Attorneys at Law

www.capozziassociates.com

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2933 North Front Street • Harrisburg, PA 17110

Telephone: (717) 233-4101

Fax: (717) 233-4103

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THE AMERICANS WITH DISABILITIES ACT OF 1990

by Debbra J. Savage, Esquire

No other area of employment law has provided employers with more general confusion than The Americans with Disabilities Act of 1990 ("ADA"). The purpose of the law is clearly understood by employers but the application presents difficulties that are sometimes remarkably challenging. This is especially true for small employers. Further, the interplay with other laws, such as The Family and Medical Leave Act, create additional complications for employers. Title I of the ADA makes it unlawful for an employer to discriminate against individuals with a disability in employment. This article will focus on an employer's responsibilities under the ADA to both applicants and employees with bona fide disabilities.

The ADA applies to all employers with 15 or more employees. The Law protects individuals who have physical or mental impairments that substantially limit one or more major life activity. This means that employers must provide to disabled persons the equal opportunity to apply for and work in positions for which they are qualified. An individual is qualified for a position if they meet legitimate skill, educational, experience, and other qualifications and can perform the essential functions of the job with or without reasonable accommodation. 42 U.S.C. §12111(8). The employer must provide an equal opportunity to obtain promotions once employed and equal access to benefits and privileges of employment. The Law also imposes a requirement that the employer ensures that a disabled individual is not subject to harassment related to their disability. Id.

The ADA's definition of "disability" provides little practical guidance to employers. "The term 'disability' means, with respect to an individual— (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). "The term (major life activity) means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir., 1994), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995) (*quoting:* 29 C.F.R. §1630.2(i)). The ADA is not applicable to impairments that do not substantially limit one or more major life activities. Temporary conditions that do not have long term effects, such as colds, broken bones, or pregnancy, are not considered disabilities under the ADA. A person who currently uses illegal drugs and/or alcohol is also not considered a qualified individual with a disability under the ADA. However, an individual who is not currently using illegal drugs or who is in a rehabilitation facility is included within the coverage of the ADA. Employers may lawfully, and should, prohibit the use of illegal drugs and alcohol in the workplace. Common examples of conditions that may qualify as bona fide disabilities under the ADA include: multiple sclerosis, blindness, deafness, AIDS/HIV, paralysis, epilepsy, diabetes, severe arthritis, bi-polar disorder, and depression (this list is not all inclusive). If an individual has a disability that is in remission, such as cancer, that individual likely qualifies as having a disability under the ADA. It is also important that employers know that if they treat or regard an individual as having a disability, even if they don't have such a disability, that individual is entitled to the protection of the ADA.

Where a "reasonable accommodation" is required, "[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work." Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 542 (7th Cir. 1995). Reasonable accommodation "may include—(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. §12111(9). Reasonable accommodations take many forms but most typically include: providing equipment or modifying equipment (i.e., amplifier for a phone or stethoscope), making materials accessible (i.e., providing someone to read training materials to blind qualified individuals), changing the work area (i.e., wheelchair accessibility), job-restructuring (i.e., re-allocating non-essential functions to other staff), allowing an employee to work from home where possible, modifying work schedules, permitting leave, and implementing policy modifications (modifying break schedules or no-fault attendance policies).

An employer is obligated to provide reasonable accommodations only when they know of an employee's/applicant's disability (mental or physical limitations). So how does an employer know that an employee/applicant has a disability and needs a reasonable accommodation? Such individuals are not required to inform the employer of their disability if the employer is aware of the disability. If an individual is in a wheelchair, an employer knows of that individual's disability because it is obvious. However, if the disability is not obvious, the individual generally has an obligation to inform the employer. The individual may inform the employer of a disability and the need for reasonable accommodations for him/herself or through another individual such as a physician or family member. The individual may make such a request either orally or in writing. So long as the request is in plain language, the employer will be deemed to have "knowledge" of the disability and the need for reasonable accommodation.

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Other topics that will be discussed in future issues include:

1) Information an employer must provide to employees/ applicants about ADA.
2) When an accommodation is reasonable and it imposes an undue burden on an employer.
3) Getting medical information from employees and confidentiality of such information.
4) An employer's obligations to a disabled employee/applicant who poses a safety threat.
5) What an employer can do if a charge is filed.

To learn more about the ADA, employers may contact the U.S. Equal Employment Opportunity Commission (E.E.O.C.) ADA Information Line at (800) 514-0301 (voice) (800) 514-0383 (TTY) or an attorney.

NEW 2006 MEDICARE SNF RATES PRESENT CHALLENGES FOR IMPLEMENTATION AND SOME COMPROMISES WITH PROVIDERS

by Louis J. Capozzi, Jr., Esquire

The Medicare Program has issued its Final Rule for FY 2006 SNF Rates. The Final Rule was published in the *Federal Register* on August 4, 2005 at 70 FR 45026 and is available on the Internet at: http://www.access.gpo.gov/su_docs/fedreg/frcont05.html.

The FY 2006 SNF Final Rule implements three (3) major changes in Medicare payments for SNF services: (1) Expansion of RUG's from 44 to 53, with updated nursing case-mix weights, effective for dates of services on and after January 1, 2006; (2) sunset of the 6.7% adjustment (Section 314 of BIPA) and the 20% adjustment (Section 101(a) of BBRA) effective with the implementation of the new 53-RUG system; and (3) Establishment of a 1-year Transitional Wage Index based on incorporation of the Metropolitan Statistical Areas (MSA's) established by the Office of Management & Budget (OMB) in 2003. The inflation factor increase for FY 2006 is 3.1% and the rates are estimated to increase payments to SNFs overall.

The new RUG's are for "Rehabilitation plus Extensive Services" with the abbreviations: RUX, RUL, RVX, RVL, RHX, RHL, RMX, RML, AND RLX. The Rulemaking indicates that: (1) for assessments with Assessment Reference Dates (ARD's) prior to November 22, 2005, only the current 44-RUG system is to be used for billing and the Final Validation Report for the MDS; (2) for assessments with ARD's after January 13, 2006, only the new 53-RUG system is to be used; while, (3) for assessments with ARD's from November 22, 2005 through January 13, 2006, either the 44-RUG or the 53-RUG system may be used for submitting the MDS. The new "federal rates for the 44-RUG grounds through December 31, 2005 are listed in Table 6 (Urban) and Table 7 (Rural) of the Rulemaking. The new "federal rates" for the 53-RUG groups are listed in Table 6a (Urban) and Table 7a (Rural). Table 10a reflects the elimination of the 6.7% and 20% adjustments, as well as the continuation of the 128% adjustment required by Section 511 of the MMA, for rates under the 53-RUG system.

CMS is implementing a 1-year Transition Wage Index (TWI) during FY 2006 in order to ease the impact of the new MSA changes on providers. The Transition Index is a blend of 50% of the new MSA wage index with 50% of the index based on the prior MSA's. The Rulemaking provides a chart with the Transition Wage Index for each county. As a result, counties which were parts of MSA's under the prior system, but not under the 2003 changes, will have only part of their current wage index based on the current statewide rural wage index (0.8291) and counties which moved from being rural counties to being part of a MSA will have part of their current wage index based on the prior statewide rural wage index (0.8319).

A listing of the Pennsylvania transitional wage index numbers follows:

	TWI
COUNTIES (33) WHICH WERE AND ARE CLASSIFIED AS RURAL:	0.8305
Adams, Bedford, Bradford, Cameron, Clarion, Clearfield, Clinton, Crawford, Elk, Forest, Franklin, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lawrence, McKean, Mifflin, Monroe, Montour, Northumberland, Potter, Schuylkill, Snyder, Sullivan, Susquehanna, Tioga, Union, Venago, Warren, and Wayne	
COUNTIES (1) THAT WERE RURAL AND ARE NOW URBAN:	
ARMSTRONG	0.8582
COUNTIES (2) THAT WERE URBAN AND ARE NOW RURAL:	
COLUMBIA	0.8408
SOMERSET (lowest TWI)	0.8189
COUNTIES (31) THAT WERE AND ARE URBAN:	
ALLEGHENY	0.8853
BEAVER	0.8853
BERKS	0.9686
BLAIR	0.8944
BUCKS	1.0980
BUTLER	0.8853
CAMBRIA	0.8220
CARBON	0.9832
CENTRE	0.8356
CHESTER	1.0980
CUMBERLAND	0.9273
DAUPHIN	0.9273
DELAWARE	1.0980
ERIE	0.8737
FAYETTE	0.8853
LACKAWANNA	0.8532
LANCASTER	0.9694
LEBANON	0.8846
LEHIGH	0.9832
LUZERNE	0.8532
LYCOMING	0.8364
MERCER	0.8198
MONTGOMERY	1.0980
NORTHAMPTON	0.9832
PERRY	0.9273
PHILADELPHIA	1.0980
PIKE (highest TWI)	1.1545
WASHINGTON	0.8853
WESTMORELAND	0.8853
WYOMING	0.8532
YORK	0.9347

Medicare SNF rates are computed by taking the Labor Component of the Federal Rate for the specific RUG times the TWI, then adding to that Adjusted Labor Component the Non-Labor Component, the total of which is multiplied by any applicable Percentage Adjustment and then times the number of Medicare days to get the payment amount. Sample computations are contained in the Rulemaking at Tables 10 and 10a.

CMS has not yet implemented the process for SNF's to obtain reclassification to a different MSA for Medicare rate-setting authorized in Section 315 of the Benefits Improvement and Protection Act of 2000 (BIPA), Pub. L. 106-554. Such reclassification is currently only available for hospital rate-setting and may result in hospitals having a higher wage index for Medicare rate-setting than nursing facilities in the same county.

The Pennsylvania Medical Assistance (MA) Program has not adopted these changes to county MSA classification, but elected instead to freeze the MSA's the MA Program uses to set nursing facilities' case-mix payment rates for rate-settings periods commencing on and after July 1, 2004 using OMB's 1999 MSA classifications of Pennsylvania counties. *See: 35 Pennsylvania Bulletin* 4612 (August 13, 2005), which invoked the authority of Act 42-2005 (enacted July 7, 2005) to promulgate the change in DPW regulations without going through final review by the Independent Regulatory Review Commission. The legality of Act 42-2005 and of this change in the regulations, as well as of its application to Year 10 (FYE June 30, 2005) case-mix rates are currently under review before the Bureau of Hearings and Appeals of the Pennsylvania Department of Public Welfare (DPW).

If you have any questions about your Medicare rates, updating your staff and compliance programs for the implementation of the new 53-RUG system, or submitting comments to the Medicare Program about necessary changes for the FY 2007 Medicare rates, you may contact Louis J. Capozzi, Jr., Esquire, at 717-233-4101 or by email at: LouC@CapozziAssociates.com.

NEW CHANGES IN THE LAW ON ASSET TRANSFERS AND SPOUSAL IMPOVERISHMENT

by Doreena Craig Sloan, Esquire

The Pennsylvania legislature amended the Public Welfare Code on July 7, 2005 to create partial month penalty periods for transfers of assets for less than fair market value. Fair Market Value is defined as the price for which an asset, income or resource could be expected to sell on the open market or would have been expected to sell on the open market. These changes took effect on August 22, 2005. This change in the law was brought about by the continuing increase in Medicaid costs, particularly for those needing long term cares services, and cases of individuals disposing of assets prior to and/or while receiving long term care services paid for by Medicaid. The legislature recognized that those assets could have been used to help defray the cost of Medicaid services.

Prior to this change, the County Assistance Offices would determine full month penalty periods only. The new law requires the County Assistance Office to first determine whether there has been an asset transfer for less than fair market value and, if there has been, to then determine whether there should be a whole month penalty period or a partial month penalty period. Transfers of assets totaling $500.00 or less in a calendar month are not subject to the fair consideration requirements unless they occur during an existing penalty period.

The partial penalty period is determined by converting the average monthly private pay rate (currently $6,062.35) to an average daily private pay rate (currently $199.31) The penalty period for transfers of assets for less than fair market value begins on the first day of the month in which the asset was transferred.

We all know of situations when one spouse has been admitted to a nursing facility for long term care and the other spouse remains in the community. Issues always arise as to how the income is treated for both the Community Spouse and the Institutionalized Spouse. There have been additional changes with regard to the spousal impoverishment procedures. The Public Welfare Code was amended on July 7, 2005 to change the method of calculating available income and resources to a community spouse. It simultaneously provided new requirements for purchasing an annuity. These changes became effective on October 1, 2005.

Under the old law, if the gross monthly income of a Community Spouse, including income from the Community Spouse Resource Allowance, is less than the Community Spouse Monthly Maintenance Needs Allowance, then the couple could choose to protect additional resources by purchasing an annuity to generate the additional income needed by the Community Spouse. The Community Spouse was not required to purchase the annuity.

Under the new law, if the gross income of the Community Spouse, including income from the Community Spouse Resource Allowance is less than the Community Spouse Monthly Maintenance Needs Allowance, then the County Assistance Office is required to project the income of the Institutionalized Spouse that would be available to the Community Spouse should the Institutionalized Spouse predecease the Community Spouse. If the gross monthly income of the Community Spouse, including income from the Community Spouse Resource Allowance and the income projected to be available to the Community Spouse if the Institutionalized Spouse predeceases the Community Spouse, is less than the Community Spouse Monthly Maintenance Needs Allowance then the Community Spouse can request additional income from the Institutionalized Spouse or the couple can protect additional resources from the couple's non-protected share by purchasing an annuity to generate the additional income needed by the Community Spouse. There are specific requirements for the annuity that we will not discuss here, but feel free to contact our office if you need additional information.

Additionally, under the old rules, if a married individual applied for Long Term Care Services under the Home and Community Based Services Program, only the income and resources of the spouse applying for long term care services under that program were considered. The new rules now require the spousal impoverishment provisions to be applied and the income and resources of both spouses are considered. A resource assessment is required for all married applicants for Medicaid Home and Community Based Services that have been determined to be medically (functionally and clinically) eligible. The resource assessment is based on the total countable resources owned by the couple on the assessment date. The assessment date is not the date that home and community based services begin; rather it is the date that the applicant spouse has been determined to meet the medical eligibility requirements for Home and Community Based Services by the appropriate Department of Public Welfare Program Office.

Capozzi and Associates, P.C., stands ready to assist you to successfully navigate these changes to the Public Welfare Code. Please feel free to contact us with questions.

THE DUTY TO SUPPORT

by Michael B. Volk, Esquire

Under the common law doctrine of necessaries, a husband is under a legal duty to support his wife and children. Where he neglects that duty to supply necessaries for their support, he is liable. What are 'necessaries?' 'Necessaries' are things that cover costs to live such as food, clothing, shelter and related items. Under the common law, an adult (child) generally has no duty or obligation to contribute to the support of his/her parents. The first provision imposing such a liability is found in Pennsylvania in the 29th Section of the Act of March 1771, which required that the children support their indigent (poor) parents if the children were of sufficient ability. This enactment, better known as the Support Statute, as well as subsequent legislation in this area, was designed to relieve state and local authorities from the burden of supporting persons who had relatives with financial means who could care for and/or support them. The Commonwealth later adopted similar provisions in the Act of March 9, 1803, and the Act of June 13, 1836. The Act of 1836 was similar to our current Rule in that every child of a poor person unable to work must, if financially able, support the indigent, at a rate set by the Quarter Sessions (legislature as they were called at the time) for the area where the poor person would reside.

The Support Law that we have in effect now originated as the Act of June 24, 1937. Our current law, found at 23 Pa.C.S.A. § 4603 provides that the following individuals have responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge: (1) the spouse of the indigent person; (2) the child of the indigent person, and (3) the parent of the indigent person. The only exceptions to that are if an individual does not have sufficient financial ability to support the indigent person and a child is not liable for the support of a parent who abandoned the child for a period of ten years during that child's minority years. What this law, and the line of cases interpreting it, means to the managers of nursing facilities in Pennsylvania is that you can pursue a failure to support claim against a patient's family (child (ren) or spouse) because you have furnished an indigent patient with shelter, food, clothing, and care. We have successfully litigated many of these cases.

A typical case illustrating this principle is Presbyterian Medical Center and Nursing Home v. Budd, Decided August 29, 2003. Mrs. B. Budd spent her last years at the Presbyterian Medical Center Nursing Home in Pittsburgh (PMC). She died owing the facility $96,000 and only had $28,000 left in her the estate at death. Mrs. Budd's daughter, Elizabeth was the Power of Attorney, who handled her mother's finances while she was living. When the unpaid bills began to accumulate, PMC contacted Elizabeth Budd, who told them that the money was almost gone and promised that she would "spend down" the remaining money and make an application for Medical Assistance on her mother's behalf.

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Well, Elizabeth Budd did not apply for Medicaid on behalf of her mother, but she did take $100,000 of her mother's money and used it for her own purposes. PMC filed suit. The Pennsylvania Superior Court took this case as an opportunity to elaborate on the duties required by the Support Statute. The Court emphasized the fact that a nursing home is an interested party capable of bringing a support action under the law and that an interested party such as a hospital or nursing home may bring an action against a child for the unpaid medical bills of an indigent parent. The Court also spoke to the fact that an indigent person need not be helpless, in extreme want, or destitute as to require public assistance before an action can be filed against the family for failure to support. They confirmed that indigent persons are those who "do not have sufficient means to pay for their own care and maintenance; indigent includes but is not limited to those who are completely destitute and helpless; it also includes those persons who have some limited means but whose means are not sufficiently adequate to provide for their maintenance or support." The Court went on to say that a hospital had a valid action for reimbursement from a child for expenditures the hospital made on behalf of an indigent parent. The Superior Court also discussed a distinction that could be made in situations where a patient is still alive when a lawsuit is brought under the Support Act and when a patient is deceased prior to the action being brought. The Court said without any ambiguity that the initiation of a support action does not prejudice the ability to seek reimbursement in life or after the death of a patient. In conclusion, even if a patient has insufficient resources, there are a variety of other legal theories on which a home or hospital can recover expenses for a patient. If you have questions or need assistance in this area, please feel free to contact us.

UPCOMING EVENTS:

Louis J. Capozzi, Jr. will be speaking on November 15th, 2005 for the PANPHA finance seminar. The workshop is entitled Tax Exemption Issues facing non-profit providers.

Capozzi and Associates is offering a 6-Hour Continuing Education Seminar on March 16, 2006 at the Holiday Inn Grantville from 9:00 a.m. – 4:30 p.m. Certificates of attendance will be provided for seminar participants. This seminar is available through advance registration only. If you are interested in attending the seminar, please send the following registration information to Joan Hoke, Capozzi & Associates, P.C. 2933 North Front Street, Harrisburg, PA 17110-1250 or email to: JoanH@CapozziAssociates.com

Best wishes for a happy, healthy, prosperous and safe Holiday Season!

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