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# THE ADVISOR

ELDER LAW & LONG TERM CARE

## New California Employment Laws for 2013



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Following are new or amended California employment laws likely to be of interest to you as we head into 2013. Employers should review Employee Handbooks and Policies and Procedures manuals to assure your policies are consistent with these changes.

### NEW RESTRICTIONS REGARDING REQUESTS FOR SOCIAL MEDIA ACCESS (AB 1844)

Beginning January 1, 2013, employers in California will be prohibited from requesting user names and passwords for social media sites from their employees or job applicants. Employers cannot circumvent the law by requesting that employees or applicants access social media sites in the employer's presence. Requests that em-

ployees divulge any personal social media are also prohibited which presumably encompasses requests regarding the social media content of co-workers or other "friends" on social media. Social media is broadly defined as "videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, on line services or accounts, or Internet web site profiles or locations." The law specifically prohibits any form of retaliation against an employee who refuses an employer's unlawful social media request.

Employers may continue to request that employees divulge personal social media reasonably believed to be relevant to an investigation of employee misconduct or a violation of the law as long as the information disclosed is not used for any purpose other than the investigation or a related proceeding.

Interestingly, complaints of violations are to be made to the Division of Labor Standards Enforcement, however, the Labor Commissioner is not required to investigate complaints. Further, the law fails to spell out the penalties that would or could be imposed for a violation.

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**COVER STORY****2013 Employment Laws***Continued from page 1***CLARIFICATION OF EMPLOYEE'S RIGHTS TO INSPECT PERSONNEL FILES (AB 2674)**

This law amends current Labor Code § 1198.5 to require employers to provide a current or former employee, or his or her representative, an opportunity to inspect and receive a copy of the employee's personnel file within 30 days of a written request, except during the pendency of a lawsuit filed by the employee or former employer relating to a personnel matter. The law requires that employers develop and provide a written form that employees may use to request access to and a copy of their personnel files. If the employer fails to provide inspection or copying of the requested records within the required time, the employee may recover a \$750.00 penalty. The employee may also obtain injunctive relief, costs and attorneys fees. An employer is not required to comply with more than 50 such requests made by its employees in one calendar month.

The law additionally amends Labor Code § 226 which requires that employers maintain copies of wage statements for three years and produce them upon request. AB 2674 defines a "copy" of a wage statement as a duplicate of the itemized statement provided to an employee or a computer-generated record that accurately shows all of the information that existing law requires to be included in the itemized statement.

**DISCRIMINATION AGAINST BREAST-FEEDING MOTHERS PROHIBITED (AB 2386)**

Under the California Fair Employment and Housing Act, it is unlawful to engage

in specified discriminatory practices in employment or housing accommodations on the basis of sex. Under existing law, "sex," has been defined as including gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. That definition is now expanded to include breast-feeding or medical conditions related to breast-feeding.

The legislature has specifically stated this bill is declaratory of existing law making it currently in effect.

**EXPANDING RELIGIOUS ACCOMMODATIONS REQUIREMENTS (AB 1964)**

The California Fair Employment and Housing Act also protects the right of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of an individual's religion. Specifically, an employer or other covered entity is required to reasonably accommodate the religious belief or observance of an individual unless the accommodation would be an undue hardship on the conduct of the business of the employer or other entity.

This law specifically adds "religious dress practices" and "religious grooming practices" as beliefs or observances covered by the protections against religious discrimination, and would specify that an accommodation of an individual's religious dress practice or religious grooming practice that would require that person to be segregated from the public or other employees is not a reasonable accommodation. Religious clothing should be broadly construed to include "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her creed." Religious grooming practice is to be similarly broadly construed to include "all forms of head, facial, and body hair that are part of

the observance by an individual of his or her religious creed."

**NON-EXEMPT SALARIED EMPLOYEES MUST RECEIVE OVERTIME (AB 2103)**

With AB 2103 the legislature has clarified that regardless of any agreement between an employee and an employer, a salaried, non-exempt employee must be paid for each overtime hour worked at a rate that is at least 1.5 times the weekly salary divided by no more than 40. When such employees work more than eight hours in one day or 40 hours in one week, they are entitled to overtime.

Last year in *Arechiga v. Dolores Press, Inc.*, 192 Cal. App. 4th 567 (2011), a California court of appeal upheld an explicit written mutual wage agreement that predetermined a nonexempt employee's overtime compensation and included it as part of the employee's salary. The *Arechiga* court concluded that Labor Code § 515 did not specifically invalidate such agreements. This new law overrules the decision in *Arechiga*. To calculate the appropriate overtime rate, employers must follow Labor Code § 515(d), which states that, "[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary." 

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## OPINION

# Cutting Out the Middle Man



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According to the 2012 Long Term Care Actuarial Analysis published by AON, litigation costs every facility on average more than \$225,000 every year. You know litigation is but a knock on your door away. You can feel its breath on your neck. So, for this moment let's presume you won't beat the odds and that a lawsuit will inevitably darken your doorstep. Is there a proactive way to lessen this financial load? As a trial attorney I am up for any fight in the courtroom you may choose to take on, but what about other options? Here's one approach that I believe should be considered.

## Save By Eliminating Unnecessary Attorneys Fees

No, I'm not talking about hiring cut-rate defense attorneys or handcuffing defense attorneys with rules that prevent them from effectively establishing your defense. These are old school strategies that experience has taught us can cause bigger problems down the road. So how do you cut attorney fees without cutting the

quality of your defense? **By cutting the plaintiff attorney out of the picture.** You see, in long term care litigation the defendant facility ultimately pays the expense

**P**laintiff attorneys work for a *percent* of any monetary resolution, regardless of how much work they do or don't do.

Defense attorneys charge only for the time they actually spend working for you.

of both sets of attorneys, those representing the facility and their opposition. Avoid the involvement of a plaintiff attorney and you avoid the inflated expense that naturally follows. Consider this.

## Establishing an Ethical and Responsible Plan for Patient Disclosure

Many plaintiffs say they only initiated litigation because they felt they had to. So, stopping litigation after an adverse event has occurred requires that your team secures patient and family confidence that you will do the right thing. I'm not talking about a façade or a well-intentioned but ill

planned and poorly executed effort. I'm talking about a proactive plan designed as a preemptive strike against litigation.

Here's an outline of key points any plan should explore.

**POINT 1** Remember that you aren't a trained negotiator and that having an attorney advising you is important. But not every attorney is trained for this specialized task. Consider first the responsiveness of your attorney. You run a 24/7 operation therefore you don't have the luxury of utilizing an attorney who works bankers hours or is just too busy to quickly return your call. When emergencies arise, you need help now. Next, you want an attorney that can effectively and efficiently investigate possible liability and build on your positive relationship with your resident's family. The ability to build the family's mutual confidence in the process is essential. This requires heightened sensitivity, knowledge, and ethics.

**POINT 2** "Transparency" is more than just a word. We can either fight it or embrace it. To embrace it means that responsible parties are best informed about known facts surrounding an adverse event as soon as reasonably possible. The appropriate disclosure of information however is a learned skill. You cannot wing it.

**POINT 3** Disclosure means appropriately informing responsible parties about known facts. It does not

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# OUR PEOPLE MAKE THE DIFFERENCE



## Volunteerism Makes the Difference



**Yolanda Hernandez**  
LEGAL ASSISTANT

Volunteers provide the backbone for many non-profit organizations throughout the country. In many cases, volunteers are crucial to the day to day operations of organizations and give of their time selflessly. Yolanda Hernandez, a Legal Assistant in our office, is one of these tireless volunteers.

Yolanda has volunteered at the Orange County Rescue Mission since 2011. She and her 13 year-old daughter, Adrianna, started on Saturdays packing food boxes and working in the kitchen preparing meals for the families. It soon turned into every Tuesday night in the Children's De-

velopment Center (CDC), and then into volunteering at the House of Hope where she brings dessert, plays games and does crafts with the children.

Yolanda says that what drives her to volunteer at the Mission is "When you volunteer, you make a difference. You change lives. You give hope. I see the need and I recognize it is my responsibility to help. I believe the world can change with simple acts of kindness". There are experiences that stand out in her mind such as "the hug of a child who appreciates you being there and the thank you from the homeless person you gave a meal to".

This year Adrianna started Love to Others, which is her private mission to feed the homeless. She makes lunches and takes them to parks in Los Angeles and Orange County. They started off making 20 lunches and they are now making 75 lunches.

We are proud of Yolanda's dedication to making the world a better place and are privileged to have her on the W&A team.

For more information on the Orange County Rescue Mission visit:  
[www.rescuemission.org](http://www.rescuemission.org)

### Positive Changes

The volunteer rate rose by 0.5 percentage point to 26.8 percent for the year ending in September 2011, the U.S. Bureau of Labor Statistics reported.

About 64.3 million people volunteered through or for an organization at least once between September 2010 and September 2011. The increase in the volunteer rate in 2011 followed a decline of equal size in 2010.

United States Department of Labor, Bureau of Labor Statistics for 2011.

## LEGAL UPDATE

### Surveillance of Residents



**Ryan Anderson**  
ASSOCIATE ATTORNEY

A burgeoning area in the long term care industry is the surveillance of residents within Residential Care Facilities for the Elderly and Skilled Nursing Facilities. Facilities place cameras in the hallways, patios, and other common areas, and it has become more prevalent for family members to place hidden cameras in their loved one's bedroom.

In what appears to be an attempt to discourage these hidden cameras and to protect the residents within long term care facilities, many states have or are attempting to implement legislation to allow for video surveillance cameras to be placed in a resident's bedroom.

In California, Senator Tom Harman introduced Senate Bill 1400 earlier this year.

(continued on page 6)

## LEADERSHIP INSIGHT

# Risky Business: Apologies

By Marilynn Allemann, L.C.S.W



Apologizing is something that all of us struggle with. We see this frequently with public figures, in the corporate world, in our own workplace and personal lives. We are all prone to making errors and sometimes behaving badly. Unfortunately, often the tendency is to try to justify our actions or to lay blame on others or circumstances.

Failure to apologize does not help the problem, it creates the potential that the offended party or parties become even more hurt, angry or frustrated. Apologizing is an important way of showing empathy and respect for the wronged person. It has the effect of disarming others of their hurt, frustration, and anger, and can prevent further misunderstandings. So why aren't we comfortable with apologizing more often? The risks we may be concerned about include, if we apologize, we may lose credibility, be embarrassed, feel humiliated, lose face, jeopardize our job or possibly, be sued. So, it may somehow feel safer to point the finger away from ourselves and toward something or someone else.

Studies have shown that after a problem has occurred, the individual, client, patient or family members have three primary interests: 1) to learn what happened; 2) receive an apology, or at least an acknowledgement from the offender; and 3) to learn that steps are being taken to reduce the likelihood that the problem will reoccur. Regardless of who it involves, a client's family member, the client, a coworker, your boss or within your own

family, the purpose of apology is to repair the relationship.

According to Beverly Engel, in her article entitled "The Power of Apology," there is a connection between apology and empathy. Most people need to gain some empathy and compassion for the wrongdoer in order to forgive. When someone apologizes, it is much easier to view that person in a compassionate way. This occurs because when someone expresses regret and acknowledges responsibility for their actions, we then develop a different image or view of that person or company. We see them not through anger or bitterness, but as fallible and vulnerable. Of course, the apology must be genuine. If your apology reads like corporate legalese, it certainly will not be effective. Ineffective apologies are those that are forced, said reluctantly and insincerely. Automatic or hasty apologies tend to be empty and insincere. Excuse laden apologies are not apologies at all.

There are three components of effective apologies. The first being a statement of regret for what happened. There must be a genuine expression of regret which indicates that you are empathizing with the party or parties hurt. This will reflect that you truly know how they feel. For example, regret for not performing up to expected standards and acknowledgement of the intent not to make the same error in the future. The second component of an effective apology is acknowledging responsibility for your actions, an act that if otherwise left unaddressed, might compromise the future relationship. The third component is remedy, such as, instituting

a procedure to lower the risks of future incidents, reeducating staff members or participating in a remedial development course.

The potential outcomes of an effective apology includes removal of the insult from the injured, restoration of respect and dignity, decreased anger, furthering the potential for reconciliation and diminishes antagonistic behavior. The best and most effective way to deliver your apology is face-to-face. The receiver will be able to assess the sincerity of your expressions and body language. And, for obvious reasons, the least effective way to express your apology is by email.

It is apparent that, the benefits of apologizing outweigh the risks. Apologies benefit not only the receiver but the giver as well. By taking responsibility for our actions or the situation, we ultimately have a greater sense of confidence, self esteem, less guilt and self-reproach, a stronger sense of personal and professional integrity, and, from a business standpoint, greater credibility. Sincere apologies are effective and in most cases have a positive outcome, reducing potential risk factors. By delivering genuine apologies integrating the three basic components mentioned above and delivering them with true sincerity and humility we are much more likely to mend any ruptures that have been created in our relationships and begin to rebuild trust. 

Additional information can be found on Marilynn Allemann's website, [www.MWAExecCoach.com](http://www.MWAExecCoach.com).

Please contact Marilynn Allemann directly at [mwallemann@hotmail.com](mailto:mwallemann@hotmail.com) with any questions.

*"A stiff apology is a second insult. The injured party does not want to be compensated because he has been wronged; he wants to be healed because he has been hurt."* - G.K. Chesterton

## OPINION

### Middle Man

*Continued from page 3*

mean speculating as to cause or prematurely accepting responsibility for unexpected outcomes. Disclosure is a process, not an event. It includes:

- Initial and timely report of known facts to responsible parties;
- Schedule a reasonable time to meet with the responsible party in follow-up;
- Conduct an appropriate and thorough investigation;
- When an investigation results in a determination that harm was caused by negligent caregiver acts, assess monetary value and determine a reasonable financial compromise;
- Meet with the responsible party to report on the factual findings of your investigation. Consider apologizing if an apology is called for (see Marilyn Allemann's article on effective apologies). Be prepared to discuss corrective actions being undertaken to prevent future events. If warranted, be prepared to offer financial compensation to stop litigation before it starts.

While these steps are straight forward, they are not simple. It's critical to remember:

- Your facility team members are trained as care providers. They are not lawyers;
- Determining a case of legal responsibility is a far different task than what's undertaken in a quality improvement investigation;
- Approach disclosure in the wrong way and you risk backfire and the in-

currence of additional financial burden.

While I enjoy a good attorney joke as much as the next guy the fact is, attorneys have specialized education and skills that when used ethically can actually accomplish a fair and rational result for all. The problem with plaintiff attorneys is that they always want a percent of any monetary resolution, regardless of how much work they do or don't do. To the contrary, defense attorneys charge for the time they actually spend working for you. Therefore, a plain-

Once a plaintiff attorney becomes involved in a case the litigation cost increases **minimally by 40%**. This represents the plaintiff attorney's cut taken on any monetary resolution. In a \$225,000 settlement this is **\$90,000**. Now add expenses and the plaintiff attorneys' take climbs to well over **\$100,000**.

tiff attorney will take the same \$90,000+ in a case that settles for \$225,000 regardless of whether it resolved early or on the steps of trial. Only the defense attorney can step in early at a limited and reasonable cost to navigate a fair result. What will it cost to bring in a defense attorney for early assistance? Generally less than the cost associated with the initial legal work required to respond to a lawsuit, a small fraction of the cost that will be added if a plaintiff at-

torney enters the scene. Now add the savings from the wear and tear caused by an additional year or two of litigation and this investment could be the bargain of a lifetime. 

## LEGAL UPDATE

### Surveillance

*Continued from page 4*

This bill would authorize a Residential Care Facility for the elderly to use video surveillance in a resident's bedroom if the facility and the resident or the resident's authorized representative consented. This would include:

- The recordings becoming part of the resident's medical record; and
- Written and informed consent being obtained from any individual entering the resident's bedroom.

Senate Bill 1400 was introduced earlier this year and was referred to the Committee on Human Services and the Committee on the Judiciary. While the 2011-2012 Legislative Calendar ended on August 31 without the passing of Senate Bill 1400, it is important to keep in mind when dealing with family members who request their loved one's room be recorded. The proposed bill can be used as a guide for long term care facilities in implementing a program for video surveillance when necessary.

Also, this is not an area of long term care that is likely to disappear anytime soon. So while Senate Bill 1400 was not passed in California during the most recent legislative session, the issue raised is likely to appear again in the future. 

# OUR EXPERIENCE MAKES THE DIFFERENCE

## SPOTLIGHT ON RISK MANAGEMENT



**Regina Casey** • SHAREHOLDER  
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With over 26 years of experience defending the healthcare professional, Regina Casey brings a unique blend of legal and nursing skills to her work as a defense advocate.

Regina's expertise enables her to assist care providers in avoiding litigation through pro-active risk management, including the investigation of sentinel

events, educating staff on best practices, and early intervention to resolve problems when patient complaints or operational issues arise. Regina's experience also encompasses specialty training as a mediation expert through Pepperdine University. In her career, she has settled hundreds of cases through the mediation process or direct negotiations. 

## In the Eye of the Storm By Kimberli Poppe-Smart

**Kimberli Poppe-Smart** • ASSOCIATE ATTORNEY



Wroten & Associates welcomes back attorney, nurse and risk manager Kim Poppe-Smart who is returning to the practice of law after serving as *Deputy Commissioner with the Department of Health and Social Services* in Alaska. Through the next year we will continue our focus on risk management as we welcome Kim's insight from the perspective of our government officials.

scape of Medicaid and Medicare, quality initiatives, managed care agreements, evolving evidence-based practices and the unexpected critical incident and your storm is now a Category I.

Risk management strategies aid you in managing the storm and avoiding potentially disastrous results. Recognizing that each and every day that you and your staff come to work you set out to deliver A+ care but the forces around you derail those good intentions, it is essential that your tool kit contains relevant and effective risk management strategies.

In the coming months our newsletter will bring to you up-to-date information on risk management. Planned topics include: implications of the Office of Inspector General's 2012 work plan for long term care providers; Center for Medicare & Medicaid's Hand in Hand training and what it means for you; and an examination of psychotropic use in Skilled Nursing Facilities. These articles will bring to you a discussion of the issues and recommended strategies to address them within your facilities. 

Sheets of water wash the hotel windows as raindrops relentlessly pelt the glass. Trees distort into unnatural shapes as the punishing winds of hurricane Sandy build into a rage. This usually bustling Washington, D.C. suburban city is now a ghost town with public transportation, schools, federal offices, day cares, and various businesses closed, in an effort to keep residents safe in their homes and out of the eye of the storm.

Inside the hotel, Kimberli Poppe-Smart is attending a bi-annual conference of state and federal leaders, vendors, consultants and media. Spirited discussion inside distracts the attendees from the storm mounting just outside the glass barriers. Uncertainty surrounding the impending Presidential and state elections outcomes, talk of a lame duck session focused on budget deals and dozens of impending due

dates related to the Affordable Care Act, including Medicaid expansion and the health insurance exchange is, for many of these leaders, more unsettling than Sandy's forceful presence.

The "perfect storm" brewing, both inside and outside the hotel, is temporary. Sandy will die down and normalcy will be restored in the business districts. The nation will transition into the next four years of a new or the same presence in the White House and state legislatures and Governors' offices will go about their days addressing the needs of their constituents.

In your facilities, the "perfect storm" brews daily. The impacts of changing needs of residents, family requests, surveyor and ombudsmen visits and financial realities are significant. Now, add to those the ever-changing reimbursement land-

# SAVE THE DATE • MAY 30, 2013



## 5th Annual Wroten & Associates' Long Term Healthcare Conference

Thursday, May 30, 2013  
at Disney's Grand Californian Resort  
in Anaheim, California.

Continuing Education Units (CEU) Offered.

This educational conference is offered at no charge.

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