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CLIENT ALERT

JUSTICE DEPARTMENT SETTLEMENT OFFERS PRACTICAL GUIDANCE TO SENIOR LIVING PROVIDERS ON CREATING RESIDENT POLICIES COMPLIANT WITH FAIR HOUSING ACT

The terms of a settlement reached by the United States Department of Justice (the “Justice Department”) with a Virginia continuing care retirement community (“CCRC”) this month offer valuable guidance to senior living providers and providers of housing to individuals with disabilities about how to balance medical and practical concerns with the mandates of the Fair Housing Act. The takeaway lessons may also assist in assuring compliance with the Americans with Disabilities Act.

The Justice Department alleged that the CCRC discriminated against existing and prospective disabled residents with policies:

- (1) prohibiting and limiting health care building (assisted living) residents from eating in the Independent Living (“IL”) dining rooms;
- (2) prohibiting and limiting health care building residents from attending IL events, including marketing events; and
- (3) requiring residents using a motorized mobility aid to obtain permission, pay a \$300 non-refundable deposit, and purchase liability insurance.

In addition to paying \$350,000 to residents who claimed discrimination (and another \$40,000 civil penalty), the CCRC agreed to implement a number of policy changes regarding dining room access, participation in IL activities, and use of motorized wheelchairs, and also to provide staff training regarding these changes.

Because these policies now bear the imprimatur of the Justice Department, they offer useful guidance to providers wrestling with balancing the rights of disabled residents and their visitors, with countervailing operational, medical and other considerations. Here are a few sample provisions:

- ___ Residents may not be required to prove their need for a motorized wheelchair. However, an assessment by therapy staff may be required in response to safety

incidents or the presence of a “medical condition that would reasonably be expected to interfere with the resident’s ability to operate” the device safely.

__ Recognizing that dining rooms are an “unregulated” area lacking the staffing and monitoring provided elsewhere, restrictions on the use of motorized wheelchairs may be imposed to balance the interests of all residents.

__ Dining room dress code and reservation policies are permissible for residents and for aides assisting them in the dining room.

__ An "Against Medical Advice" form which includes a Liability Release can be required as a condition of a resident eating in the IL dining room or attending events against medical advice.

__ A Level of Care Committee and Fair Housing Act Compliance Officer at the CCRC will review requests for reasonable accommodation (including exceptions to policies).

The Norfolk case included allegations that residents who complained about the policies were subjected to “retaliation.” While it is unclear if those claims were substantiated, they point to the critical importance of obtaining legal advice in this developing area of the law.

When a concern or question is raised, it is wise to have the challenged policy reviewed for legal compliance. Better still, in light of the new Justice Department guidance, **providers might consider a proactive review of their policies.** Difficult issues can arise where housing is shared by individuals with a broad range of interests, conditions and medical needs.

If you have questions or would like assistance with a review of your policies, staff training, or posting requirements, please contact Attorneys Paul Holtzman (pholtzman@kb-law.com) or Jennifer Gallop (jgallop@kb-law.com).