



INVESTIGATING WRONGDOING BY ELDER CARE WORKERS

Employers must balance rights of staff members and residents

By **GABRIEL JIRAN**

The duty to investigate allegations of employee misconduct in elder care facilities is heightened given the vulnerability of the patients or residents involved. In California recently, a jury awarded a \$7.75 million verdict against a nursing home for the abuse of a resident. The family of the resident had complained about suspected abuse, and the nursing home failed to conduct an investigation or address the allegations.

While this case may be an extreme example, employers must take all reports seriously and respond promptly when confronted with an allegation of employee misconduct toward a resident. However,

duties, and the strategic use of such leave can serve at least two important purposes during the investigation. First, the employer can protect other residents by removing a potentially

dangerous employee from the workplace. Second, removing the employee allows the employer to conduct a fair and thorough investigation without the employee exerting undue influence on witnesses and residents. The employer should consider both of these factors, and err on the side of protecting residents when determining whether to use administrative leave.

Once the issue of administrative leave is addressed, the employer must diligently conduct a thorough investigation. In doing so, the employer needs to be cognizant of the rights and obligations relating to both the employee and the resident involved. For the resident, the employer must be careful not to disclose pro-



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tected health information in violation of state and federal laws, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA). While these laws typically have exceptions for investigating alleged abuse, the employer still must be cautious not to disclose more information than is necessary.

Personnel Information

Employers must also be aware that they may be mandated reporters of abuse or neglect under state laws designed to protect residents. In addition, residents may have civil remedies available to them for physical and mental injuries, as was the situation in the California case.

The employee at issue in the investigation has rights as well. For example, the Connecticut Personnel Files Act, Connecticut General Statutes § 31-128a *et seq.*, protects the release of personnel information concerning employees except in specified circumstances. Almost all employees are protected by various anti-discrimination, anti-retaliation, and whistleblower laws that require fair treatment during the investigation process.

In unionized environments, employees have rights such as the right to union representation during investigatory interviews and some form of due process prior to the imposition of discipline. The role of the union representative during the investigation may present some additional

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the employer must also use care in its investigation to protect the rights of all of the individuals involved.

An important first consideration is whether the employer should remove the employee from the workplace during the investigation. Many employers use “administrative leave” as a non-disciplinary method of relieving employees from their

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challenges under the confidentiality laws that employers must consider.

The law in this context is becoming increasingly complex, particularly with regard to resident rights. Employers should thus consider establishing a designated team of individuals with expertise in both employee and resident issues who will be actively involved in the investigation. For example, the team might include a human resources professional, a clinical advisor knowledgeable about the resident at issue, and a privacy officer familiar with confidentiality issues.

The goal is to involve the right personnel so that an adequate investigation is conducted while making sure that the disclosure of information is limited and in compliance with all applicable laws and regulations. Where the employer does not have all of these resources available internally, it may need to consult with an outside investigator. If that is the case, the employer would want to have the outside investigator complete a business associate agreement wherein the investigator agrees to be bound by the restraints of HIPAA and other confidentiality requirements. The employer's staff should work closely with any outside investigators to ensure that all applicable laws are followed.

Conducting Surveillance

During any investigation, the employer will have to gather information related to the allegations and interview the relevant witnesses. This process is fairly routine, but a relatively common issue that arises is whether the employer can conduct surveillance in order to verify alleged misconduct or "catch" the employee in the act.

The prospect of surveillance implicates issues for both employees and residents, particularly where the surveillance is electronic in nature. For electronic surveillance such as video cameras, the employer must comply with Connecticut General Statutes § 31-48d, which outlines the notice requirements necessary for conducting electronic surveillance of employees in the workplace. Exceptions to the notice requirement exist, but the employer must be careful in considering whether any of these exceptions apply prior to conducting the electronic monitoring. On the resident side, employers must be careful not to record residents without their authorization.

During and after the investigatory process, the employer must be careful to disclose the information only on a need-to-know basis. At some point, however, the

employer will likely have to confront the employee with the allegation of misconduct and get his or her version of the incident. In doing so, the employer may need to disclose information to the employee regarding the allegation. This disclosure is permitted, but the employee must be reminded of the requirement to maintain confidentiality of that information.

In addition, documentation produced during the investigation or thereafter should not include any information that would identify the residents involved, and redactions may thus be necessary. These redactions will be important particularly where there is a challenge to any subsequent disciplinary action that is taken as a result of the investigation. Whether it is a union arbitration or a civil case, documents will likely need to be produced in the course of the litigation and the employer must not release confidential information through these documents.

By utilizing caution and control over the investigation process, employers can conduct a timely and fair investigation while still protecting the rights of all of the individuals involved. ■