

DEVELOPMENTS IN LABOR & EMPLOYMENT:

An Activist NLRB and Other Challenges

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The Long-Term Care Law Firm

Rolf is the law firm of long-term care providers, and of the Ohio Health Care Association (OHCA). Our focused practice is dedicated to partnering with our clients to assist them with strategizing for the future, and in responding to all of their current needs. Over the years we have established ourselves as true advocates of not only our clients, but of the LTC profession as well. We serve as legal counsel to OHCA, and to providers across Ohio in a wide range of matters, including, but not limited to:

- | | |
|--|--|
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A Long-Term Commitment to Long-Term Care SM



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Rob Pivonka is a Partner with the law firm of Rolf Goffman Martin Lang Co., LPA, the Ohio Health Care Association's legal counsel.

The firm has an extensive health care practice, which represents long-term care providers, hospitals, physicians, pharmacies and numerous other providers across Ohio and in other states.

Mr. Pivonka has been selected as one of Ohio's best employment law attorneys by his peers in the "Super Lawyers" publication.

Mr. Pivonka concentrates his practice on representing and advising employers in connection with employment litigation and day-to-day operational issues concerning employees. He has litigated matters before numerous state and federal courts, and has represented employers before various administrative agencies including the U.S. Equal Employment Opportunity Commission (EEOC), the Ohio Civil Rights Commission (OCRC), the U.S. Department of Labor (DOL) Wage and Hour Division, the Ohio Department of Job & Family Services (ODJFS), the U.S. Occupational Safety and Health Administration (OSHA) and the National Labor Relations Board (NLRB). Rob also has represented clients in numerous private arbitrations and mediations.

Mr. Pivonka received his Juris Doctorate from Case Western Reserve University School of Law, where he graduated *magna cum laude*, was inducted into the *Order of the Coif*, and served as the Executive Notes Editor for the *Case Western Reserve Law Review*. He earned his Bachelor of Arts from Marquette University, where he graduated *magna cum laude*, and was inducted into Alpha Sigma Nu, the National Jesuit Honor Society.

Mr. Pivonka is admitted to practice in any state court in Ohio, the U.S. District Courts for the Northern and Southern Districts of Ohio, and the U.S. Sixth Circuit Court of Appeals. He is a member of the Cleveland Metropolitan Bar Association and the Ohio State Bar Association (Labor & Employment Law Section).

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Over his long and distinguished career, Mr. Englehart has earned an excellent reputation based on his successful outcomes. He has significant experience in collective bargaining, union avoidance, unfair labor practice and representation cases, labor arbitration, injunction work, the Norris LaGuardia Act, and all aspects of the National Labor Relations Act (NLRA).

Mr. Englehart provides hands-on support in labor cases from concept to fruition, including meeting with corporate representatives to identify existing / potential concerns, conducting and/or overseeing legal research & due diligence, writing legal memoranda, trying cases, presenting labor law risks & liabilities, providing template to support long term strategies, and serving as legal counsel in union avoidance, negotiations, arbitrations, litigation, and/or injunction work.

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DEVELOPMENTS IN LABOR & EMPLOYMENT:
An Activist NLRB and other Challenges

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The National Labor
Relations Board



Introduction

- ❖ Presenters warned about:
 - The Employee Free Choice Act which threatened unionization without a secret ballot election;
 - The radical new NLRB changing traditional case law doctrine and engaging in ruinous rulemaking;
 - A new activist NLRB General Counsel;
 - Enhanced remedies For employer labor law violations;



Introduction

- Quickie Elections”;
- “Micro Units” in long term care facilities;
- The loss of employer-side labor lawyers willing to do union avoidance work;
- Etc. . . Etc. . . Etc.



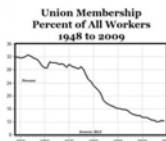
Introduction

- ❖ I wish I could tell you that my colleagues and I were wrong. Unfortunately that is not the case. Many of the items on that list that were unthinkable four years ago are now in place and the result is a labor law environment that will present substantial challenges for employers, especially those employers who are in the sights of radical activist unions like SEIU.



Introduction

- ❖ If there is a silver lining in this story, it is this: **Big Labor's** presence in the American labor force has been systematically shrinking for over 50 years.



Introduction

- ❖ Since the end of World War II when what we call “**Union Density**” peaked at about 35% of the private sector workforce, density has slipped to under 7% in 2011. The only bright side for unions has been the public sector which is now Big Labor’s only growth engine.



Introduction

- ❖ So, Employers have a choice:
 - Cross fingers, toes, arms and legs in the hope that Labor’s historical inability to grow will continue; or
 - Proactively prepare your workforce for an organizing campaign.




Objectives

- ❖ Outline the labor law changes that are now in place
- ❖ Explain what I mean by “proactively prepare for an organizing campaign.”




Quickie Elections
 “Voters Really Have No Need to Hear What Employers Want to Say.”

- ❖ **Quickie Elections**
 - The good news is that the EFCA appears to be dead.
 - The bad news is that effective last week, the NLRB election procedure is radically different.
 - The major provision of the new procedure will eliminate the current 25-day period for Board review of unit decisions and the ability to suspend hearings once the region has determined that there are no major unit issues (i.e. unit issues affecting more than 20% of the voting unit).

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Quickie Elections
 “Voters Really Have No Need to Hear What Employers Want to Say.”

- ❖ Effectively, that provision alone will shorten the time between Petition and election to, probably, between 10 and 21 days, from the current average of about 42 days.
- ❖ The NLRB has promised guidance on how the new procedures will work, but the guidance was not available at “press time.”

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Partial Rights Posting

- ❖ The NLRB has promulgated a rule that requires every private sector employer to hang a poster that is a virtual roadmap for employees who want to form a union.
 - Originally slated to go into effect in November 2011, and twice delayed, the NLRB’s posting requirement became effective **April 30, 2012**.
 - ✓ Two federal district courts are split on the question of whether the NLRB has the authority to order the posting.

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Partial Rights Posting

- ❖ Employees' Rights:
 - To organize to negotiate concerning wages, hours, and other terms and conditions.
 - To form, join or assist a union.
 - To bargain collectively.
 - To discuss wages and benefits and other terms and conditions.
 - To take action with one or more co-workers to improve working conditions.
 - To strike and picket.
 - To choose **not** to do any of these activities.



Partial Rights Posting

- ❖ Illegal Employer Activities:
 - Prohibiting employees from talking about or soliciting for a union during non-work time, or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
 - Questioning employees about union support or activities.
 - Taking adverse action against employees (or threatening) because of protected activity.
 - Threatening to close the facility if workers unionize.
 - Making promises to discourage or encourage union support.
 - Prohibiting shows of union support.
 - Spying or pretending to spy on union activities.



Partial Rights Posting

- ❖ Illegal Union Activities:
 - Threatening or coercing employees to gain support for the union.
 - Refusing to process a grievance for discriminatory reasons.
 - Using or maintaining discriminatory standards or procedures in making job referrals.
 - Causing or attempting to cause an employer to discriminate against employees because of union-related activity.
 - Taking adverse action against employees because they have not joined or do not support the union.



Micro Units
"Why Have One Bargaining Unit
When you Can Have Four or Five?"

❖ In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011) the Board overturned the traditional analysis to determine what constitutes an "appropriate bargaining unit" in LTC facilities that it had used for 37 years.

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Micro Units
"Why Have One Bargaining Unit
When you Can Have Four or Five?"

❖ Traditionally, employers could insist on a comprehensive unit that included STNAs, housekeeping, dietary, laundry, and clerks.

❖ Here is a portion of the Board's analysis:

❖ "The CNAs' (STNA) distinctive duties are further evidenced by the fact that, at this facility and across the nation, Federal regulations require that CNAs, unlike all nonnursing staff, must be certified by the State and have a minimum of 75 hours of training within 4 months of hire."

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Micro Units
"Why Have One Bargaining Unit
When you Can Have Four or Five?"


❖ "CNAs, unlike the other employees, must also undergo periodic training in order to maintain their certification. Lacking such certification, other employees are barred from performing key CNA tasks such as assisting residents with eating and positioning."

❖ "CNAs are the only employees required to staff three 8-hour shifts. CNAs are the only employees assigned to work exclusively in particular areas of the residential wings."

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Micro Units
"Why Have One Bargaining Unit
When you Can Have Four or Five?"

- ❖ "CNAs also are paid according to a distinct wage scale although the scale falls within the range of those used to compensate the other employees."
- ❖ "There is only "limited and unspecific" interaction among the CNAs and the other employees . . . and CNAs rarely if ever interact with some of the other employees, such as the maintenance assistant, cooks, data entry clerk, business office clerical, and receptionist."

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Micro Units
"Why Have One Bargaining Unit
When you Can Have Four or Five?"

- ❖ "There is no evidence of significant functional interchange or overlapping job duties. Finally, the Regional Director correctly found 'no evidence' of transfers into the CNA position from the other job classifications and only one such transfer out of the CNA position."

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Picketing without a 10-day Notice

- ❖ On December 9, 2010, the NLRB issued a decision that all healthcare employers should note. In *Correctional Medical Services, Inc.*, 356 NLRB No. 48, the Board held that as long as picketing employees are off duty when they picket and/or such picketing does not cause "disruption" to the employer's operations, the picketing is lawful and employees who participate in such picketing are protected from adverse employment action under Section 8(g) of the National Labor Relations Act (the "Act").

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To Persuade, or Not to Persuade?

- ❖ Another little-known rules change the U.S. Department of Labor is considering and will likely enact in 2012 will also have a deleterious effect on Employers.
- ❖ Currently labor counsel may advise Employers on union avoidance without any disclosure to government agencies as long as the attorney does not personally address potential voters.



To Persuade, or Not to Persuade?

- ❖ The proposed rule change will require both Employers and labor counsel to disclose confidential information to the Department of Labor for all union avoidance work (the "persuader rule").
- ❖ I have personally spoken with several labor lawyers from large firms. All have indicated that their firm will not allow them to register with the DOL as a persuader, which means that when the union comes to your facility, you may have to scramble to find legal assistance.



No One Really Reads Our Handbook, Right?

- ❖ The NLRB has been finding that the mere existence of "overbroad" and/or what it calls ambiguous handbook violations may be enough to overturn an election even when there is no evidence the policy was enforced, let alone that employees were even aware of it.



No One Really Reads Our Handbook, Right?

- ❖ In other words, "the NLRB nullified employee free choice based on the purely theoretical impact of a policy found in a multi-page handbook which the employees received, but likely never read.



No One Really Reads Our Handbook, Right?

- ❖ In 2 Sisters Food Group, Inc., 357 NLRB No. 168 (December 29, 2011), Chairman Pearce and (former) Member Becker found that the employer's rule subjecting employees to discipline for:
 - "inability or unwillingness to work harmoniously with other employees," was an unfair labor practice (and, therefore, also grounds for an election objection) because "it was sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and that employees could reasonably construe the rule to prohibit such activity."



No One Really Reads Our Handbook, Right?

- ❖ There are two problems with this analysis:
 - First, there was no evidence that the rules were designed or ever construed to prohibit protected union activity (or any other activity for that matter). The election in this case was contentious and hotly debated, which is empirical proof the "harmonious" and "arbitration" handbook policies had no effect on the election.



No One Really Reads Our Handbook, Right?

- Second, and more importantly, this case amply demonstrates to the unions that the NLRB will be friendly to such charges.
 - ✓ Therefore, employers can and should expect unions to raise more of these challenges. The ruling creates an incentive for the union to scour the employer's handbook in search of some innocuous or ambiguous phrase, such as a requirement that employees work "harmoniously."



No One Really Reads Our Handbook, Right?

- ❖ No proof other than the policy itself is required because the NLRB decides what the employee would "reasonably construe" a rule to mean. Thus, the union strategy will likely be to keep silent on the issue until after the results of the election. If the union loses, it will simply file objections seeking to overturn the election based on some obscure policy buried in the handbook. While this is an area of law that changes, and will continue to change, each employer should review its handbook in an attempt to remove such hidden land mines.



Dealing with the New Realities

- ❖ Experienced labor lawyers will tell you that unions do not win elections, companies lose them. Your employees do not vote for the union; they vote against you. It is important therefore for an employer that wishes to remain union-free to develop programs and policies that are designed to reduce employee dissatisfaction so that when a union shows up it will not be able to gain sufficient employee support.



Dealing with the New Realities

- ❖ This principle has been the cornerstone of successful union avoidance for decades, but in this new era of 10-day election campaigns its importance is greatly magnified.



Dealing with the New Realities

- ❖ Measuring employee satisfaction across a large diversified organization, is challenging. Not every facility (or department) has the same problems.
- ❖ Using a "one-size-fits-all" strategy, especially when time, money and energy are limited will likely be ineffective in the era of "Quickie Elections."



Dealing with the New Realities

- ❖ The key is to develop a cost-effective way to evaluate actual problems, and a strategy that allows the allocation of resources where they will have the best result.
- ❖ A properly constructed and executed Unionization Vulnerability Assessment Program provides this approach, and renders the additional benefits of improved employee satisfaction and increased quality and productivity.



Dealing with the New Realities

- ❖ Do you know what your employees think about you as an employer?
- ❖ Do you know what your employees think about your front line supervisors?
- ❖ Do supervisors have the proper skills and abilities?
- ❖ Do supervisors consistently follow policies and practices?



Dealing with the New Realities

- ❖ Do you know how employees reacted to recent changes in policies, to layoffs, to restructuring moves and management changes, etc?
- ❖ Are pay raises and promotions consistent?
- ❖ Do you provide employees with a positive work environment?
- ❖ Are hiring practices fair and consistent?



Dealing with the New Realities

- ❖ Do you effectively assimilate new employees, make them feel like they a part of the organization?
- ❖ Do you conduct employee surveys?
 - If so, do you follow up?
- ❖ Is there a *canary in the coal mine*?



Dealing with the New Realities

- ❖ Vulnerability changes, sometimes very rapidly.
- ❖ Management Changes?
 - Especially where the departing manager was fair, well liked and respected by employees.
- ❖ Benefits Changes?
 - Higher medical insurance contributions?
 - More out-of-pocket expense to employees?



Dealing with the New Realities

- ❖ Pay Freeze?
- ❖ Layoffs?
- ❖ Schedule Changes?
- ❖ Stress the Positives!



Dealing with the New Realities

- ❖ Consider adopting a *daily meeting* for all employees.
- ❖ Such meetings promote the *team* concept.
- ❖ It need not be long, 2-3 minutes typically.
- ❖ Briefly discuss a different work issue every day.
- ❖ Thank and acknowledge where appropriate.
- ❖ Acknowledge birthdays, long service anniversaries; births, etc.
- ❖ Consider presenting a "union fact" periodically.



Summary

- ❖ This environment is brand new. Whether or not Big Labor will overcome its historical paralysis and be able to exploit these new factors remains to be seen. What is not unknown, is that because of the new environment, employers who are targeted will have to be prepared and act quickly. Ten day elections will demand it.



Challenging Issues in Discrimination Law



Americans With Disabilities Act

- ❖ The EEOC is placing increasing emphasis on requiring employers to provide leaves of absence as a reasonable accommodation for disabled employees.
- ❖ This makes it extremely difficult for employers to control absenteeism.






ADA

❖ EEOC's Hierarchy of Accommodations

- 1) Accommodate in current job (most preferable).
- 2) Transfer to a similar position (duties, hours, pay, benefits, and perks).
- 3) Transfer to different position (even if it would be a demotion, or a change from full-time to part-time status).
- 4) **Place on a leave of absence (apply FMLA if eligible) (least preferable).**


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ADA

❖ **ADA & FMLA**

- An employee on leave for her own serious health condition also may have an ADA protected disability.
- You must consider whether the employee is covered by ADA before terminating if he or she is unable to return from maximum FMLA leave.
 - ✓ Note: It's nearly certain that he or she is disabled.

❖ **The ADA does NOT place time limit on leave**

- "Indefinite" leaves are not required.
- Regular attendance is always an essential function.


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ADA

❖ Inflexible leave policies

- *Per se* violation of the ADA
- *EEOC v. Sears Roebuck & Co.* - Sears agreed to pay \$6.2 million as part of a consent decree to resolve a class action lawsuit filed by EEOC in federal court in Chicago. Sears had a an "inflexible" workers' compensation leave exhaustion policy," in which employees were automatically terminated after 12 months of leave.
 - ✓ Employers must make a **case-by-case determination** whether a reasonable accommodation might allow an employee to return to work or whether additional leave should be granted.
 - ✓ Employers should not have inflexible leave policies.



ADA

❖ ADA Leave Pre-FMLA

- If an employee is not yet eligible for FMLA (employed for less than one year, less than 1250 hours in preceding year, or fewer than 50 employees within 75 mile radius) he or she may be entitled to leave as a reasonable accommodation under the ADA.
 - ✓ ADA applies to employers with 15 or more employees.
 - ✓ ADA has **no** length of service requirement.



ADA

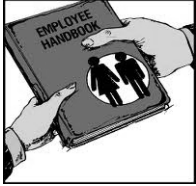
❖ "100% Healed to Return to Work" Policy

- *Per se* violation of ADA.
 - ✓ Because implemented without individual assessment of whether employee is qualified and able to perform essential functions of job, with or without a reasonable accommodation.



ADA

❖ Check Your Employee Handbook!



- Do your leave policies have maximum time limitations?
- Do your policies require employees to be 100% healed before returning from a leave of absence?



ADA

❖ Educate your managers:

- Ask why employees are missing work.
- Document their responses.
- Bring issues to HR and get assistance.



Discrimination Charges

- ❖ The EEOC received 99,947 charges of discrimination in fiscal year 2011 – a record.
- ❖ The EEOC “delivered” approximately \$365 million dollars – another record.
- ❖ We personally are seeing more aggressive investigation of charges (*i.e.*, requesting follow-up information and on-site interviews), but **not** an increase in adverse rulings.



Discrimination Charges

- ❖ Carefully document decisions that adversely affect employees – start early.
 - Borrow from healthcare documentation: if it wasn't documented, it didn't happen.
- ❖ Ensure that employees are being treated the same in comparable situations.
- ❖ Be specific – do not discipline employees for “bad attitude.”



Wage and Hour Issues



Meal Periods

- ❖ Meal Periods – Automatic Deductions
 - Many employers automatically deduct for a 30-minute meal period from employees' pay.
 - There has been an increase in lawsuits (both private and by DOL) based upon this practice.
 - Fundamental problem: no accurate record of the employees' hours worked.



Meal Periods

- ❖ Damages tend to be extremely high:
 - Start with straight time for every hourly employee on every shift.
 - Potential of overtime for all employees.
 - Attorneys' fees for plaintiffs.



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Meal Periods

- ❖ Recommendations
 - Require employees to punch out at the beginning of their meal periods, and punch back in afterward.
 - ✓ Treat failure to punch as disciplinary issue – much like unauthorized overtime.
 - If you intend to auto-deduct, have a written policy that instructs employees to indicate when they do not get a meal and to be paid for that time.
 - ✓ Have employees sign off on the policy.
 - ✓ Discipline employees who fail to follow the policy.
 - Train management on the importance of these issues. This is an **extreme** liability issue.



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Companionship

- ❖ Since 1975, certain employees were exempted from the minimum wage and overtime requirements under the “companionship exemption.”
 - Changes in the home health industry have led the DOL to consider changes to the companionship exemption.
- ❖ The DOL has proposed a new rule that will significantly affect how these employees must be compensated.

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Recent Cases of Note



Christopher v. Smithkline Beecham Corp.

- ❖ Supreme Court heard oral arguments on April 16, 2012.
- ❖ Question regarding exempt status of pharmaceutical sales representative.
- ❖ Case is noteworthy because of DOL's involvement:
 - DOL filed an *amicus* brief in support of plaintiffs claim that they did not qualify as outside sales representatives.



Christopher v. Smithkline Beecham Corp.

- ❖ The court noted that the DOL's position was a departure from its "seventy-plus years" of acceptance.

"while it is 'possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the . . . industry has been left alone' because DOL believed its practices were lawful."



Wal-Mart v. Dukes

- ❖ Supreme Court held that class action was not appropriate in massive sex discrimination case with proposed class of 1.5 million.
 - There were not sufficient common questions of law or fact in the class.
 - The case involved millions of separate employment decisions.
 - There was not enough evidence of an overriding policy or procedure that supported the claim of systemic discrimination.



Burrage v. FedEx Freight, Inc.

- ❖ Northern District of Ohio rejected a hostile work environment claim where employee who was not Mexican was subjected to offensive comments.
 - Employee was not a member of the protected class (*i.e.*, his national origin was not Mexican), and therefore was not protected.
 - Rejected "regarded as" analysis under Title VII.



Wells v. Cincinnati Children's Hospital Medical Center

- ❖ Southern District of Ohio case interpreting the revised ADA.
- ❖ Employee had gastrointestinal issue, and missed time for gall bladder surgery.
- ❖ Upon return, made several significant errors, causing employer to question her ability to work as a nurse in a critical unit.
 - Employer believed that the errors likely were a result of her medication.



Wells v. Cincinnati Children's Hospital Medical Center

- ❖ Employee was given a leave of absence and referred to the employer's EAP.
 - When cleared to return to work, she was reassigned to a different unit that the employer viewed as less critical, and received fewer hours and reduced pay.
 - Court held that there was sufficient evidence that plaintiff was "regarded as having an impairment."
 - ✓ This is a significant departure from pre-amendment ADA which required that the employee be regarded as having an impairment that substantially limited a major life activity.



Gesegnet v. J.B. Hunt Transport, Inc.

- ❖ An early case revealing how the amended ADA may be interpreted by courts.

"In difficult cases, a plaintiff usually proves disability through a combination of medical evidence and personal testimony detailing the practical impact of that medical condition. Here, Plaintiff is lacking in each area.... The Court doubts that the medical and personal evidence here is sufficient to show an actual inability to perform a basic function of life. Nevertheless, given the broad definition of disability Congress intended, the Court will assume that Plaintiff has a disability under the ADA."



Communicating with Employees



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Communicating Effectively to Help Avoid Liability

- ❖ The origins of countless cases (and much liability) lie in ineffective communication.
 - Unclear policies and procedures.
 - Performance evaluations.
 - Disciplinary meetings and notices.
 - Discharge documentation.

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Communicating Effectively to Help Avoid Liability

- ❖ Be honest and direct with employees.
- ❖ Do not surprise employees – if performance is unsatisfactory, let them know early.
- ❖ At the time you hire employees, let them know what the job entails and your expectations for their performance.

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Communicating Effectively to Help Avoid Liability

- ❖ In evaluations, provide meaningful feedback and real examples.
 - Avoid vague comments: “bad attitude”
- ❖ In disciplinary settings, provide the real reasons for your actions.
 - Untrue explanations are worse than no explanation.
- ❖ It is not necessary to provide every last detail in explaining your actions.



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Corporate Compliance

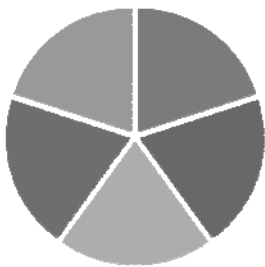


History



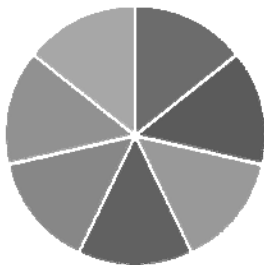
Now

Areas of Focus



- Quality of Care
- Resident Rights
- Billing & Cost Reporting
- Employee Screening
- Kickbacks

Components



- Written Standards
- Compliance Officer
- Education
- Reporting
- Audits
- Discipline
- Investigation & Response

ZPICs, MRAs, MICs, MACs

What are they and what are they designed to do?



Where is the Focus?

- ❖ Certs and recerts
- ❖ Therapy billing and licensure
- ❖ MDS accuracy
- ❖ Length of skilled stay
- ❖ PASAAR



How Can I Be Prepared?

- ❖ Education, Education, Education
- ❖ Internal and external audits
- ❖ Create a compliance program



What is a Compliance Program?

- ❖ Genesis
- ❖ March 2013 requirement
- ❖ Elements
- ❖ Checking for effectiveness



Emphasis on Quality

- ❖ Nursing Home Compare – 5 Star and addition of standardized complaint form, reporting now on fines and bans
- ❖ Increase in number of Special Focus Facilities
- ❖ Medicaid Quality Points



Quality Payment Penalties

- ❖ Financial penalties for rehospitalizations and preventable events
 - Will they be extended to NFs?
- ❖ Survey fines and bans
- ❖ "Worthless" services cases



Quality Drives...

- ❖ Reputation
- ❖ Census
- ❖ Revenue
- ❖ Avoidance of lawsuits
- ❖ Government investigations
- ❖ Penalties



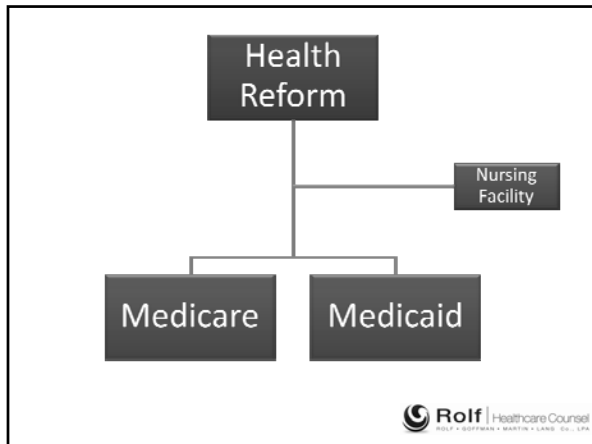
Creating a Culture of Quality

- ❖ Leadership
- ❖ Code of Conduct and Expectations
- ❖ Customer & Employee Satisfaction Surveys
- ❖ Formal Customer Service Programs
- ❖ Training (Ritz, Disney)
- ❖ QA Chart Audits, Be Careful Who You Admit



Future





PPACA: Medicare Compliance Reqs

Who?

- ❖ Hospitals
- ❖ Critical Access Hospitals
- ❖ CORFs
- ❖ Home Health Agencies
- ❖ Hospices
- ❖ Skilled Nursing Facilities

Rolf Healthcare Counsel
ROLF • GOFFMAN • MARTIN • LANG, GC, LPA

PPACA: Medicare Compliance Reqs

Deadline?

- ❖ None set
- ❖ Up to DHHS
- ❖ May vary by industry

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PPACA: Medicare Compliance Reqs

Guidance?

- ❖ Yes
- ❖ Will establish "core elements" for each provider type
- ❖ No set deadline

PPACA: Medicaid Compliance Reqs

Who?

- ❖ "Providers and Suppliers" under the State plan or under waiver of the plan
- ❖ Drafting error?

PPACA: Medicaid Compliance Reqs

Deadline?

- ❖ None set
- ❖ Presumably after development of Medicare guidance
- ❖ Must meet Medicare compliance reqs

The Red-Headed Step Child



The Red-Headed Step Child



Nursing Facility

**What Do I Have
to Do?**

Nursing Facility

When Do I Have to Do It?



March 23

2012 Guidance due

2013 Compliance date



Nursing Facility

Size Matters



Practical Considerations

- ❖ Creating one / Timing
- ❖ Updating – esp. in light of focus on governing body responsibility
- ❖ Auditing for effectiveness
- ❖ Compliance officer education
- ❖ Level of detail



Reference Material

- ❖ **Health Reform Summary**
- ❖ **NF Compliance Guidance**
 - Supplemental (2008)
 - Original (2000)
- ❖ **Fraud Alerts**
 - NF – Hospice
 - NF Services
 - NF Supplies



Overpayments



Overpayment - Basics

- ❖ New law
 - Part of Health Reform (PPACA)
- ❖ In effect NOW
- ❖ Will require you to significantly modify your current practices



Overpayments

- ❖ **What is an “overpayment”?**
 - Any funds that a person receives or retains under Medicare or Medicaid to which the entity is not entitled, after applicable reconciliation



Overpayments

- ❖ **What to do with overpayments?**
 - If a person has received an overpayment, then they must:
 - ✓ Report & return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate; and
 - ✓ Notify the entity to which the overpayment was returned in writing of the reason for the overpayment



Overpayments

❖ What is the deadline?

- An overpayment must be reported and returned by the later of:
 - ✓ 60 days after the date it was identified; or
 - ✓ The date that a cost report is due, if applicable



Overpayments

❖ What if you fail to report / return an overpayment?

- Constitutes a "false claim"
- Penalties of triple the overpayment, plus penalties



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Unanswered Questions

- ❖ What does “applicable reconciliation” mean in the definition of “overpayment”?
- ❖ In what form should the “report” be made to the Secretary, state, etc.?
- ❖ To whose attention should the report be made?
- ❖ How much detail needs to be provided for the “reason for the overpayment”?



Unanswered Questions

- ❖ When is an overpayment “identified”?
 - When someone reports a suspicion?
 - When you receive a report from a government auditor?
 - When you receive a report from a hired consultant?
- ❖ And, is 60 days enough time to dot all “i’s” and cross all “t’s”?



Reality Check

- ❖ The law is in effect NOW
- ❖ BUT, there is no guidance
- ❖ So, this really puts providers in a bind, right?
- ❖ Not necessarily
 - For now, the lack of guidance can be an opportunity



Practical Considerations

❖ Overpayment policies

- Defining “undefined” terms
- Design of consistent process



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Objectives

- ❖ Discuss how the health care reform act has now mandated NFs to establish corporate compliance programs
- ❖ Identify new rules related to compliance programs and overpayments
- ❖ Discuss how the new rules will affect the scope and structure of your internal auditing process
- ❖ Describe the components needed to develop, evaluate & revise your program