Risk Insights: Senior Living & LTC

Episode 9

Understanding the ADA, the FHA, and where they intersect

Welcome to the *Risk Insights: Senior Living & LTC* podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Each month, 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. In today's episode, I'm sitting down with an industry expert to discuss some risk around anti-discrimination laws and exposures in the senior living and long-term care industry. Please note that today's episode features a general discussion around two federal laws that could be applicable in certain senior living and long-term care settings. Today's interview provides an overview and general discussion on this topic, and it's based on information currently know as of the taping of this podcast. The information provided does not constitute legal advice and should not be relied upon as legal advice. Please consult you council for any specific interpretation and applications of the laws discussed, or any other relevant local or state law.

My guest today is Joel Goldman. He's a partner with the law firm of Hanson and Bridgett. Hey, Joel. Thanks for joining today.

Joel Goldman:

You're welcome, Tara. Great to be here.

Tara Clayton:

So Joel, I know you've been around forever, and I say that in a very positive way. But I feel like everybody knows who you are. But I'm sure there are some out there who haven't had the pleasure of getting to work with you yet. So can you just tell our audience a little bit about yourself and your practice at Hanson Bridgett?

Joel Goldman:

Sure. I've been at the firm now for 42-plus years, so it's pretty close to forever. For most of that time, and certainly for the past 35 years, I've focused my practice almost exclusively on representing senior care providers on a wide range of operational, life insure, regulatory, and risk management issues.

Tara Clayton:

Great. Thanks, Joel. We're going to narrow in on just one of those many exposures that I know you've, you've helped clients with over the number of years. I mentioned anti-discrimination and, and how we see those exposures in senior living. I think, understanding that, especially for senior living providers, they're primarily regulated on the state side. So rarely are we talking about federal laws when we're talking about exposures. But there are a number of federal laws that providers need to be aware of. And the two that kind of jump out at me, and I know you and I have talked about before, is the Americans with Disabilities Act, as well as the Fair Housing Act. And so I think before we get into the examples of where you see the interplay with the specific laws in our space, can you just high level walk us through what are those two different acts laws that we're seeing in the space?

Joel Goldman:

So the Americans with Disabilities Act, it's been around for a long time. It was enacted during, uh, George H.W. Bush's administration, and it not only prevents discrimination based on disability. It also requires reasonable accommodation of disabilities. And the ADA applies to public accommodations, and the word public is used in a rather broad term because it's pretty clear that an assisted living community is subject to the ADA with respect to the dining room, the common areas. Those would be considered public accommodations.

Tara Clayton:

Okay.

Joel Goldman:

The Fair Housing Act covers much more than just disability discrimination. The original Fair Housing Act, uh, precluded discrimination based on race, national origin, age, and other categories. And then that was expanded shortly after the ADA was enacted, to include in what's called the Fair Housing Amendments Act, a prohibition on discrimination based on disability. So if we're talking about an assisted living community or an IL community, we've got a housing component which is subject to the Fair Housing Act. And then we have common areas, um, that are subject to the Americans with Disabilities Act. So we're, we're subject, in effect, to a hybrid analysis.

Tara Clayton:

In addition to kind of that connection to both of the laws, you mentioned the disability component, the anti-discrimination for disability under both of them. What are some examples of what a disability would mean, especially when we're looking at it from a senior living perspective?

Joel Goldman:

It's an incredibly wide range. But just by way of example, there are the obvious ones. Someone who is blind or vision impaired. Someone who is deaf or hearing impaired. Someone who has cancer. Someone who is HIV positive. Someone who has Parkinson's or multiple sclerosis. Those would all be examples of disabilities. And it also includes mental status. So someone who's bipolar has a disability under federal law.

Tara Clayton:

That's helpful to know. Then I guess my next question, as a provider, okay, there's these two laws. It tells me I can't discriminate. At least one section I need to be focused on, my common areas. From the Fair Housing perspective, I need to be focused on the broader housing aspect of it. But I guess maybe give me some examples of where are these laws coming up? What is it I need to be thinking through to avoid having some type of violation in this area?

Joel Goldman:

Let's use an example of a resident moves into your community, moves into an apartment. They utilize a wheelchair. The bathroom is configured in a way where they can get the wheelchair in, but it's kind of a tight squeeze, and they say, “I want you to widen the door to the bathroom." Okay. So we're under now the Fair Housing Act because it's, this is clearly in the residential portion, not the common area. Any landlord would have to allow the resident to widen the door. But they don't have to do it them self or pay for it. And they can require the resident to restore the bathroom when they move out. Now, let's consider a similar issue in a common area. There's a restroom outside the dining room, and the door's too narrow to accommodate a wheelchair. Under ADA, the owner of that building has to make that bathroom handicapped accessible.

Tara Clayton:

Knowing those laws are out there and there's this requirements regarding reasonable accommodations that you referenced under the ADA, and obviously, the Fair Housing imposes requirements to prohibit discrimination on the basis of disability, what does the enforcement piece of that look like? So we've got federal laws. How does that look for a provider if an allegation is made that a violation of that act or one of those acts has happened?

Joel Goldman:

Sure. Well, I know we're going to get into the discussion at some point about motorized scooters. Let's use that, maybe, to segue into this. There have been a number of cases throughout the country that have been brought against providers, typically independent living providers, because they had either prohibitions or restrictions on the use of motorized scooters. And in those situations, people have filed complaints with the US Department of Justice. The Civil Rights Division is charged with enforcement.

It's interesting because if you look back over the administrations since the first Bush administration, we went from Bush, Republican. We had Clinton, Democrat. Bush, Republican. Obama, Democrat. Trump, Republican, and Biden, Democrat. There has been a wide disparity from administration to administration, in how civil rights have been enforced depending which regime was in power. But the one consistency has been disability discrimination. It has not

mattered whether it's been Democratic administration or Republican administration. They have consistently brought lawsuits when they felt that disabled persons' rights were being violated.

So we've seen a number of cases brought against providers based on wheelchairs in the dining room, motorized scooters in the community, and when you get hit with a Department of Justice investigation, they've got, you know, tremendous resources on their side, and they're not paying. Taxpayers are paying for it. Your defense is not going to be covered by insurance. Those are expensive cases to fight. Almost all of them settle, and frequently, they settle with the provider having to not only agree to stop doing that which is pretty clearly illegal, but to have to stop doing things that are probably defensible if you're willing to spend a few million dollars to take the case up through the federal courts.

Tara Clayton:

You gave us an example related to accommodations in a restroom, kind of, doorframe within a restroom setting in a common area setting. But I want to kind of talk through other common examples that you see. And you just said, you've defended clients in some different investigations that have come from these two particular laws. Motorized scooters are one that I know you and I have talked about in some other settings, of kind of a common fact pattern, or at least questions around requirements with motorized scooters. Generally speaking, where are you seeing the issues come with motorized scooters?

Joel Goldman:

Sure. So the, the first case that I was involved with was quite a number of years ago. I can't even tell you the date anymore, but I'm guessing it was somewhere in the, probably in the early to mid '90s. It's one of ... It may be the only published judicial decision. It was United States versus Hillhaven. Hillhaven was a large national company. It had an independent living community outside of Salt Lake City. They had had issues with motorized scooter drivers driving recklessly, and they had imposed what I thought were very reasonable safety-related restrictions. And a resident who didn't like the restrictions filed a complaint with, I believe with HUD, which in turn then brought the US Department of Justice, and US Department of Justice filed the lawsuit against Hillhaven, claiming that any restrictions on the use of motorized scooters violated the Fair Housing Act.

Our firm defended that case, and we were able to demonstrate in deposition testimony that there were other residents living there who were basically being terrorized by drivers of these scooters, which could go up to 12 miles an hour. And, in the end, we won on a motion for summary judgment, and what the court said — and this is really critical because this then kind of sets the roadmap for what we can and can't do — but the court said that it would be a perversion of the Fair Housing Act to prevent the community from imposing reasonable safety-related rules that would protect the rights of other people who had other kinds of disability, vision impairment, hearing impairment, or who just can't, aren't agile enough to jump out of the way of someone coming around the corner at 12 miles an hour.

So what we learned from Hillhaven was that you can restrict motorized scooters, but the restrictions have to be a) safety related and b) no more restrictive than necessary to achieve a legitimate safety-related goal. So, for example, if you came up with a rule that said, "No scooters in the dining room because it's dangerous," well, yeah, that's safety related. But it's more restrictive than necessary to achieve a safety concern there. There are other ways you could deal with it. You could say, "Scooters are gonna enter the dining room first and leave last so that they're not caught up in sort of rush hour traffic." Or even making... depending on the configuration of the dining room, it might be reasonable to ask scooter users to use tables that are at the perimeter so that they're not driving through, you know, again, through tight spaces.

One thing that we know we can impose, in terms of rules, is a speed limit. The speed limit needs to be the normal walking speed of a non-disabled person. So people have a right to use their scooter to go two to three miles an hour, which would sort of be normal walking speed. They don't have a right to become a track star and drive the scooter at full throttle. And, frankly, just imposing, speed restrictions, that cuts the number of accidents and injuries precipitously.

Tara Clayton:

Yeah. And that makes sense to me. I think that was my concern when I heard what the request was, of I should be able to do whatever I want with my scooter, right, from a disability standpoint. But it's comforting to know that the court took into consideration, "No, this is other individuals' house as well. We need to protect their

safety and welfare, too, in finding that balance." So, I guess, kind of what I'm hearing, Joel, when we're looking at either ADA requests for accommodations or Fair Housing Act requests for accommodations, it's not a blanket no. There's a process that a provider needs to put into thinking through, "Can we do a reasonable accommodation? What does that look like? Is the least invasive?" Am I summarizing that correctly?

Joel Goldman:

There's supposed to be discussion. When somebody says, "Hey, I have a disability, I need you to modify a rule that the community would otherwise have to accommodate my disability," it doesn't mean we have to say, “Yes” to every request. But I think if I had to give one bit of advice, it would be don't just say, “No.” A knee-jerk no reaction is going to get you into trouble. And actually, we'll segue in a moment into hearing impaired issues on that point.

But the key is that you're supposed to engage in a dialogue to come up with what is a reasonable accommodation. And it may not be necessarily what the resident puts out as their first request. There may be some kind of compromise. You know, I can remember right after the ADA was enacted, I was involved in a presentation for the California Assisted Living Association. We had a gentleman who came from the Center for Independent Living in Berkeley as a guest speaker, and he gave just a great example.

He was working as a consultant with this large company that had just put in these beautiful, work stations for all of their employees, and they cost like 10 grand apiece. And this is many years ago. It was, in terms of today's dollars, a lot more. And they're in a panic because they just hired a guy who was in a wheelchair and realized that the wheelchair couldn't fit under the desk. He couldn't pull up close enough to the desk because the height of the desk and the height of the wheelchair. And they were saying, "Oh, we're going to have to replace his, his unit's going to cost us 10,000. “And this guy's response was, "Go out and buy a couple two-by-fours and stick them under the desk to raise the desk two inches” or whatever it took so that the wheelchair could fit under it. It's a good example of where there's sort of a middle ground.

Tara Clayton:

I like that point of you don't have to blanketly accept what's being proposed, but there's creativity that can go into what the ultimate solution looks like. We've been talking, really, about, to me, physical layout, and some examples of where providers need to be thinking through, "Do we have exposures from the physical setting, including even the use of motorized scooters?" To me, that's kind of a physical space consideration. But you mentioned another area is with those who maybe have some hearing impaired or vision impaired, so there's, I think, more than just the physical landscape, but other considerations to think through. So what are some examples from that setting, Joel, that you, where you're seeing providers maybe needing to maybe flag for providers to think through?

Joel Goldman:

I've seen this issue pop up several times now. A few years ago, in a number of Southwestern states, not California, my home state, but I remember it included, I believe, New Mexico, Utah. I think Nevada may have been there. A group that was basically an advocacy group for hearing impaired persons, had someone call assisted living, licensed assisted living communities. The conversations were recorded. Those states that were part of this allow the recording of phone conversations as long as one party consents. California, for example, requires two-party consent, and therefore we were not part of this. But in each case, the person called and said, "I am interested in your community for my mother. My mother is completely deaf. She is only able to communicate effectively through American Sign Language. We're not asking for a full-time interpreter, but do you provide ASL interpreters for important occasions?"

And in each case, the person either immediately said "no" or said "I need to check" and then came back and said no. And coming back to the point we made a few minutes ago, don't just say, "No," 'cause saying no got them into trouble. That's the wrong answer. Any business has an obligation to provide a reasonable accommodation. Reasonable accommodation in this situation would be having, making sure that this perspective resident had the ability to communicate while she's touring the community, while she is going through the admission process. Now, the reasonable accommodation could've been, "Well, you, her daughter, presumably are fluent in ASL. Will you be there for the tour? And if not, yeah, we'll hire an ASL interpreter, assuming we don't have anyone at the community who could do the interpreting."

The fact is, in that case, there was no mother. This was just a purely fictitious test that all of these providers flunked. Again, the, the correct response would've been, "Bring her in for a tour. If you need an interpreter there, we will provide it. We will provide ASL interpretation for important events, annual reappraisals, things like that."

Tara Clayton:

So Joel, knowing that we see these kind of what I call tester cases, not just with hearing impaired situations, but I think we've seen them in some other circumstances related to maybe the admissions process, I think, is primarily where we see those. We were talking about some physical. Now we're talking about maybe the admission process where we could get ourselves into some trouble. That makes me start to question, who at the community needs to understand and have training related to these laws? Because typically I'm talking with risk managers or general counsel. But that's not who's answering the call when these prospective families call, or they're not the ones in the building when an individual is asking for an accommodation. Where do you see the importance of trainings and who's getting them inside the community?

Joel Goldman:

Yeah. Look, at a minimum, the executive director and the marketing director. Frankly, all marketing personnel should have at least some basic training, if nothing else, just to say, "I need to go ask my executive director." Tara, let me give you another real-life example. This was an IL building. This was probably 20 years ago. I get a panicked call from the community. "We had this prospective resident who had signed up for a tour. They just showed up. They're on a gurney?

My immediate reaction was, "This is a test. This isn't real. They're testing." I said, "Give them a tour." "What kind of tour?" "Your regular tour. Nothing different. Forget, pretend that they are walking like a track star." And, of course, they never came back. They were given the tour, and that was the end of it. And it was just an obvious setup. But an IL community cannot deny someone admission based on a disability. If you were assisted living, it might be a little different because, depending on the person's medical condition, you might not be able, under state licensing regulations, to accommodate that person. But that's not something you want your marketing people deciding. That's where you want them to be trained to, "Hey, we accommodate people with disabilities. I need to talk with the executive director to see how we might be able to provide for you or for your mother or father" or whatever.

Tara Clayton:

Joel, another area that I, I think we would be remiss not to bring up and talk about, you know, you talked about the dangers of race car drivers on the motorized scooters. The other spot that I think of... So what is the limit of meeting accommodations while also protecting the safety of other residents and staff members in the community? I think of service animals or emotional support animals. And so I want us to talk a little bit on that area. And I know service animals, that's different from emotional support, so maybe we start there. What is the difference? Because those are two very distinct groups that providers need to understand.

Joel Goldman:

Service animal, number one, is a dog. It's not a guinea pig. It's not a mouse. It's not a bird. It's not a cat. It's a dog. And it is a dog that has had special training to assist a disabled person with some particular task. The most common example is a seeing-eye dog. But there are hearing-ear dogs who are trained to assist deaf people. There are dogs that have been trained to assist quadriplegics with things like opening doors, turning on lights. And then there are also dogs that have been trained to, really through their incredible sense of smell, to detect when, for example, an epileptic is going to have a seizure, when a diabetic's blood sugar gets to a dangerous level, they can actually sniff that out. It's really actually quite remarkable.

Service animals are allowed to go anywhere and everywhere. The only exception is an operating room of a hospital. They are not pets. They are not subject to pet fees or restrictions on pets. They are not subject to weight limits. Most service dogs are large dogs. Most senior communities that allow dogs have a 20- or 30-pound weight limit. It would be rare to see a service dog that is that small. You are allowed certain inquiry into someone who claims that they have a service animal. And you basically need to ask whether the dog is there for, um, to assist you because of a disability and whether the, the dog has special training.

Tara Clayton:

Is there limits, though? My understanding is you can't ask what the specific disability is, right? You can only ask if they have a disability.

Joel Goldman:

If they have a disability, and then you can ask, "What special training has the dog had?"

Tara Clayton:

Can you require proof of that special training?

Joel Goldman:

No. No, you really can't. The Americans with Disabilities Act and the Fair Housing Act both recognize service animals. The Fair Housing Act also recognizes assistance animals, which includes service and emotional support animals. The ADA does not recognize emotional support animals. So what does that mean as a practical matter?

It means that if you're a restaurant, you have to allow someone with a seeing-eye dog to come in. But you do not have to ... Not, not only do you not have to, you're not allowed to have a patron come in with a little miniature poodle on their lap because the poodle makes them feel secure or whatever. On the other hand, because the Fair Housing Act recognizes emotional support animals, and again, we're subject to this hybrid, whether we're IL or AL, if a resident says, "Yeah, I know you have a no dog policy or a no pet policy. But, I need my cat because I have anxiety, and the cat helps keep me unanxious."

And all they need is a note from a doctor or a psychologist, and it's really easy to get that. You do have a right to ask for the note. But you really can't do a whole lot of questioning, although the rules seem to have relaxed a little bit to try to deal with just some of the scams. But if you go ahead and just Google, “emotional support animal,” the first five or 10 websites that pop up are all going to be, "Pay a hundred bucks, and we'll give you a note from the doctor." As providers, what does this mean as a practical matter? What it means is my 30-pound weight limit on dogs is going to have to go out the window if somebody shows up with an 80-pound golden retriever and a note from a doctor or psychologist saying that the resident has anxiety and that the dog provides comfort.

Tara Clayton:

You mentioned with service animals that essentially, they're one and one with the person. So they can go anywhere…

Joel Goldman:

Yeah.

Tara Clayton:

...with the exception of an OR. But we're not going to have an OR setting…

Joel Goldman:

Right.

Tara Clayton:

...in our industry space. So they can go anywhere. What about these assistant animals or some that they used to be called emotional support animals? But assistant, are there limitations, or can providers at least set some parameters around where those assistant animals can access?

Joel Goldman:

As a general rule, yes. And this is still a largely untested area. But we have generally taken the position that because emotional support animals are only recognized by Fair Housing, you can have that animal in your apartment and in sort of the housing component, but not in the public areas. Not in the dining room. Not in the library or the activity room or whatever.

My advice to anyone out there is if that issue comes up, again, don't just say, “No.” That's where you want to have a conversation. You probably want to have a conversation with your legal counsel, figure out where do we want to draw the line here.

Tara Clayton:

What if it's a situation where let's say the dog's aggressive. Let's say Fifi snips at people in the dining room if they pass by the table, and it's, it's threatening the safety of other residents, I guess. What should providers do in that situation?

Joel Goldman:

Yeah. Uh, well, first of all, let me just say this. If it is a bonafide service dog, that ain't gonna happen, period.

Tara Clayton:

Right.

Joel Goldman:

But let's say we just happen to have an, an anomaly dog that should've flunked out of seeing-eye dog school or whatever. You do not have to tolerate bad behavior by the animal. It's more likely to occur with an emotional support animal, which does not have special training. And, and that issue has come up, where someone had a Miniature Doberman who was purportedly an assistance animal, um, emotional support. And this dog bit a staff member. The dog would go after other dogs, would bark ferociously at other people as the resident would take the dog out for a walk or whatever. And there we are absolutely entitled to require the resident to get rid of the dog.

Tara Clayton:

We talked a little bit about things for marketing to think through from an admissions process or what I would call exposure areas on the admission process. But what about the back end, when we have a resident who perhaps we can't meet the needs, or it's not a safe environment based on whatever may be going on with that particular resident in the setting, and, and we need to initiate a discharge process? I would assume hearing what you've said today, there's some exposures from an anti-discrimination standpoint that providers need to think about when they're looking at the discharge process.

Joel Goldman:

Yeah. No, that’s exactly correct, Tara, and I think we need to create a dichotomy here between IL and AL. So let's start with IL. In the IL setting, we wanna focus not on what is causing the problem, but what is the manifestation of the problem. An example is someone is starting to show signs of Alzheimer's or dementia, and they're acting confused. Our focus would need to be, well, they're creating a disruption because they're using inappropriate language, or they're getting in people's faces. So we don't want to focus on why they're having problems, but focus on the manifestation of the problem.

In the AL setting, it's a little tougher because we're in the business of caring for people with disabilities. And the question would become, "Is it a reasonable accommodation to do X, Y, Z, or is that now beyond a reasonable accommodation and asking us to make some fundamental change?" So example, we have an assisted living community that does not provide memory care, and a resident comes back from their physician visit with a new diagnosis of dementia. We don't have memory care. We do not have to accommodate that person by now turning our assisted living community into a memory care setting. I think and hope the courts would agree that that would be not a reasonable accommodation. That would be a fundamental change in the programming that we have.

On the other hand, we have a community that does have memory care. We have a resident who becomes very agitated every day between four and five o'clock, and we now are saying, "Well, we can no longer care for you because you require one-on-one between four and five o'clock." And the resident or the resident's family says, "We will hire a private duty attendant to take the resident out for a walk every day at four o'clock, or maybe even every day at 3:30, before he becomes agitated, and go take him for a two-hour walk, and bring him back." And that may very well be a reasonable accommodation that we have to agree to. It doesn't cost us anything. It's not requiring us to change the way we the way we operate. But it is reasonably accommodating this person's particular needs.

Tara Clayton:

It sounds to me, Joel, that when we're, when we look at exposures related to anti-discrimination laws, it's, each individual fact pattern that presents itself is going to require careful analysis and thinking through. I think your, your first point of don't blanketly say no, but there's thought that has to go in, and working with your outside counsel and making sure that you're taking appropriate steps and making a reasonable accommodation of what that reasonable accommodation looks like, or if it's a decision that, no, we can't provide, and we don't have an obligation to provide.

Joel Goldman:

Tara, I think you hit the nail on the head. It’s never going to be one size fits all. Each case has to be looked at individually and, again, a determination made. Is this a reasonable accommodation, or is this something that is unreasonable to ask us to do?

Tara Clayton:

Joel, thank you again for joining and sharing this helpful information today.

Joel Goldman:

You're very welcome. Thanks, Tara.

Tara Clayton:

You can learn more about Joel Goldman, his law firm, Hanson Bridgett, as well as the work that they do, related to anti-discrimination and other areas on their website listed in our show notes. As a reminder, today's episode features a general discussion. The information provided does not constitute legal advice and should not be relied upon as legal advice. Please consult you council for any specific interpretation and applications of the laws discussed, or any other relevant local or state law.

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