



www.capozziassociates.com

The Quarterly

2933 North Front Street • Harrisburg, PA 17110

Telephone: (717) 233-4101

Fax: (717) 233-4103

March 2009

GET READY FOR DEBATE ON THE EMPLOYEE FREE CHOICE ACT OF 2009

By Louis J. Capozzi, Jr., Esquire

On March 10, 2009, the Employee Free Choice Act of 2009 was introduced in both the U.S. House of Representatives (H.R. 1409) and the U.S. Senate (S.560). The bills, sponsored by the Democratic leadership, already have 222 sponsors in the House (including 2 New Jersey Republicans) and 39 sponsors in the Senate (including Independent Senator Lieberman, but no Republicans). A prior version of the bill passed in the U.S. House of Representatives last year (H.R. 800).

The bills are designed to amend the National Labor Relations Act to establish "an efficient system to enable employees to form, join, or assist labor organizations" and to provide for mandatory injunctions for unfair labor practices during organizing efforts. The bills would implement the most fundamental change to the relationship between employers and employees in the last 50 years; and, not unsurprisingly, have significant support from labor unions and significant opposition from employer organizations.

H.R. 1409 is expected to pass in the House. The future of the legislation appears to hinge on whether Senate supporters of S. 560 can get sufficient votes to permit the bill to come to a vote; and, that may depend not only on whether "moderate Republicans," including Pennsylvania's Senator Specter, will support a filibuster against passage of the bill, but also on whether there are a sufficient number of Senators who will support bringing the bill to a vote. The Senate currently has 56 Democrats, 2 Independents (Senator Lieberman and Senator Sanders), 41 Republicans, and 1 vacancy (the still contested Minnesota seat). The Senate's Standing Rule 22(2) requires a vote of 3/5 of the Senators "duly chosen and sworn" to end debate, which means 60 votes even if the Minnesota race remains undecided.

The proposed new law's most dramatic changes are:

(1) its elimination of elections and a secret ballot to determine and certify labor representation where "a majority of employees in a unit appropriate for bargaining" have signed "valid authorizations" designating their bargaining representative, based on guidelines and procedures to be

developed by the National Labor Relations Board, which must include model authorization language and procedures to establish the validity of signed authorizations (Section 2 of the proposed act); and,

(2) the creation of a process to establish the initial collective bargaining agreement following certification or recognition of a bargaining representative, including, as needed if the parties are unable to agree within 90 days, compulsory mediation and conciliation and, if needed 30-days thereafter, compulsory arbitration to resolve any outstanding issues and which is binding on the parties for next 2 years (Section 3 of the proposed act).

There are a lot of questions about how the new law would work in practice that remain unanswered, including:

- How and when will the Board find the "unit" to be an appropriate one? Will there be presumptively appropriate units, such as those identified in the 1987 health care rulemaking?
- If the Union has sufficient cards to be the representative of a number of units, and would accept representation in several of them, which units will the Board certify?
- What should the Board do if the unit mixes professionals and non-professionals (insist that the cards give the professionals the right to decide whether or not to be included in one big unit?)
- If the Board grants certification and tries to figure out unit issues later, should it do so administratively or in a hearing; and, how should it investigate the petition?
- If employers resist bargaining, will the U.S. Courts of Appeal be able to handle what may be a significant increase in test-of-certification cases?

Continued on Page 2

GET READY FOR DEBATE ON THE EMPLOYEE FREE CHOICE ACT OF 2009 *Continued from Page 1*

- What happens if, by the time the Board is ready to certify based on a card majority showing, card signers attempt to retract Union cards or otherwise show that the Union's majority status is open to question?
 - Will decertification petitions be treated the same as representation petitions (i.e., no election is necessary)?
 - Will the Board have a handwriting expert?
 - Would certification under the Act permit the Union to engage in secondary picketing or other secondary activities for the purpose of enforcing its status as the certified collective bargaining representative of the primary employer's employees?
 - Would employers have to maintain the status quo throughout an entire card-signing campaign? How would that campaign be measured?
 - Do employees have the right to strike during the arbitration process?
 - Will an employer be required to open its books whether or not it has made a claim that it is unable to meet the Union's demands?
- Is there a right to appeal the interest arbitration awards? If so, who hears those appeals and what are the standards that will be used in ruling on them?
 - In determining penalties for violations that "significantly" interfere with organizing rights, not to exceed \$20,000 each, does "significantly" refer to the number of employees affected, the percentage of the unit affected, or the gravity of the conduct itself?
 - If arbitration is not required to be on the employer's ability to pay rather than industry-wide patterns, will unions simply sit out the bargaining process in the hope of getting a better deal at the end?
 - How will the supervisory status of LPN's be impacted by the Act?

If you have questions about how the Employee Free Choice Act of 2009 would change things at your nursing facility, you may contact Louis J. Capozzi, Jr., at our Firm.

SUPERIOR COURT LIMITS GUARDIAN'S AUTHORITY IN END-OF-LIFE MATTERS

By David C. Dagle, Esquire

In a case of first impression, the Superior Court of Pennsylvania determined that a court-appointed plenary guardian did not have authority to decline life-sustaining mechanical ventilation for an incapacitated person who was neither terminally ill nor in a persistent vegetative state and the guardian was required to seek authorization for such a decision through a petition to the Orphans Court, which authorization can only be permitted upon clear and convincing proof that death is in the incapacitated person's best interests. In re: D.L.H., ___ A.2d ___, 2009 Pa. Super. 25 (No. 336 MDA 2008, decision filed February 10, 2009, affirming denial of petition by Cumberland County Court of Common Pleas). The Superior Court's decision is noteworthy, not only because of its decision on the question before it, but also because of its analysis of the authority granted to health care agents and representatives under Act 169-2006, Pennsylvania's recent amendments to its Living Will statute.

The case arose when the hospital providing emergency treatment to D.L.H. for aspiration pneumonia resulting from his swallowing a hairpin refused to agree with his guardians' efforts to decline ventilator treatment. The guardians filed a petition with the Orphans Court. While D.L.H. recovered from the illness, his guardians continued the case to establish their authority should such a situation recur.

The incapacitated person involved in this case is a profoundly mentally retarded man residing at the Ebensburg Center whose parents were appointed as his plenary guardians. Because

D.L.H. was a resident of a State Center, the Pennsylvania Department of Public Welfare (DPW) intervened in the case and opposed his parents' efforts to have the Court recognize their authority as surrogate decision makers for their son under the Health Care Agents and Representatives Act which became effective on January 29, 2007, 20 Pa. C.S.A. §§ 5451-5471, as added by Act of November 29, 2006, P.L. 1484, No. 169 (Act 169). During the hearing before the Cumberland County Orphans Court, the guardians did not present any evidence to demonstrate that declining the mechanical ventilator treatment was or would be in D.L.H.'s best interests. The Orphans Court denied the parents'/guardians' application and the Superior Court affirmed that order.

The Superior Court noted that, while a health care agent under Act 169 is appointed by the individual when that individual was competent, a guardian is appointed by the Orphans Court and is always subject to that Court's supervision and, while the agent is required to carry out the principal's expressed wishes, a guardian is required to assert the rights and best interests of the incapacitated person (20 Pa. C.S.A. § 5521, duty of a guardian of the person). The Superior Court agreed with the guardians that:

Considering §§ 5456(a) in light of 5461(c) [of Act 169], we conclude that a health care agent has express authority to object to life sustaining medical procedures on behalf of a principal, where a principal has neither an end-stage medical condition nor is permanently unconscious.

Continued on Page 3

The Court found that, since the guardians did not qualify as health care agents under the Act, they could not claim such authority from their status as guardians alone. The Superior Court noted that Orphans Court consideration of the question was required to protect against the possibility of abuse of power by a guardian.

The Superior Court determined that Court approval of a request to withhold life-sustaining treatment from even a life-long incompetent such as D.L.H. is "an extraordinary burden to carry," which must be based on whether death would be in the incompetent's best interest, not on any consideration of the interest or conveniences of his parents, guardians, or society in general. The Superior Court indicated that meeting this burden of proof requires "at a minimum" "reliable medical expert testimony documenting the incompetent's severe, permanent medical condition (or severe, permanent medical condition with progressive features) and current state of physical/ psychological deterioration and pain." The Superior Court added that: "it would be wise (although not absolutely necessary depending of the severity of the medical condition) for the guardian to adduce additional evidence of the incompetent's expressions, either through demeanor or conduct, which could reasonably be interpreted as evincing the incompetent's wants, needs and/or feelings during the course of medical treatment"; and, if that evidence is not presented, then the quality of medical evidence should be able to "definitively" convince the court that the benefits of prolonging life are markedly outweighed by the

incurable nature of the incompetent's medical condition and the consistent, recurring degree of pain. The test that the Superior Court establishes is that:

"a court should be able to conclude, without hesitation, that extending life would amount to an inhumane act that runs so contrary to basic notations of fundamental decency that death furthers the best interest of the incompetent."

The Superior Court noted that D.L.H.'s life-long profound mental retardation prior to the medical treatment involved, or any other mental disability or cognitive deficiency, could form a basis for the determination, but stated that a court may consider such factors "as a starting point to analyze whether the current medical condition or a proposed medical treatment has resulted, or would result, in a reduction in those abilities."

The Superior Court was careful to limit its analysis of the specific facts of this case, which involved a patient with a curable emergency condition that required temporary mechanical ventilation. The Superior Court, agreeing with the Orphans Court, also refused to extend the limited holding of *In re Fiori*, 543 Pa. 592, 673 A.2d 905 (1996), which permitted the family of a previously competent patient in a persistent vegetative state to exercise limited surrogate decision-making authority, to the facts of this case.

If your facility has questions about this case or your own policies and procedures for dealing with surrogate decision-making for residents, you may contact David C. Dagle, Esquire at our Firm.

MANAGING YOUR ACCOUNTS RECEIVABLE #3 — USE YOUR ADMISSION AGREEMENT TO PROTECT THE BOTTOM LINE

By Andrew R. Eisemann, Esquire with Bruce G. Baron, Esquire

Does your nursing home's Admission Agreement include provisions that authorize you to protect your resident's (and your facility's) right to receive payment from the resident's payment source(s)? If not, you are leaving your bottom line open for problems whenever the resident or the resident's family or representatives delay or fail to take action to qualify for coverage. The most frequent problem is a gap in Medicaid coverage due to the family's failure to provide information required during the application process and to appeal a denial of eligibility; however, it is also important in transfer of asset penalty period determinations. Nursing homes that get authorization in the Admission Agreement for the facility to take action to preserve a resident's Medicaid coverage, including filing protective appeals, can prevent such gaps.

The ability to file a protective appeal on behalf of a resident, particularly where an initial application was denied for lack of family participation in the verification process, is essential to obtain the maximum three-month retroactive coverage period permitted by law (55 Pa. Code § 181.12). If the facility or the family simply files a new application and does not file a protective appeal from an initial denial, some retroactive coverage may be lost and the nursing home will be left with the expense and problems involved with obtaining payment for charges for the gap period through a collection effort. If a protective appeal is filed and the required documentation, including both the MA-

51 and the AAA's Options assessment, is provided, even as part of a subsequent application process, DPW policy, 55 Pa. Code § 275.5, permits full retroactive coverage based on the application involved in the protective appeal.

While a nursing home is permitted under current Pennsylvania Medicaid regulations to file an application for coverage on behalf of a resident, 55 Pa. Code § 125.84(a), unless the nursing home has some written authorization to act on a resident's behalf in the appeal process, the nursing home will not be permitted to continue to protect resident coverage if there is a denial of benefits during the application process. Both the Pennsylvania Department of Public Welfare (DPW) and the Commonwealth Court have ruled that, without the additional authorization, the nursing facility does not have "standing" to represent the resident's interest in the appeal process. *Beverly Healthcare-Murrysville v. DPW*, 828 A.2d 491 (Pa. Cmwlth. 2003). Both DPW and the Commonwealth Court, however, have indicated that the a nursing home can represent its resident's interests through both the application and the appeal process where the resident has given the nursing home written authorization to do so, including authorization contained in provisions of the Admission Agreement. While the recent Commonwealth Court decision in *HCR Manor Care*

(Old Orchard Health Care Center) v. DPW, ___ A.2d ___ (No. 180 C.D. 2008, En Banc decision filed March 2, 2009) involves Admission Agreement authorization, the Court did not decide in that case whether that authorization was enough because the case also involves a conflict between the resident's Power of Attorney and the nursing home about who would handle the specific appeal; so, the Court had to remand the case to DPW for additional evidence to resolve that conflict. DPW's Bureau of Hearings and Appeals, however, has permitted one of our Firm's nursing facility clients to file protective appeals on behalf of a resident and to represent the resident's interests on the basis

of written authorization in the Admission Agreement, where the resident's Power of Attorney did not take any action to do so, in 2009 cases being handled by our Firm that are currently awaiting settlement or a hearing.

If you would like more information on how your Admission Agreement can be used to protect your facility's bottom line, including the use of written authorization to file Medicaid eligibility appeals to protect your resident's (and your facility's) rights to retroactive coverage, you may contact Andrew R. Eisemann, Esquire or Bruce G. Baron, Esquire at our Firm.

THE LILIES OF THE FIELD, THE FACTORY AND THE FRONT DESK: PRACTICAL IMPLICATIONS OF THE LILLY LEDBETTER LEGISLATION

By Trudy A. Marietta Mintz, Esquire

The very first piece of legislation signed by President Obama was the Lily Ledbetter Fair Pay Act of 2009, Pub.L. 111-2, signed on January 29, 2009, amending Title VII of the Civil Right Act (42 U.S.C. § 2000e-5) and the Age Discrimination in Employment Act (29 U.S.C. § 626(d)). This piece of legislation and the resulting controversy played a key role in highlighting the differences between Presidential candidates Obama and McCain. Various criticized as "beneficial to working women and minorities" and "unnecessarily politically correct", the Act is intended to provide workers who are unlawfully discriminated against with more time to discover the issue and act to have it corrected. Although the Act was inspired by a case of gender-based pay discrimination, the Act forbids pay discrimination against all Title VII protected workers. In other words, under the Act, determinations regarding pay rates and benefits must not be based on gender, race, national origin, religion, age or disability. Additionally, pay discrimination is expanded beyond basic salary or hourly wage to include benefits, paid leave, bonuses, stock options and pension payments.

Previously an employee had a 180 day federally mandated window from the time that their first unfair paycheck was issued to file a claim for discrimination. Lilly Ledbetter was unaware of the discrimination against her until many years after that initial event; and, U.S. Supreme Court found that, under the old law, her claim filed after she retired was not timely. Despite a finding by a jury that Ms. Ledbetter's male colleagues were paid 15 to 40 percent more for the same work, the Supreme Court determined that she was not entitled to the \$360,000 awarded to her at trial.

Under the Act, although Ms. Ledbetter herself will not receive any compensation, employees now will have 180 days, not only from the date of each paycheck as it is issued, but also from the date of any change in benefits related to their employment. Additional events that may trigger a claim are job evaluations and other personnel actions such as transfers

and reassignments between departments. Rather than running from the date of the initial discriminatory decision, the Statute of Limitations now runs from the actual date of the impact of the decision on the employee. Although employees will still be required to act quickly to preserve their rights, they will have the opportunity to address pay discrimination when they become aware of it, rather than lose their rights because of a decision made months or years earlier and known only to select persons within a company.

The Act applies retroactively to employment discrimination back to May 27, 2007. However, the current recovery limit of two years on back pay awards remains in place. Also unaffected is the treatment of pensions. Pensions are considered paid upon retirement. Therefore, the 180 day Statute of Limitations begins to run from the date of initial payment rather than each date that a check for a pension payment is received.

Employers now have less protection from the consequences of discriminatory pay and benefit determinations. However, the vast majority of employers are fair, responsible individuals who evaluate employees as individuals and provide rewards to them based upon their merit. To defend against discrimination claims, employers must still document the reasons for pay and benefit determinations in a clear and concise manner.

To suggest that all employees be paid the same wage and receive the same benefits, regardless of their relative value to the company, is not the purpose of this new Act. Failing to reward an outstanding employee or increasing the compensation for a poor performing employee out of fear would be as discriminatory as the actions Congress was seeking to prevent. The key is to have plainly stated reasoning for decisions regarding employee compensation and benefits in the company personnel records. An employer who evaluates their employees promptly, fairly and without unlawful discrimination has nothing to fear from a grandmother from Alabama named Lilly Ledbetter.

UPDATE ON BACKGROUND CHECKS

By Bruce G. Baron, Esquire

Both the Pennsylvania Department of Health and CMS have put out reminders for nursing facilities to conduct periodic and as needed background checks of employees and contractors after initial hiring. The Department of Aging has also announced that they will be publishing new background check regulations later this year that deal with changes required since the Supreme Court of Pennsylvania declared that certain background check sections of the Older Adults Protective Services Act violated rights protected by the Pennsylvania Constitution..

The Pennsylvania Department of Health advised Pennsylvania licensed nursing facilities on November 24, 2008 that: "it is imperative that facilities monitor criminal activity throughout an employee's tenure" in order to assure that staff are not precluded from working in a nursing facility and that monitoring should be done whenever the facility believes it appropriate. Congress is still working on implementation of a national database for more reliable criminal background checks. These criminal background checks are in addition to screening employees on the State Nursing Aide Registry to assure compliance with 42 CFR § 483.13(c)(2)(B).

CMS reminded DPW in a State Medicaid Directors Letter issued January 16, 2009 (#09-001) to communicate with all providers about their obligation to screen employees and contractors for excluded individuals and entities both prior to hiring or contracting and on a periodic basis. This kind of screening requires reference to the databases maintained by DPW itself (the "Medicheck List," which is searchable on DPW's website at: <http://www.dpw.state.pa.us/PartnersProviders/Medicalassistance/AdvocatesStakeholders/003673510.aspx> as well as those searchable databases maintained by the Office

of Inspector General (OIG) (http://www.oig.hhs.gov/fraud/exclusions/exclusions_list.asp) and by the General Services Administration (GSA) (<http://epls.arnet.gov>). The importance of continuing background checks was also emphasized in the OIG's Supplemental Compliance Guidance for Nursing Facilities published September 30, 2008 at 73 F.R. 56832.

In the Governor's Regulatory Agenda published February 7, 2009, at 39 Pennsylvania Bulletin 749, the Department of Aging is listed as working on proposed regulations to replace the provisions of 6 Pa. Code Chapter 15 that were invalidated by the Supreme Court of Pennsylvania's decision in *Nixon v. Commonwealth*, 576 Pa. 385, 839 A.2d 277 (2003), which declared unconstitutional, under the Declaration of Rights in the Pennsylvania Constitution, portions of the Older Adults Protective Services Act relating to employment of individuals whose criminal background checks disclosed certain criminal offenses. The Department published an interim Statement of Policy on its website which both the Department of Aging and the Department of Public Welfare have been using for enforcement. Neither the *Nixon* decision, nor any provisions of the Act require nursing facilities to hire individuals with any particular criminal background history; and, the *Nixon* decision does not invalidate the provisions in Federal regulations, 42 CFR § 483.13(c)(2)(A), that preclude Medicare or Medicaid providers from hiring individuals with criminal convictions involving resident abuse, neglect or mistreatment.

If your facility has questions about implementing compliance procedures and policies to keep up with current State and Federal background check requirements, you may contact Louis J. Capozzi, Jr., Esquire or Bruce G. Baron, Esquire at our Firm.

CAPOZZI & ASSOCIATES, P.C. WELCOMES TRUDY A. MARIETTA MINTZ, ESQUIRE

Trudy A. Marietta Mintz is a 2006 graduate of the University of Baltimore School of Law where she graduated with honors. She earned her B. A. in Jurisprudence from the University of Baltimore, also with honors.

Ms. Mintz comes to Capozzi & Associates from Bell, Ragland and Gauges, P.A. in Annapolis, Maryland. Prior to working as an attorney, Ms. Mintz owned a collection agency specializing in medical billing and collections. Ms. Mintz is licensed to practice in both Pennsylvania and Maryland; and,

at Capozzi & Associates, will represent our clients in Medicaid and Medicare reimbursement appeals, collection actions, and employment issues.

Ms. Mintz currently resides in Lemoyne, Pennsylvania, while she is working on a redevelopment project in Harrisburg to convert a vacant factory for urban loft living. Ms. Mintz, a Harrisburg native, is looking forward to reestablishing her roots in the area after her 20 year absence.

RECENT AND UPCOMING EVENTS:

- MARCH 5, 2009 –** Bi-Annual Capozzi & Associates, P.C. Seminar on “Current Issues for Nursing Facilities in Pennsylvania,” in Grantville, including continuing education credits for NHA’s and attorneys (Fall Program scheduled for October 13, 2009 in Grantville).
- MARCH 7, 2009 –** Bruce G. Baron, Esq. taught the full-day seminar as part of Slippery Rock University Department of Allied Health’s licensing program for nursing home administrators on “The Government’s Role in Health Care Policy, Regulation and Reimbursement,” in Slippery Rock.
- MARCH 19, 2009 –** Bruce G. Baron, Esq. taught morning seminar as part of the nursing home administrator licensing program offered by the Healthcare Institute for Training, in Devon, Pennsylvania, on “Government and 3rd Party Reimbursement.”
- MARCH 23-24, 2009 –** Bruce G. Baron, Esq. taught a full-day seminar as part of Penn State Greater Allegheny’s licensing program for nursing home administrators on “The Government’s Role in Health Care Policy, Regulation and Reimbursement” as well as the two-hour “Module 5” program of DPW’s required training for personal care administrators on “Local, State and Federal Laws and Regulations Pertaining to the Operation of a Home,” in McKeesport.
- APRIL 4, 2009 –** CAPOZZI & ASSOCIATES, P.C. “ADOPT-A-HIGHWAY” CLEANUP DAY ON INTERSTATE 81 AT Mile markers 61.5-62.5 (Cumberland County) (East and West sides).
- JUNE 25, 2009 –** Louis J. Capozzi, Jr., Esq. is teaching at a seminar on the Employee Free Choice Act, for Sterling Education Services, at the Harrisburg Hilton in Harrisburg.
- JUNE 26, 2009 –** Louis J. Capozzi, Jr., Esq. is speaking at the 2009 PANPHA Annual Conference, in Hershey, on “Funding the Future of Long Term Care.”

PRESORTED
STANDARD
U.S. POSTAGE PAID
HARRISBURG, PA
PERMIT NO. 583

Capozzi & Associates, P.C.
Attorneys at Law
2933 North Front Street
Harrisburg, PA 17110
Return Service Requested