

OSH Law Update for Retirement Villages and Aged Care Facilities

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25 February 2009

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LAWYERS

Agenda

- Health and Safety in Employment Act 1992
- Health and Safety under the Retirement Villages Act 2003 and the Code of Practice
- Pre-employment screening

Health and Safety in Employment Act 1992

- Underlying principles of the Act:
 - comprehensive coverage for all work situations
 - clearly defined responsibilities
 - promotion of excellent health and safety performance
 - improved hazard identification and control methods
 - involvement of employees in health and safety issues
 - health and safety education and training
 - dual approach of incentives and penalties

Definitions

- “All practicable steps”
- “Harm”
- “Hazard”
- “Place of work”
- “Serious harm”

Duties imposed by the Act (1)

- Duties of employers
 - take all practicable steps to ensure employees' safety
 - provide and maintain a safe working environment
 - eliminate, isolate, or minimise all hazards
 - monitor employees' exposure to hazards
 - take all practicable steps to ensure that no employee's action or inaction harms another person

Duties imposed by the Act (2)

- Duties of persons in control of places of work:
 - take all practicable steps to ensure that hazards do not harm people in the vicinity, people at work, or people who have paid to be present or are there to purchase goods or services
- Duties of principals:
 - take all practicable steps to ensure that no contractor, sub-contractor, or contractor's employees are harmed while doing work they are engaged
- Duties of employees
 - take all practicable steps to ensure own safety
 - ensure that no action or inaction in the workplace causes harm to any other person

Employee Participation

- An employer must provide “reasonable opportunities” for their employee participation
- Employee participation system
- Appointment of health and safety representatives
- Responsibilities include:
 - foster positive practices in the workplace
 - identify hazards
 - consult with inspectors
 - promote the interests of employees
 - issue hazard notices

Principles and Enforcement (1)

- Serious harm – maximum fine \$500,000
- Other offences – maximum fine \$250,000
- Sentencing Act 2002:
 - sentences of reparation
 - sentencing principles
- Court's approach:
 - three step process: reparation, fine, overall assessment
 - ordinarily sentences should include both reparation and a fine
 - starting points for offences, then adjusted up or down

Principles and Enforcement (2)

- OSH inspectors now able to conduct examinations, tests and inspections
- Key areas:
 - hazard management
 - accident register
 - training and supervision
 - first aid training
 - emergency procedures

Identifying Hazards for Employees at Aged Care Facilities

- Stress – specifically included in the definition of harm and hazard
- Physical hazards – including risks arising from residents' behaviour
- Chemical hazards – such as from medications or cleaning products
- Biological hazards – such as from sick or injured residents

stuff.co.nz

By REBECCA TODD - The Press | Thursday, 19 February 2009

Caregivers put at risk

Being punched, kicked and hit on a daily basis has become part of the job for many rest-home workers who say operators need to do more to protect staff.

ACC figures show the cost to the country for employees injured in rest homes has risen from \$4.5 million in the financial year ending June 2005 to \$5.5 million to June 2008.

The biggest expense was soft-tissue injuries - with more than 1800 over the past year at a cost of \$4.6 million.

Other injuries included fractures, infections, hernias and brain injuries.

New Zealand Nurses Union industrial adviser Lynley Mulrine said patient violence was a major issue for people working in mental health and rest homes.

She said violence was a symptom of dementia, which was becoming more common.

It made it more important to ensure staff had the right skills to deal with difficult behaviour.

The current emphasis on not physically restraining patients in any situation could put health workers at risk, she said.

"There needs to be a lot more work done by employers to make sure they are providing a safe and healthy environment for their staff."

A Christchurch caregiver, who spoke to The Press on condition of anonymity, said violence was a daily occurrence in the dementia unit.

Anything from kicking and spitting to pulling hair and verbal abuse were so common that many incidents went unreported, she said.

"If you are hurt or injured in any way you have to fill out an incident form, but more often than not now the hierarchy just expect that it will happen and that you'll cope, which isn't always the case."

The problem was getting worse as a focus on profits and strain on dementia beds meant patients who were previously classified D6 (the most uncontrollable) were being downgraded to D3 or D4 wards where there were fewer staff and no registered nurse on night duty.

"It's all very well and good on paper but their behaviour certainly isn't D3 or 4," the caregiver said. "We are being put at more and more risk."

Canterbury District Health Board figures show there are 45 people on the waiting list for rest-home dementia beds and eight for dementia hospital beds. Another 60 beds are expected to become available this year.

Rannerdale Veterans Hospital and Home general manager Stephen Shamy said there was a risk of violence towards staff across aged care.

"The key thing is the responsibility of the provider, particularly management, to keep not only residents safe, but keep the staff safe," he said.

Any homes operating outside regulations on grading of dementia patients needed to be exposed, said Shamy. He hoped this would happen with the introduction of proposed government spot audits.

Ministry of Health manager of quality and safety Rose Wall said the ministry was looking at a "number of initiatives to strengthen the monitoring and auditing of residential aged-care facilities", including spot audits.

Identifying Hazards for Older People (1)

- May apply to older employees, as well as residents
- Physical changes associated with age
 - muscular strength and range of movement
 - posture and balance
 - reaction time
 - sleep regulation
 - thermoregulation
 - vision
 - hearing

Identifying Hazards for Older People (2)

- Resulting hazards
 - repeated actions
 - slippery and unstable surfaces
 - shift or night work
 - varying, and extremes of, temperature
 - poor lighting and glare
 - noisy environments

Identifying Hazards for Older People (3)

- Psychological changes associated with age
 - cognitive
 - memory
 - learning
- Resulting hazards
 - noisy, busy environments
 - tasks requiring completion of different functions simultaneously
 - situations requiring frequent adaptation to change

Eliminating, Isolating and Minimising Hazards (1)

- Eliminate
 - if practicable, eliminate the hazard entirely
- Isolate
 - if elimination is not practicable, isolate the hazard
- Minimise
 - if neither elimination nor isolation practicable, minimise the likelihood of harm from the hazard

Eliminating, Isolating and Minimising Hazards (2)

- Application to hazards specific to employees:
 - stress
 - monitor
 - address concerns
 - have mechanisms for dealing with stress available
 - take action when an employee is not coping
 - physical hazards, chemical and biological hazards
 - establish and implement policies and procedures to isolate or minimise hazards
 - provide appropriate training, and retraining or reminders

Eliminating, Isolating and Minimising Hazards (3)

- Application to hazards relevant to older people
 - repeated actions and overuse: eliminate causes and minimise risks and exposure
 - balance and reaction time: eliminate slippery or uneven surfaces, spills and clutter
 - shift work or night work: where possible, eliminate or reduce the need, or allow sufficient recovery time
 - varying extremes of temperature: monitor and regulate changes
 - visual difficulties: eliminate or minimise glare, extremes of light/dark, problematic colours, and clutter
 - hearing: eliminate background noise, ensure warnings and alarms are sufficiently loud
 - cognitive changes: minimise the need to multitask, and ensure training is appropriately paced

Retirement Villages Act 2003

- Retirement Villages Code of Practice – effective 2 October 2009
- Clause 16 – Safety and Personal Security Policy:
 - staff codes of conduct
 - lighting requirements
 - appropriate heating
- Written copy of policy must be provided on request
- Also relevant are:
 - clause 17 – safety and security policy and procedures
 - clauses 12-15 – staffing at retirement villages

Pre-employment Screening

- Generally, an employer is free to employ, or not employ, any person
- Specific statutory exceptions to be considered:
 - Privacy Act 1993
 - Human Rights Act 1993
 - Criminal Records (Clean Slate) Act 2004

Privacy Act 1993

- Application forms:
 - job applicants usually cannot refuse to provide information
 - the collection of the information must be “necessary” for that purpose
 - “necessary” to collect test not difficult to satisfy
- Job References:
 - must be authorised by the applicant
 - may be able to be withheld as “evaluative material”
- Drug and alcohol testing:
 - consent based pre-employment testing is generally accepted to be lawful

Human Rights Act 1993

- 13 prohibited grounds of discrimination covering a large number of matters
- In employment:
 - unlawful to fail or refuse to offer employment by reason of a prohibited ground
 - unlawful to use an application form or make an inquiry that could be seen as indicating an intention to discriminate
 - certain exceptions apply
- Other requirements of the Act apply to areas such as the provision of goods and services and the provision of accommodation

Criminal Records (Clean Slate) Act 2004

- Allows some prospective employees not to disclose criminal convictions
- Requirements that must be met:
 - seven years since the most recent sentence was imposed
 - no custodial sentence has ever been imposed
 - the conviction was not for an excluded offence (generally sexual offences)
 - in the case of a fine, the amount owed has been paid
 - no order has been made indefinitely disqualifying the individual from holding a drivers licence

Criminal Records (Clean Slate) Act 2004 (2)

- The effect of the clean slate scheme:
 - if the individual meets the criteria he or she is deemed to have no criminal record for the purpose of any question asked about his or her record
 - an individual can answer any question by saying “I have no criminal record”
 - a criminal record check will not disclose convictions covered by the scheme
- Certain limited exceptions apply, but are unlikely to be relevant to residential aged care operators

Tai v Robinson (T/A Coronation Lodge Rest Home) (1)

- Unjustified dismissal (and disadvantage) claim brought by a rest home employee
- Employee was asked whether or not she had any prior convictions. She answered "no"
- Response was untrue - employee had been convicted of assault two times
- Employee was in charge of a night shift and a patient died on her watch
- Disciplinary action was commenced and the criminal convictions were revealed.
- Employee was dismissed for lack of trust and confidence

Tai v Robinson (T/A Coronation Lodge Rest Home) (2)

- The Court made several observations about the non-disclosure of criminal convictions:
 - questions about prior criminal convictions are lawful
 - they are legitimate questions to be asked in the aged care industry
 - staff in rest homes deal with a very vulnerable section of society and cannot have a tendency towards violent behaviour
 - the denial of criminal convictions deprived the employer of the chance to make inquiries into the convictions (and the employee of the chance to explain), and was a lie
 - these factors led to the “inescapable conclusion” that the dismissal was substantively justified, but the procedure was flawed

Practical Tips (1)

- It remains lawful for an employer to ask an applicant whether or not he or she:
 - has any convictions and if so, what for
 - has ever lost his or her licence
 - has ever been arrested
 - has ever spent any time in police cells
 - has ever been dismissed from a previous employment for dishonesty, harassment or serious misconduct
 - has ever been the subject of diversion by the police

Practical Tips (2)

- An employer can obtain a copy of an applicant's criminal record from the Ministry of Justice
- Consent must be given by the employee
- Form available through the Ministry of Justice website
- Recommended that a criminal record check is carried out for all prospective employees in the aged care industry



Privacy Unit
Ministry of Justice
National Office
P O Box 2750
WELLINGTON

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MoJ Request Number

REQUEST BY THIRD PARTY UNDER THE OFFICIAL INFORMATION ACT 1982 FOR A COPY OF AN INDIVIDUAL'S CRIMINAL CONVICTIONS HELD ON THE MINISTRY OF JUSTICE'S COMPUTER SYSTEMS

SECTION 1: SUBJECT'S AUTHORITY TO RELEASE INFORMATION TO A THIRD PARTY

I hereby authorise the Privacy Unit, Ministry of Justice, to release a copy of my personal information, to the undersigned Third Party, for the purpose of:

Pre-employment vetting

Insurance Claims vetting

Other (specify)

Tick the report required:

All convictions report Traffic Convictions Report

Signature of subject and date

I wish to receive a copy of the information provided to the Third party. Yes / No

SECTION 2: THIRD PARTY DETAILS

Third Party Name Details

Full Name of Third Party

Full name and address of the person or agency the third party is acting for (if applicable)

Third Party Reference Number (if applicable)

Third Party Address Details

P.O. Box or Street Address

Suburb

City

State / Province

Post Code

Country

Signature of Third Party

The term "subject" refers to the person whose criminal convictions is being requested.

The term "third party" refers to the requestor or ultimate intended recipient, such as an employer, insurance company, credit agency et cetera.

The Ministry of Justice will process this request as soon as is reasonably practicable, and in any case no later than 20 working days from receipt of this application.

This application and associated letters and reports will be disposed of three months after processing the response.

Recap

- Significant obligations arise under the Health and Safety in Employment Act
- Obligations also arise under the Code
- Pre-employment screening can be a useful tool, though it is subject to certain constraints
- Often obligations under the different pieces of legislation will be in harmony
- Sometimes a balancing of rights and interests may be required

Questions



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