

PUBLICATION

Beware! Long Term Care Class Actions are Coming

Authors: Christy T. Crider

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Long term care providers beware, class action suits are coming. Due to allegations of chronic understaffing, long term care providers are beginning to face massive class action lawsuits nationwide. The trend began in 2010, when Skilled Health Care settled a class action suit with more than 32,000 class members for around \$63 million. The settlement followed a jury award of \$671 million due to alleged chronic understaffing of 22 facilities. That got our attention. Following suit, California plaintiff attorneys began filing class action suits under similar theories of chronic understaffing. Many of the California cases resulted in multi-million dollar settlements, something no long term care provider wants to face. For years this was a trend unique to California. However, times have changed. Class action chronic understaffing claims have begun to spread throughout the nation and have recently obtained a foothold in the South.

Less than a month ago, in *GGNSC Arkadelphia LLC v Lamb*, the Supreme Court of Arkansas certified a class action lawsuit against 12 nursing homes operated by Golden Living Centers in Arkansas. The certified class includes an astounding 3,400 past and present residents along with their family members. The plaintiffs allege that the practice of chronically understaffing the nursing homes breached the facilities' standard admission agreement, violated Arkansas' Long-Term Care Residents' Rights Act and violated Arkansas' Deceptive Trade Practices Act. Various officers, directors and administrators of Golden Living Centers were named in the suit in an individual capacity. There are two more similar class certifications pending in Arkansas.

The plaintiffs in *GGNSC Arkadelphia LLC v Lamb* and plaintiffs in California rely upon varying types of evidence to make their cases. Facilities' monthly staffing reports have been used to show a failure to meet state and federal minimum staffing requirements. Statements by employees, residents and residents' families that a facility has too few staff have been cited to support a finding of understaffing. Individual tales of residents soiling themselves, suffering repeated falls, being served cold food, etc., have been used by plaintiffs to paint a picture that all residents at a facility, or network of facilities, suffered through similar incidents. Inaccurate or missing chart entries have also been used to insinuate sub-par care. Plaintiffs argue that poor charting means that either a required task was not completed or an employee didn't have time to record it because the facility was understaffed. We have handled countless cases where plaintiffs have used imperfect charts to support their claims. Plaintiffs have argued, and some juries have agreed, that long term care providers pick "profits over people" by failing to staff a facility appropriately.

The evidence of understaffing has helped plaintiffs win compensatory damages, but it is punitive damages that keep long term care providers up at night. Punitive damages are often huge sums intended to deter an actor from engaging in the prohibited conduct. The Supreme Court of Appeals of West Virginia recently awarded a single wrongful death plaintiff \$32 million in punitive damages due to the facility's alleged chronic understaffing and pattern of much higher staffing ratios during state inspections. Those damages would be compounded in a class action lawsuit. Long term care providers should not wait until they are hit with a multi-million dollar lawsuit to take notice.

We have seen advertisements pop up in many jurisdictions seeking out plaintiffs who feel they have been "affected by understaffing." The potential exposure from these types of suits, particularly those of the class

action variety, is massive. Long term care providers should take steps to prevent understaffing suits from occurring and be prepared to defend them if they arise. Here are a few tips:

1. Have a method to track that you are maintaining minimum staffing standards.

Ensure that each facility maintains the minimum staffing requirements, but be mindful that plaintiffs file suits even when minimums are met, with testimony that the basic needs of the residents were not being met. Plaintiffs build class actions by arguing that if there is not enough staff to meet one patient's needs, chances are several other patients are also not receiving adequate services. The minimum standards vary from state to state, so it is crucial your facilities know and adhere to state laws. Then, you must have a method to track those staffing patterns. That way you can identify and fix quickly any staffing issue.

2. Include an arbitration agreement in your admission packet.

Arbitration is an alternative to a jury trial where both parties agree to have a neutral third party decide their dispute rather than go through an extensive court proceeding. There is most often no right to appeal, so both parties get closure quickly with less cost. Arbitration agreements can also hinder class action lawsuits by removing members from the class or, in some cases, by blocking class certification entirely. Additionally, the U.S. Supreme Court has held that an arbitration agreement can include explicit provisions that forbid residents from joining a class or consolidated arbitration, further limiting providers' exposure. Enforceable arbitration clauses can significantly decrease exposure and litigation costs.

3. Train your staff on how to chart properly.

We have seen charting mistakes cost long term care providers millions of dollars. Plaintiffs will argue if it wasn't charted it didn't happen. Long term care providers should create clear charting guidelines and invest in training on proper charting. It is crucial to have professional charts that accurately reflect all the services provided to residents. This becomes critical when there is an injury or accident. If a jury hears an injury wasn't documented, they often assume the facility was trying to cover it up. Facility staff members are often very busy so it is understandable that they might hastily fill out a chart or forget to document some information. While understandable, it can be a costly mistake. The failure to do so can result in a lawsuit even in a case where a resident was well cared for.

4. Don't hire more staff on inspection days and for goodness sake don't send emails suggesting that.

Developing a pattern of hiring more staff for inspection days will imply to a judge and jury that every other day of the year you believe your facility is inadequately staffed. This is a bad inference to have. Everyone can understand wanting to put your best foot forward when being inspected. However, if you need more staff on inspection days to meet the state's standards, chances are you need more staff every other day of the year. Staffing records that reveal a pattern of only having higher standards on inspection days plays right into a plaintiff's argument that our facilities choose profits over people. And, whatever you do, don't send emails or distribute memos suggesting that practice.

5. Respond to complaints regarding understaffing.

Residents and family members complain about understaffing for many reasons. Maybe a family member is having a bad day and wants to lash out. Maybe a resident forgot a nurse already stopped by twice that day. Or, maybe there is a legitimate issue with understaffing. It is important to document all complaints, investigate them thoroughly, and record the outcome. If the investigation reveals there was an issue with understaffing, fix it immediately. A lawsuit can go from manageable to disastrous if it is revealed a facility received several legitimate complaints about understaffing and did nothing to remedy the issue.

6. Manage residents' and families' expectations about staffing levels.

Some lawsuits can be prevented by managing residents' and families' expectations. Many cases exist where family guilt is inappropriately directed towards caregivers. The reason for such guilt is unrealistic expectations.

Long term care facilities do not provide a caregiver 24 hours a day for each resident. A good nursing home provides in the neighborhood of three hours of direct care to each resident each day. However, many families expect hospital-like care. Informing families and residents of the estimated hours the caregivers will and will not be with the resident is a good way to ensure everyone is on the same page about staffing.

7. Don't advertise yourself as something you're not.

It is essential that you accurately advertise your services. In recent cases, plaintiffs have begun to allege deceptive trade practices. Long term care advertisements help set families' and residents' expectations. Claiming you can provide services you don't provide sets expectations too high, which will cause people to believe you are understaffed when you don't deliver the advertised services.