUE 5: STAFFING

- Facilities would not be eligible for an exemption if:
 - They have failed to submit their data to the Payroll-Based Journal System;
 - They have been identified as a special focus facility (SFF) or
 - They have been identified within the preceding 12 months as having widespread insufficient staffing with resultant resident actual harm or a pattern of insufficient staffing with resultant resident actual harm or have been cited at the immediate jeopardy level of severity with respect to insufficient staffing as determined by CMS.
- The rule includes a requirement to disclose the percentage of Medicaid payments that are spent on compensation to direct care workers and support staff
- CMS is seeking comments on the proposal, and other alternatives, including the viability of an overall 3.48 hours per patient day standard



ISSUE 5: STAFFING

- DOH has yet to comment on the proposed federal standards and what they would mean in relation to the state standards.
 - Would DOH consider an “exemption” process in connection with the DOH rules, as is in place in the proposed federal rule?
- In releasing the proposed rule, the White House stated that nursing facilities “would need two registered nurses for each eight-hour shift and 10 nurse aids per eight-hour shift.” To comply with the proposal, “68% of nursing homes would have to hire nurse aides and 36% of nursing homes would have to hire RNs.” Trade associations put those figures higher.
 - Where will facilities find these staff members?
 - How will facilities absorb the costs to pay for this increased staff?

TOP 5 EMPLOYMENT LAW ISSUES FOR LTC PROVIDERS



ISSUE 1: STAFFING AND PERSONNEL

- PA Department of Health Updates to the Long Term Care Regulations
- Chapter 201
 - 201.19 Personnel records
 - Changes include a more detailed and comprehensive list of items that must be in the staff personnel files
 - All personnel files must be kept current and available for each facility must contain the following information:
 - ❖ 1. The employee's job description, educational background and employment history
 - ❖ 2. Employee performance evaluations, including, documentation of any monitoring, performance, or disciplinary action related to the employee
 - ❖ 3. Documentation of credentials, which shall include, at a minimum, current certification, registration or licensure for the position assigned



ISSUE 1: STAFFING AND PERSONNEL

- Chapter 201
 - 201.19 Personnel records
 - ❖ 4. A determination by a health care practitioner that the employee as of their start date is free from communicable diseases or conditions
 - ❖ 5. Records relating to a medical exam, if required by the facility or attestation that the employee is able to perform the employee's job duties
 - ❖ 6. Documentation of the employee's orientation to the facility and the employee's assigned position prior to or within 1 week of the employee's start date
 - ❖ 7. Documentation of the employee's completion of required trainings under this chapter, including documentation of orientation and other trainings



ISSUE 1: STAFFING AND PERSONNEL:

- Chapter 201

- 201.19 Personnel records

- ❖ 8. A copy of the final report received by PSP and FBI as applicable in accordance with Older Adults Protective Services Act and the Adult Protective Services Act
 - ❖ 9. In the event of a conviction prior to or following employment, documentation that the facility determined the employee's suitability for initial or continued employment in the position to which the employee is assigned "Suitability for employment" shall include a review of the offense; the length of time since the individual's conviction; the length of time since incarceration, if any; evidence of rehabilitation; work history; and the employee's job duties."
 - ❖ 10. The employees completed employment application



ISSUE 1: STAFFING AND PERSONNEL

- Chapter 201
 - 201.20 Staff development
 - Changes include a new requirement for staff training
 - Topics required to be covered:
 - ❖ Topics outlined in 483.95
 - ❖ Accident prevention
 - ❖ Restorative nursing techniques
 - ❖ Emergency preparedness in accordance with 483.73
 - ❖ Fire and safety in accordance with 483.90
 - ❖ Resident rights, including nondiscrimination and cultural competency
 - ❖ Training needs identified through the facility assessment
 - ❖ Facility orientation shall include training on the prevention, detection and reporting resident abuse and dementia management and communication skills



ISSUE 1: STAFFING AND PERSONNEL

- Staffing Agencies:
- PA Health Care Facilities Act Chapter 8-A: Temporary Health Care Services Agencies.
- “ A temporary health care services agency . . . may not restrict in any manner the employment opportunities of Health Care Personnel. This requirement shall also apply to a health care facility.”
- Grandfather provision?
- What does this mean for “placement fees?”



ISSUE 1: STAFFING AND PERSONNEL

- Effective Dates:
 - For a Staffing Agency in operation as of 11/3/2022, effective date is May 2, 2023 (180 days).
 - Immediately applicable to newly-opened Staffing Agencies.
- Grandfather Provision?
 - There is no explicit “Grandfather Provision,” which raises the question of whether non-competes in existing contracts are invalidated.
 - However, the statute states:

Section 807-B. Sanctions.

 1. Grounds for sanctions. --The department may sanction a temporary health care services agency or a controlling person of the temporary health care services agency or refuse to issue a registration to the person that owns or operates the temporary health care services agency, as applicable, for any of the following reasons:
 - (9) For a temporary health care services agency operation in this Commonwealth on the effective date of this section, continuing operations without complying with the provisions of this chapter on or after the date when the provisions of this chapter are applicable to the temporary health services agency.



ISSUE 1: STAFFING AND PERSONNEL

- What effect, if any, does this new language have on placement fees?
- Example of Language:

HIRING OF EMPLOYEES BY PROVIDER AND PLACEMENT FEE

1. Provider may wish to employ directly an Employee who has been supplied by Agency. In the event of such a placement to the employ of Provider or to any other employer to which Provider refers such Employee, Provider agrees to pay a placement fee. The placement fee is \$0.00 for an RN, \$0.00 for an LPN, \$0.00 for a CNA and \$0.00 for a HHA or NA. The placement fee will be reduced by \$00.00 for each 40 hours of weekly services performed while on assignment to the Provider, however in no event will there be any less than a \$0.00 placement fee for any position.

2. The placement fee above is payable if Provider hires, employs or enters into a contract with the Agency-supplied Employee, regardless of the employment classification, on either a permanent, temporary, or consulting basis within ---- months after the last day of the assignment. Provider also agrees to pay a placement fee if the Agency Employee assigned to Provider is hired by or enters into a contract with any other related entity or individual as a result of referral of the Employee by Provider.



ISSUE 1: STAFFING AND PERSONNEL

- What positions can we take?
 - Aggressive position: The new language effectively bans placement fees from the Temporary Staffing Agreement and relieves a provider from having to pay them. Hire away!!!
 - Conservative position: The new language has no effect on a provider's contractual duty to pay the placement fees because it's not a direct restriction on the agency staff.
 - Middle-Of-The-Road position: Take the position that placement fees are not owed once provisions take effect, communicate that with the Temporary Staffing Agency, and make hiring decisions on a case-by-case basis.



ISSUE 1: STAFFING AND PERSONNEL

- What positions can we take?
 - Wait and See: Maintain the status quo until we have written regulatory guidance (2 years), oral guidance from the Department, or guidance from the courts.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- Provisions:
 - Requires “covered employers” to provide “reasonable accommodations” to an employee’s known limitations related to pregnancy, childbirth, or related conditions unless the accommodation will cause the employer an “undue hardship.”
 - Applies only to accommodations. Other laws, such as the Americans with Disabilities Act (“ADA”) and Pregnancy Discrimination Act (“PDA”) make it illegal to terminate or otherwise discriminate on the basis of pregnancy, childbirth or related medical conditions.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- PWFA went into effect on June 27, 2023, and employers are required to comply immediately.
- EEOC issued proposed regulations interpreting and implementing the PWFA, which will be subject to a comment period prior to finalization.
- EEOC began accepting charges under the PWFA as of 6/27.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- For purposes of the PWFA, a “covered employer” is a private or public employer with at least fifteen (15) employees.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- “Reasonable Accommodation” under the PWFA:
- Same definition as ADA.
- A “reasonable accommodation” is a modification or adjustment to a job, the work environment, or the way things are usually done during the hiring process.
- The FAQs to the PWFA provide some examples of a “reasonable accommodation”:
 - The ability to sit or drink water;
 - Receive closer parking;
 - Have flexible hours;
 - Receive appropriately sized uniforms and safety apparel;
 - Receive additional break time to use the bathroom, eat, and rest;
 - Take leave/time off to recover from childbirth; and,
 - Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- Employers are also prohibited from:
 - Requiring an employee to accept an accommodation without a discussion with the employee (interactive process);
 - Denying a job or employment opportunity to a qualified employee based on the individual’s need/request for a reasonable accommodation (retaliation);
 - Requiring an employee to take leave if another reasonable accommodation is possible;
 - Retaliating against an individual for reporting or opposing discrimination or participating in an investigation into such behavior; or,
 - Interfering with an individual’s rights under the PWFA.



ISSUE 2: PREGNANT WORKERS FAIRNESS ACT (“PWFA”)

- How does PWFA differ from PDA and ADA?
- Unlike ADA, pregnancy-related medical restrictions no longer need to rise to the level of a disability in order to require accommodation.
- Unlike PDA, the duty to accommodate a pregnant employee does not depend on whether or how an employer accommodates other individuals who are “similar in their ability to work.”



HOW DOES THE PWFA DIFFER FROM THE PDA AND ADA?

- The PWFA takes accommodations for a pregnant employee further than the ADA since employers must provide an accommodation even when the employee CANNOT perform the essential functions of her job if it's only for a "temporary period" and she will be able to perform the essential job functions "in the near future."



ISSUE 3: OVERTIME

- On September 8, 2023, the U.S. Department of Labor's ("DOL") Wage and Hour Division published a Notice of Proposed Rulemaking in the Federal Register.
- The Notice outlines an updated salary level which was last raised in a 2019 Rule to \$684/week.
- Prior to the 2019 Rule, the salary level was set at \$455/week.



ISSUE 3: OVERTIME

- The new Rule proposes revisions including increasing the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South).
- The proposed level is \$1,059/week or \$55,068 per year.
- The proposed Rule also increases the highly compensated employee total annual compensation threshold to the annualized weekly earnings of the 85th percentile of full-time salaried workers nationally, which is \$143,988.



ISSUE 3: OVERTIME

- The Fair Labor Standards Act (FLSA) requires covered employers to pay employees a minimum wage and, for employees who work more than 40 hours in a week, overtime premium pay of at least 1.5 times the employee's regular rate of pay.
- Section 13(a)(1) of the FLSA exempts from the minimum wage and overtime pay requirements “any employee employed in a bona fide executive, administrative, or professional capacity.”



ISSUE 3: OVERTIME

- The exemption is commonly referred to as the “white-collar” or executive, administrative, or professional (EAP) exemption.
- The statute delegates to the Secretary of Labor (Secretary) the authority to define and delimit the terms of the exemption.
- The Overtime Rule has been modified from time to time over the years.



ISSUE 3: OVERTIME

- The regs implementing the EAP exemption have generally required that each of the following three tests must be met:
 - (1) the employee must be paid a fixed salary that is not reduced because of variations in the quality or quantity of work performed (the salary basis test);
 - (2) the amount of salary paid must meet a minimum specified amount (the salary level test found in the Rule); and
 - (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regs (the duties test).



ISSUE 3: OVERTIME

- Employers need to know and review employee classifications, especially in nursing.
- Can nurses be paid a salary versus hourly? Hybrid situations?
- Considerations for 8/80 Rule.



ISSUE 4: HANDBOOKS AND POLICIES

- On August 2, 2023, the National Labor Relations Board (“NLRB”) overruled a prior 2017 decision (Boeing) that gave employers some flexibility in their employment policies governing employee conduct.
- The case is called *Stericycle* and it remains to be seen exactly how broadly it will affect employers’ policies.
- NLRB stated that an employer’s work rules should be narrowly tailored to “only promote its legitimate and substantial business interests while avoiding burdening employee rights.”



ISSUE 4: HANDBOOKS AND POLICIES

- Under the new *Stericycle* standard, when the NLRB reviews a challenged work rule:
 - NLRB General Counsel (“GC”) must first show that the challenged rule has a reasonable tendency to chill employees from exercising their rights.
 - If proven, the rule is presumed to be unlawful.
 - The employer then must:
 - ❖ Prove that the rule advances a legitimate and substantial business interest; AND
 - ❖ The employer is unable to do the same thing with a more narrowly tailored rule.



ISSUE 4: HANDBOOKS AND POLICIES

- What does *Stericycle* mean for employers?
- Effectively, employers must ensure that handbook and other employee policies cannot be read to chill or discourage concerted activities. Policies that may need review include:
 - Non-Disparagement
 - Social Media
 - Civility/Insubordination
 - Cell phone/Camera/Recording policies
 - Policies regarding speaking to the media or other outside persons
- Additionally, there are no longer policies that are presumed to be lawful such as policies relating to the confidentiality of investigations, rules prohibiting outside employment, and non-disparagement rules.



ISSUE 5: MEDICAL MARIJUANA

- PA Medical Marijuana Act (“MMA”) passed in 2016.
- An employer cannot discriminate against applicants or employees “solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”
- Federal MORE bill, which would end federal prohibition on cannabis use, passed in the House, but not expected to pass Senate.
- Recreational use still illegal in PA, as is smoking medical marijuana.
- Philadelphia ordinance regarding job applicant testing.



ISSUE 5: MEDICAL MARIJUANA

- The following states have or soon will authorize recreational marijuana:
- Alaska, Arizona, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Nevada, Oregon, Rhode Island, Vermont, Virginia, Washington, Washington, D.C.
- What does this mean for PA employers?
- At the federal level; marijuana is still listed as a Schedule I Drug under the Controlled Substances Act.



CONCLUSIONS/QUESTIONS



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