



MEDICARE PART C

- Paid a Capitated rate based upon severity
 - Potential to increase Severity to Increase Payments
 - Can Affect Providers: Settlement of \$1.5 Million for upcoding.



PRIVATE EQUITY

- Has become the new scapegoat for Healthcare issues
 - Key issues are what did they know and when did they know it?
 - Settlements: \$21.5 Million; \$19 Million
- Firm Paid \$1.78 Million because it failed to follow up on Due Diligence

LITIGATION UPDATE	DISCRIMINATION IN LTC	PRIVACY ISSUES	LTC ACRONYMS	EMPLOYMENT UPDATES	LTC POTPOURRI
		\$200	\$200	\$200	\$200
		\$400	\$400	\$400	\$400
\$600	\$600	\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800	\$800
\$1000	\$1000	\$1000	\$1000	\$1000	\$1000

DISCRIMINATION IN LTC - \$600

DERIVATIVES OF THE
CANNABIS SATIVA PLANT
USED TO TREAT SYMPTOMS
OR CONDITIONS

WHAT IS
**MEDICAL
MARIJUANA**



MEDICAL MARIJUANA ACT

- Legal under PA Medical Marijuana Act (MMA)
- MMA permits use for 24 medical conditions
 - Physical conditions (e.g. cancer, Epilepsy, Crohn's, Parkinson's, Glaucoma, neuropathy, chronic pain)
 - Mental conditions (e.g. anxiety disorders, PTSD)
 - Opioid addiction therapy
- MMA requires physician certification, annual registration, and medical marijuana ID card



RESIDENT USE

- MMA Exception for Violation of Federal Law
- SNFs
 - Permitting resident use of medical marijuana may jeopardize Medicare/Medicaid participation
- PCFs
 - Personal Care Facilities are not certified by Medicare or Medicaid
 - PA DHS Guidance:
<https://www.dhs.pa.gov/docs/Publications/Documents/FORMS%20AND%20PUBS%20OMAP/012003.pdf>



STATUS OF FEDERAL LAW

- Oct. 2022: Executive Order on Marijuana Reform
 - Directs HHS to review how marijuana is scheduled
- Aug. 2023: HHS/FDA Recommendation to DEA
 - Recommendation that marijuana be reclassified from Schedule I to Schedule III under Controlled Substances Act
 - Reversal of HHS 2016 position that marijuana should remain a Schedule I substance
 - DEA's past position that marijuana must be classified as Schedule I or II substance under U.S. treaty obligations



EMPLOYEE USE

- MMA §2103(a): No licensure consequence for lawful use of medical marijuana
- MMA §2103(b): Employers may not discriminate against individuals certified to use medical marijuana
- ADA/PHRA: Employers may not discriminate on basis of disability



EMPLOYEE USE

- MMA §510: Medical marijuana patient may be prohibited from:
 - Performing any tasks the employer deems **life-threatening** to the employee or other employees, while under the influence of medical marijuana
 - Performing any duty which could result in a **public health** or **safety risk** while under the influence of medical marijuana



SAFETY-SENSITIVE POSITIONS

- What is a safety-sensitive position?
 - The job duties of the position can affect the safety or health of the employee performing the duties or others
 - The job duties of the position could cause death or serious bodily injury to the employee or others



SAFETY-SENSITIVE POSITIONS

- Job Descriptions should clearly identify safety-sensitive positions:
 - “Safety-sensitive” indicator on job description form
 - Statement in position summary: This is a safety-sensitive position
 - Plain English description of job duties, physical demands, environment, PPE requirements (may include description of potential injuries)
 - Statement after relevant duties: This is a safety-sensitive job function



SAFETY-SENSITIVE POSITIONS

NO PRE-EMPLOYMENT DRUG TESTING **OR** MARIJUANA IS EXCLUDED FROM TESTING PANEL

- Drug testing does not indicate active impairment
- Testing only reflects a single point in time, does not capture ongoing use
- Cost and liability concerns if employee causes death, serious bodily injury, or property damage while under the influence?

EMPLOYEES TREATING WITH MEDICAL MARIJUANA ARE NOT PERMITTED TO HOLD SAFETY-SENSITIVE POSITIONS

- Law does not prohibit employees who use MM from holding SS positions
- *Clark v. J.R.K. Enterprises* – having marijuana in system constitutes being “under the influence”
- Prohibition must be based on active use/treatment with MM, not cardholder status

ATTESTATION THAT EMPLOYEE WILL NOT REPORT TO WORK WHILE UNDER THE INFLUENCE

- Off duty use of MM treated similarly to alcohol
- Employees that hold SS positions are required to sign attestation that they will not report to work or perform SS duties while under the influence of MM
- Requires review of reasonable suspicion policy

LITIGATION UPDATE	DISCRIMINATION IN LTC	PRIVACY ISSUES	LTC ACRONYMS	EMPLOYMENT UPDATES	LTC POTPOURRI
		\$200	\$200	\$200	\$200
		\$400	\$400	\$400	\$400
\$600		\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800	\$800
\$1000	\$1000	\$1000	\$1000	\$1000	\$1000

LITIGATION UPDATE - \$600

LAW THAT PROHIBITS
PAYMENT TO INDUCE OR
REWARD PATIENT
REFERRALS

WHAT IS THE
**ANTI-KICKBACK
STATUTE**



AKS BASICS

- What is “resulting from” and AKS violation?
 - But For vs. No But For
 - What does it mean in the real world?



BUT FOR VS. TAINTED

- But For Test
- Kickback must cause false claim
 - Overbilling
 - Unnecessary services
- Tainted (3d Cir)
 - If claim was tainted by kickback it is also an FCA violation
 - Any Purpose Test – If 1/1000 of payment was for referral all the claim is tainted



SUBJECTIVE BELIEF TEST

- US Supreme Court (SuperValu Case)
 - What is “Intent” requirement?
 - Intend to do the act or intend to violate law?
 - Court held it is the subjective intent of the actor.



SUBJECTIVE INTENT APPLIED

- Reasonable Ambiguity
Could Defeat Claim
- Could be Post-Conduct
 - Oh yea, that was correct
- If you believed it was wrong when you submitted, you are liable
- No post-hoc ambiguity allowed
- But supposed you were wrong about being wrong?

LITIGATION UPDATE	DISCRIMINATION IN LTC	PRIVACY ISSUES	LTC ACRONYMS	EMPLOYMENT UPDATES	LTC POTPOURRI
		\$200	\$200	\$200	\$200
		\$400	\$400	\$400	\$400
		\$600	\$600	\$600	\$600
\$800	\$800	\$800	\$800	\$800	\$800
\$1000	\$1000	\$1000	\$1000	\$1000	\$1000

DISCRIMINATION IN LTC - \$800

ENSURING THAT INDIVIDUALS
WITH DISABILITIES CAN ACCESS
INFORMATION, PRODUCTS,
SERVICES AND ENVIRONMENTS

WHAT IS

ACCESSIBILITY



AG SETTLEMENT

- Facts:
 - Complainant felt interpreter services he received at hospital were not adequate/he could not effectively communicate
 - During COVID, interpreter services had difficulty finding registered interpreters for hospital interpreter services
 - Interpreter provided services to Complainant, did not advise that he was unregistered
- Settlement with Interpreter Services:
 - Policy and procedure for assignment of interpreters
 - \$5,000 donation

LITIGATION UPDATE	DISCRIMINATION IN LTC	PRIVACY ISSUES	LTC ACRONYMS	EMPLOYMENT UPDATES	LTC POTPOURRI
		\$200	\$200	\$200	\$200
		\$400	\$400	\$400	\$400
		\$600	\$600	\$600	\$600
\$800		\$800	\$800	\$800	\$800
\$1000	\$1000	\$1000	\$1000	\$1000	\$1000

DISCRIMINATION IN LTC - \$1000

CONDUCT IS SO SEVERE OR
PERVASIVE THAT IT INTERFERES
WITH AN EMPLOYEE'S ABILITY
TO DO THEIR JOB

WHAT IS A
**HOSTILE WORK
ENVIRONMENT**



HARASSMENT BY RESIDENTS

79% of nurses have experienced racism/discrimination from patients

88% of nurses working in nursing homes, residential care facilities, and home health care, have experienced racism/discrimination from residents

Insights Into Nurses Experiences and Perceptions of Discrimination, (May 2023, Robert Wood Johnson Foundation in collaboration with the National Opinion Research Center at University of Chicago),

<https://www.statnews.com/wp-content/uploads/2023/05/rwjf473632.pdf>



HARASSMENT BY RESIDENTS

EEOC v. Elderwood at Burlington (VT)

- Allegations:
 - White residents repeatedly directed racial slurs and physically assaulted Black nurses and nurse assistants
 - Incidents were observed by managers and supervisors
 - Elderwood told Black employees that residents could say what they wanted



HARASSMENT BY RESIDENTS

EEOC v. Elderwood at Burlington (VT)

- Elderwood argued in Motion to Dismiss that it cannot be held liable for the acts of its residents
- Court denied motion-
 - Employer may be liable for harassment by third parties when the employer knew or reasonably should have known about the harassment and failed to take reasonable remedial action
- Case in active litigation



RESIDENT HARASSMENT

Chaney v. Plainfield Healthcare Center (7th Cir. 2010)

- Facts:
 - Nursing home honored resident racial preferences – “Prefers No Black CNAs”
 - Co-workers made racial remarks
 - Nursing home argued that it honored racial preferences to comply with state and federal laws granting residents the right to choose providers, to privacy, and to bodily autonomy



RESIDENT HARASSMENT

Chaney v. Plainfield Healthcare Center (7th Cir. 2010)

- Holding:

Without resorting to discharging residents, a long-term care facility confronted with a hostile resident has a range of options. It can warn residents before admitting them of the facility's nondiscrimination policy, securing the resident's consent in writing; it can attempt to reform the resident's behavior after admission; and it can assign staff based on race neutral criteria that minimize the risk of conflict.



RESIDENT HARASSMENT

Pickett v. Sheridan Health Care Center (N.D. Ill. 2008)

- Facts:
 - Incident #1: Nursing home resident sexually harassed housekeeper
 - Nursing Home Response: counseled resident concerning his conduct; put him on a monitoring program; reported the incident to the resident's physician (who adjusted his meds); and instructed housekeeper not to clean resident's room again



RESIDENT HARASSMENT

Pickett v. Sheridan Health Care Center (N.D. Ill. 2008)

- Facts:
 - Incident #2: Another resident rubbed a yellow smiley face sticker on housekeeper's breast and squeezed her buttocks
 - Nursing Home Response: reported incident to police; counseled resident; sent resident to hospital for evaluation; directed female staff to provide no care services to resident when alone; reassigned housekeeper to admin area



RESIDENT HARASSMENT

Pickett v. Sheridan Health Care Center (N.D. Ill. 2008)

- Holding:
 - Court found that nursing home investigated each incident reported by housekeeper, counseled the residents and took other remedial steps
 - Court dismissed sexual harassment claim against nursing home

LITIGATION UPDATE	DISCRIMINATION IN LTC	PRIVACY ISSUES	LTC ACRONYMS	EMPLOYMENT UPDATES	LTC POTPOURRI
		\$200	\$200	\$200	\$200
		\$400	\$400	\$400	\$400
		\$600	\$600	\$600	\$600
\$800		\$800	\$800	\$800	\$800
\$1000		\$1000	\$1000	\$1000	\$1000

LITIGATION UPDATE - \$800

**THIS TYPE OF LIABILITY
ARISES WHEN A PERSON
BREAKS THE LAW**

WHAT IS

**CRIMINAL
LIABILITY**



FEDERAL ENFORCEMENT

United States v. Gilbert, et al., (W.D Pa.)

- Federal government obtained a criminal conviction of the two companies that operated Brighton Rehabilitation and Wellness Center in Beaver County
- Guilty of making false statements in connection with the payment of health care benefits and for the purpose of obstructing and impeding the investigation



PA ATTORNEY GENERAL CASES

- Personal Care Home Administrator Charged With Involuntary Manslaughter
- Alleges that Administrator-
 - Failed to provide a resident's medications, which led to a seizure that caused the resident's death
 - Failed to renew a prescription for anti-seizure medications
 - Altered the records to make it appear as though the health care provider had discontinued the medication