

# Risk Insights: Senior Living & LTC

## Episode 14

### Understanding the evolving employment legal landscape

Welcome to the *Risk Insights: Senior Living & LTC* podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Tara, a former litigator and in-house attorney, speaks with industry experts about a variety of challenges and emerging risks facing the industry.

#### Tara Clayton:

Hello, and welcome to *Risk Insights: Senior Living and Long-Term Care*. I'm your host, Tara Clayton, and in today's episode, I'm joined by an industry expert to discuss the current employment landscape impacting senior living and long-term care providers, as well as some mitigation tips for those areas of high exposure. So I'm going to jump right in and introduce my guest. It's Caroline Berdzik. She's a partner with the law firm of Goldberg Segalla. Caroline, thank you so much for joining us today.

#### Caroline Berdzik:

Thank you for having me, Tara.

#### Tara Clayton:

Caroline, I could spend this whole podcast, if probably not two podcast episodes, going through the leadership roles and all of your background and experience, not just in senior living and employment law, but you've done a number of, of amazing things, including chairing several practice groups. But can you take just a couple

of minutes and talk to our audience a little bit about your background and your expertise?

#### Caroline Berdzik:

Sure. I've been practicing employment law for close to 25 years now. I have experience both as a defense attorney, and I also was in-house counsel for a large long-term care company that had assisted living facilities, skilled nursing facilities, hospice, home care, and long-term care pharmacy.

And in my role as an assistant general counsel, I also handled day-to-day issues and challenges in the industry. So that expanded, my legal acumen in terms of going beyond employment issues. But the thing about long-term care is it's really all about the employees. They're really what make or break a facility. So the area of employment law's very important for all long-term care facilities to understand and appreciate. And as these risks evolve, it becomes even more important for them to understand what the impact is for the workforce, but more importantly, the potential impact on the residents.

I also am on the Federation of Defense & Corporate Counsel. I'm on the board of that organization, which is both an industry and defense council organization. And I also sit on my firm's management committee. So I handle the day-to-day issues that most business owners deal with. So I think I have a unique perspective, particularly on the employment issue aspect of things.

#### Tara Clayton:

Yeah. And you really do have a unique perspective, Caroline, and I think your point about the importance of employees and associates, you know, really, they're what drive ultimately what, what we're here to do, which is the quality of life and high quality services for our residents.

Looking at different cases that I've seen, I have the sense that legal obligations in the employment landscape have become a little more onerous than maybe we've seen, in some recent years. But I'm kind of curious, maybe, we'll start on the federal side, Caroline. But what are you kind of seeing from that trend when it comes to employment law?

## Caroline Berdzik:

Oh, where do we even start? To say that it's been a very rough few years for employers, I think would be an understatement. As employment law practitioners, we knew that it would be more difficult, particularly at the federal agency level. But honestly, I think it's even been a little bit worse than we anticipated. So employers are having to deal with whatever is coming at them from the federal agencies, and I want to explain a little bit. The Biden administration really changed its focus that impacted a variety of the agencies, which now has trickled down to employers and the obligations they have to abide by.

So there were a lot of memorandums of understanding that these federal agencies have entered into, which is somewhat of a new phenomenon. So in short, what that means is that these agencies are information sharing with each other, and they've agreed to enhance their coordinated efforts, both in investigations and enforcement.

So this allows, say, the Department of Labor to refer a complaint over to another federal agency. It also allows these agencies to advise employees that come to them, you know, "Hey, you may want to go to this other agency and file a charge of discrimination, or look into issues that the Department of Labor handles."

Another example for instance, if you have an NLRB investigator, and NLRB is the National Labor Relations Board, which we'll be speaking about quite a bit. If that person suspects that an employer may have violated a Department of Labor regulation, for example, if there is a memorandum of understanding in place, that investigator can then tell the employee, "Hey, we think you should go to the Department of Labor."

We've never really seen such coordination at a high level. And this has made it very difficult for employers because now, it's not uncommon to see an employee or a plaintiff that presents with issues that cross a multitude of agencies.

So you may be dealing with the Department of Labor complaints as well as an NLRB charge. Or you may have an EEOC charge and an NLRB charge that also has to be dealt with, and it's called "the whole government approach," that is what President Biden has termed it. And we have agencies now involved in employment issues that we never had involved in

employment issues. And I'll mention the Federal Trade Commission, for example.

There were a lot of headlines earlier this year about non-compete agreements and how the FTC is trying to put their thumb on the scale of an area that, you know, employment law practitioners, at least on the defense side, we were scratching our heads. And so this is just some of, of what we're seeing. And I think it all trickles down to the appointments that were made at the agency levels.

So most presidents, when they come in, they clear the decks a little bit. I would say President Biden cleared the decks a lot a bit. And so your appointments to the NLRB, if you look at the background of these folks, Gwynne Wilcox, David Prouty, they both came to the NLRB after having served as council to unions for many, many years.

And then the general counsel of the NLRB, she's an NLRB career attorney, and she had most recently served as the GC for the Communication Workers of America. So when you have those types of folks in those types of positions, you can only imagine what that means. But this administration, I think, has made no secret of the fact, particularly on the union side of things, where it would be headed. Two days after he was sworn in, the president issued an executive order that said that it was the policy of the US to encourage union organizing and collective bargaining. So really, the path was clearly laid out. And I think the decisions that have come down from the NLRB, illustrate that and some of the other agencies as well.

## Tara Clayton:

And I want to talk, Caroline, about some of the final rules that we've seen come out from some of those agencies here in just a second. But on your note about the administration's pathway, and really messaging that they're sending through the appointments, like you mentioned, I remember seeing a lot in the news about, just increase in staff, you know, at the EEOC level as well as some of the other agency bodies.

And I'm curious, you know, from that perspective, you've talked about new areas and new agencies kind of getting into the employment landscape, but looking at like the EEOC — who we're used to dealing with in the employment context — are you seeing any upticks in EEOC complaints, any areas that seem to, especially in

the senior living and long-term care space frequency from that standpoint, that would be helpful for our audience to know?

### Caroline Berdzik:

So you raise an excellent point. The funding had been so depleted to an agency like the EEOC that five years ago, we really did not see much activity coming out of that agency. Now it has been funded. It has been funded plenty. So we're seeing a lot of action by the EEOC in terms of the number of charges, which I'll break down for you, and also the active role the EEOC is now taking in litigation because every year, the EEOC and their general counsel decide what lawsuits they're going to bring on behalf of the agency. And we've seen a definite increase over the last two years.

So pretty soon, we'll have the data from fiscal year 2023. That should be released in March. So I could talk about the data from fiscal year 2022. The EEOC proudly releases its metrics every year, so when it comes out, I encourage the listeners to take a look at it.

The number of charges it received between '21 and '22 was up 20%, which is not a small increase. The EEOC touts how much money they have obtained and monetary benefits for victims of discrimination. So it was \$513 million in fiscal year 2022, which was up from \$484 million.

So how do they obtain these monetary benefits? This comes by way of mediation, settlements, and different litigation resolution, so when the EEOC takes on litigation, for example. And when I talked about the increase of lawsuits, so in 2022, they filed 91 lawsuits. It's actually down a little bit from the previous fiscal year in '21 of 116. But you also talked about the increased workforce there.

They had a \$15 million budget increase (laughs) between fiscal year 2021 and '22. And what that allowed the EEOC to do, they had a tremendous amount of, of vacancies. So they filled 500 staff vacancies during that time, but then also added 352 new positions. So it just kept growing. President Biden has pledged to provide even more funding to the EEOC.

So the EEOC has always, as I would say, had a soft spot for the long-term care community. I think, generally, these types of facilities are more prone to EEOC charges. By the nature of the workforce, you

have a lot of turnover in the industry. It's a very difficult job that folks do. So I think you have more unhappy employees. So that's the perfect recipe, I think, for increased charges.

This is something that these agencies do. They publicize when they sue a company or a long-term care facility. They will publicize what monetary relief they receive. You know, in addition to the monetary relief, and I think listeners need to understand this, when a matter is settled with the EEOC, either through a conciliation process or through a mediation, or even at the litigation phase, the monetary settlement is only a small part of it.

A lot of times, there are onerous, non-monetary components to a settlement or to a mediation or to a conciliation outcome that really can sort of be deal breakers, particularly in an industry like ours because it may go to training aspects, training of residents or training of staff that may potentially conflict with obligations that providers have under CMS regulations. EEOC is not familiar necessarily with those regulations. And, sometimes, they intersect.

We are seeing more claims, I would say, in the racial and National Origin Discrimination realm coming out of the EEOC. There was a press release about a lawsuit that they filed against a facility in Florida actually. It was someone of Haitian national origin who applied for an open nursing home administrator position, apparently met with the owner, and it's alleged that the owner made some statements that were discriminatory.

That's an example of one. Another example we see on the increase is disability discrimination and failure to accommodate. And let's face it, some of the jobs in these facilities are very dependent on being physically agile. There's lifting involved, particularly with CNAs, and you may have CNAs too that become pregnant, for example, and may have lifting restrictions as a result of that.

That's a common issue that I encounter when I'm counseling clients that are going through that interactive process with employees. The disability discrimination and failure to accommodate claims, sometimes, also have overlap with the FMLA, if there is leave time that becomes part of it. And that involves the Department of Labor.

So another case that we've seen is sex discrimination. Whether it's, you know, based on pregnancy or whether it's based on sexual harassment. We're also seeing more transgender and those types of claims and people, you know, pursuing those types of allegations.

Sexual orientation is also an area, I think, the EEOC has been focused on. So I think that's just a, a small sample. But something to keep in mind is these cases also do not necessarily settle or resolve for little amount of money. The EEOC publicizes these settlements. There was an Illinois nursing home owner who was ordered to pay \$400,000 in a pregnancy discrimination case. These numbers are unfortunately not uncommon.

So litigation is expensive, particularly employment litigation. The EEOC also has a work plan, like most federal agencies do, and that provides practitioners like myself with an idea of where the EEOC is focusing its enforcement efforts on because as you mentioned, Tara, even though they are very well funded now, they still have somewhat limited resources.

So the EEOC is very much focused on systemic discrimination, which means it involves more than one person. So if there's a policy that impacts a class of people, for example, that may be something that draws their interest, you know. If there's a group of pregnant employees that have routinely lost their jobs after they've asked for accommodations regarding lifting, that may be something that strikes the interest, or sometimes, the EEOC focuses on a subset of discrimination that they try to seek out charges that have those allegations.

### **Tara Clayton:**

Caroline, knowing that these employment, both the litigation as well as just investigating charges and responding have pretty expensive consequences, you've highlighted really several areas that providers should be looking at making sure that their policies and practices are on par and up to speed with current regulations and laws. Generally speaking, each provider is going to have tailored counseling and guidance, but just kind of big picture, you know, tips that you're working with clients knowing here's the focus and frequency of charges that we're seeing, some tips for listeners to be thinking about.

### **Caroline Berdzik:**

Sure. First and foremost, make sure your EPL coverage is up-to-date and in place, because it's not a question of "if," it's a question of "when" you'll see one of these charges or lawsuits come across your desk.

I think some of the most important risk management tools that employers could use is making sure you're doing adequate training of your staff. That not only includes staff that you directly employ, but also staff that is provided to you through agencies. It's very important that everyone working in the buildings understands the non-discrimination policy, the EO policy, sexual harassment policy, how to report alleged violations of those policies, understanding how that all works. Additionally, having robust reporting mechanisms and encouraging employees if they see something, to say something. A lot of providers would always say, "Oh, talk to the administrator," or, you know, "Take it to the payroll person."

But a lot of providers also have outside hotlines that function more like compliance hotlines. But when I sat in the seat of an assistant general counsel, a lot of times folks would call with employment issues to those compliance hotlines. So it's important that who's ever reviewing compliance hotline complaints is not only paying attention to what may be brought up in terms of residents, but also paying attention to what employees may be bringing through that outlet.

Having open door policies is extremely important. Also, getting feedback from the staff in terms of the working environment and the workplace culture. I would say in the last year, I've had the most requests that I've had in my career to go in and do interviews of employees to get a feel for the workplace culture. It could be because a complaint was brought to an administrator or to someone at the facility where someone tosses around the term, "Hey, I feel like I'm being treated differently."

Whether they mention a protected category or not, you know, a proactive employer is very well served in having someone dig into that a little bit further. And it's usually good if you have someone who's not affiliated with the facility. Could be an attorney. Could be someone who just works in the HR world and develops a rapport with employees and gets feedback. Employees feel valued and heard that way.

And even if it turns out that it's not actionable discrimination or harassment, for example, but it may just be a personality dispute. It's important for employers to keep on top of those things because you can raise issues from employees, and it could then just spiral in a direction you don't want it to. I think also, and I'm not saying this because I'm an outside attorney that does this, having a trusted employment attorney that you could call upon as those day-to-day issues arise, whether it's just to get feedback or, "Hey, how should we look at this scenario," the employment law world is becoming increasingly complex.

I surely don't know all of it, and this is what I do day in and day out. And certainly, we cannot expect our administrators, our directors of nursing, or even our payroll HR clerks to understand all of the nuances. So if there's a situation that comes up, having the ability to pick up the phone and talk it through with someone and try to manage it so you don't have an issue down the line. It may not prevent a lawsuit, but at least it's going to be well documented, and it's going to show that there was a thoughtful process to whatever decision was made.

### **Tara Clayton:**

Caroline, you mentioned all the new changes in employment law and really the importance of having that connection with an expert in this space, I think, very important. We briefly mentioned earlier, and I want to dig in a little bit on this, some new rules that have come out.

One, the NLRB released their final rule on classification of joint employer, that I think is impactful and providers need to know how that could impact them, as well as the Department of Labor's release of their final rule on independent contractor.

Treating them together, we can split them up if you want, Caroline, but knowing listeners are in the senior living/long-term care space, why are those two rules, you know, why are those flags that they need to understand and start working with their trusted advisor on understanding the potential impact there?

### **Caroline Berdzik:**

Sure. Well, in terms of the joint employer rule, the NLRB expanded this definition, which it basically would result in a shared obligation to bargain with unions representing jointly employed workers and a shared

obligation to recognize a union that's newly certified at one of the employers.

And the issue when you have a joint employer relationship is that you're subject to joint and several liability for unfair labor practices committed by one of those employers. And what we've seen, particularly through the pandemic, and now post-pandemic, is there's a significant staffing shortage in the long-term care world.

So that has meant a heavy reliance on agency staff. And I think, unfortunately, many operators have operated under the assumption that, "Not my problem, these agency staff. I'm not an employer with the agency. The agency assumes all of the obligations. It says so in the contract. It says so in the agreement." And, unfortunately, that's not the case.

It doesn't really matter what the agreement says. You cannot put your obligations to another entity. So if that staffing agency, for example, is engaging in certain practices that are not appropriate or not lawful, I'm talking from like a discrimination standpoint, for example, you're on the hook as well.

Even if they're getting their paycheck that you're funding as a facility to that staffing agency, you are considered to be a joint employer because you are directing the day-to-day of what that staff does. They're coming to your building. They're using the materials you have there. You're telling them what the schedule is going to be. So in the past, there may have been a belief that there was an arm's length distance, but I think based upon what the NLRB has done, and other agencies, it's not that way anymore.

And so I think providers just need to be very careful of that and understand really what their obligations are under employment law. Also with the union situation, I think we're seeing increased unionization efforts. If the staffing agency or any employees associated there may have had some involvement with the unions, that could potentially permeate into the workplace or the facility.

And you also spoke about the independent contractor rule that the Department of Labor passed. For a bunch of our providers out there, at least the ones that I deal with, it wasn't really new news to us because the states where I primarily practice, it's pretty evident that it's almost impossible. It's like a unicorn to have an independent contractor relationship. And again, I'll have

clients say, "But, but the agreement says so." Well, it doesn't matter what the agreement says.

So really, this is a codification, I think at the federal level from what we've seen in a lot of states like California, like New Jersey, like New York. And they're not going to find folks to be independent contractors. And there's a reason why government agencies don't want that. They'll come out and say, "Well, you know, employees should be entitled to the benefits of unemployment, workers' compensation, et cetera."

But let's face it, employers pay a lot of taxes to those agencies for their employees. So it also benefits the government for folks to be classified as independent contractors. And, you know, you have to also look at the other side of this as the gig economy, people wanting flexibility when they work, how they work. The government has basically come in and said, "We don't care, person, you know, employee, independent contractor. We're going to call you an employee. You may want to be an independent contractor, but we're not going to allow you to have that discretion or voluntarily agree to have that relationship with a company."

So really, the only time now that you're seeing independent contractor, 1099-type relationships is almost from a business-to-business perspective, where it's two separately incorporated entities, whether it's a facility that has a contract with a company. And there's invoices that are sent back and forth. It is extremely, extremely difficult to have the staff that you normally have in a nursing home, for example, or in assisted living to be classified as an independent contractor. And this more or less confirms that.

### Tara Clayton:

You mentioned, Caroline, how the final rule on the federal side's bringing the federal piece up to speed with some other state laws. I know we've been talking about the federal because that does play such a big role in employment litigation and for providers who are trying to meet their employee obligations. But we also know there are state laws that we have to look at. And so, I'm curious, what trends are you seeing on the state side that would be helpful for the audience to kind of be tuning into as well?

### Caroline Berdzik:

Right. And we start out with the premise that an employee is always entitled to the more favorable of the two laws, whether it's a federal law or a state law. And it has been in the past that states have really been the champion of employees' rights. But now, under this new administration, the federal government has basically stated, "We want to step up our game and be on the same footing as the states are."

But the states still, I think, are further ahead than the federal government in other ways. So some of the things that we're seeing, the WARN Act was frequently mentioned during COVID times. Everyone was sort of pulling their hair out because we had never experienced a pandemic. What did that mean if staff needed to be laid off?

And, obviously, that was something that didn't impact this industry because it's a 24/7 business, and people need to be cared for. But a lot of the other clients that I work with outside of this industry had their locations of business completely shut down.

So New Jersey, where I happen to spend a lot of my time practicing, has a state mini-WARN Act, which is different than the federal law in several key ways. There's no faltering business exception. You need 90 days' notice of a WARN triggering event. And it also provides for mandated severance one week for every year of service for employees that are caught up either in the plant closing or the shutdown of business. So whether the federal government gets some ideas from New Jersey and looks to revisit the WARN Act federally, they do get their ideas from states. So that's something to definitely keep on the horizon.

We've also seen a focus on a temporary workers and staffing agency bill of rights. New Jersey, yet again, we're like the California of the East, I like to say. WE passed a law that has a lot of obligations for temp staff, well actually temporary service firms and employers to utilize temporary workers. There's equal pay provisions and transparency obligations. So, basically, temp workers in New Jersey cannot be paid less than the average rate of pay and cost of benefits that are provided to directly employed employees in similar positions with similar skills.

The law also prohibits temporary service companies from restricting the rights of these workers to accept

permanent employment. It also looks to clamp down on some of these exorbitant placement fees that these temp agencies charge and also requires them to be certified by our division of Consumer Affairs.

There's also disclosure forms that both the employer and the temp service agency have to fill out. It's quite onerous, and there are some legal challenges that are facing this law. Another area that we're seeing is on the whistleblower side. Again, New Jersey. We were, we were first in line. We have the most comprehensive whistleblower statute in the country called the Conscientious Employee Protection Act, which although employee is in the title, it still applies to independent contractors too.

We have a case on point there. New York has expanded rights under their whistleblower statute. Pennsylvania also has some provisions there. So these state whistleblower laws, I find them to be incredibly difficult to defend, particularly in this area since it's so highly regulated. New York just aligned its standards (laughs) with New Jersey. It's whether the employee had a reasonable good faith belief that a rule, a policy or statute was being violated.

And it's that reasonable belief that is frequently litigated. And for that reason alone, it's very difficult to get these cases dismissed on a summary judgment motion. And we could just think about all the things in a given day that go on in a nursing home and all the potential for someone to think that something is wrong when it's not. And they could say, "Oh, well, I had a reasonable good faith belief."

So I think we're going to see a proliferation of whistleblower-type claims. And it is something that at least we frequently see in New Jersey with our long-term care providers because of how robust the statute is. And these are fee shifting statutes. And what I mean by that, most employment laws are. If it goes to trial and the person even collects 10 cents, the employer is then on the hook for all of the attorney's fees that the plaintiff has incurred. And so, it's really an uneven playing field in terms of the employment litigation landscape.

### **Tara Clayton:**

Those attorney fees, I know, really do drive up the severity of these claims. Kind of predicting and anticipating an increase in whistleblower lawsuits, any recommendations? And maybe, it goes back to some of

the other recommendations that you were already making, but what can senior living and long-term care providers do as best as they can to help mitigate against the whistleblower type suit?

### **Caroline Berdzik:**

You can't ignore the squeaky wheels. Everyone has in their facility that employee or those employees that seem to complain about every little thing. And as frustrating as it may be, you have to investigate all of these things that folks are complaining about. Document it. Sometimes, you need to speak with other employees, look at documentation. But you have to take it seriously.

And it's a lot of work and time. And, especially in long-term care facilities, time is in short supply. So again, this is when an outside attorney or an HR consultant could help guide you in that circumstance, like, "Do I need to investigate it? If so, how big of an investigation?" because you don't need it to be a three-ring circus. And so there's some discretion that comes into play. And again, the compliance hotline's critical. That really tells you when things are going on in your building.

People have the ability to be anonymous. You know, I've seen circumstances with companies where someone doesn't necessarily call a hotline. But there'll be an anonymous letter that comes in, either handwritten, kind of scary, or typed up that alleges a variety of different things. And sometimes, it may appear to be so far-fetched, but don't throw it in the trash because, sometimes there's some truth to what's in there.

So I think basically having good robust policies, reporting mechanisms, that's critical. Your employee handbook, it's a living breathing document. So every year, that really should be reviewed to make sure that it's current and up to date. And I also mentioned that because the NLRB, which we spoke about earlier, came out with some decisions, which I happen to question, calling into question policies that are routinely in handbooks. Confidentiality, for example.

Workplace rules such as, no cursing in the workplace. No gossiping. And there have been some decisions from the NLRB that call into question the legality of those types of policies. So we've advised a lot of clients over the last year in terms of reviewing their handbook,

tightening that up or adding disclaimers. And every year in your state, there may be new laws that come into play that need to be reflected in your handbook.

And if you have operations in multiple states, there need to be state supplements depending on the state that you're in. So I think those are all steps, proactive steps. It used to be, I would say, 15 years ago that it was more of a luxury to be able to do these things, like, "Oh, the risk management piece. Yeah, we'll wait. Maybe we'll get sued. Maybe we won't."

But in today's employment litigation landscape and regulatory environment, you just can't operate in that fashion. You do have to spend time, resources, and money to make sure you're doing the best you can to comply with the ever-evolving employment landscape.

### **Tara Clayton:**

Caroline, very on point information. To me, I think the biggest thing is this mindset of you can set it and forget it no longer exists. To your point, laws are constantly changing on both the federal and state, so I think some of the tips you gave are really good suggestions of where to start for providers in connecting with their legal experts on the outside, as well as those HR consultants that you mentioned. So really appreciate all of the information, Caroline, that you shared with us today.

### **Caroline Berdzik:**

Thank you.

### **Tara Clayton:**

So for our listeners, you can learn more about Caroline as well as her law firm, Goldberg Segalla, and in multiple areas of practice, including their employment practice on the website, linked in the show notes. Also, if you'd like to learn more about the Department of Labor's new rule on independent contractor that Caroline was mentioning, we will also have on our marsh.com website, linked in the show notes, a newly released white paper entitled, "What the Department of Labor's New Worker Classification Rule Could Mean for Businesses."

So be sure to check that out. Again, linked in our show notes. As always, be sure you subscribe, so you don't miss any future episodes. You can find us on all of your favorite podcast platforms, including Apple and Spotify. And if you have any topics you'd like to have addressed on the show, please email your ideas to the email

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