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ADA ISSUES  
IMPACTING  
RESIDENTS AND  
EMPLOYEE OF  
RESIDENTIAL  
HEALTHCARE  
FACILITIES



## PRESENTERS



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**HOT TOPICS UNDER  
ANTI-DISCRIMINATION STATUTES AFFECTING  
RESIDENTIAL HEALTHCARE FACILITIES**

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## HOT TOPICS UNDER ANTI-DISCRIMINATION STATUTES AFFECTING RESIDENTIAL HEALTHCARE FACILITIES



- Litigation and Statutory Developments Affecting Residential Healthcare Facilities as Employers
  - Wrongful termination claims by former employees that failed to get COVID-19 vaccination
  - Proliferation of Pay transparency laws
  - Recent amendments to New York City Human Rights Law expanding the pool of protected classes to include obesity

## HOT TOPICS UNDER ANTI-DISCRIMINATION STATUTES AFFECTING RESIDENTIAL HEALTHCARE FACILITIES



- Litigation and Statutory Developments Affecting Residential Healthcare Facilities as Employers
  - Increased activity by Civil Divisions of US Attorneys offices throughout the country
  - Investigations and extraction of large settlements alleging that Nursing Home policies that preclude acceptance of patients with Opioid Use Disorder (“OUD”) who receive Medically Assisted Treatment (“MAT”) is unlawful discrimination under the Americans with Disabilities Act

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# RESIDENTIAL HEALTHCARE FACILITIES AS EMPLOYERS

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# RESIDENTIAL HEALTHCARE FACILITIES AS EMPLOYERS



- LITIGATION
  - Wrongful termination claims under the Americans with Disabilities Act related to terminations for failure to get COVID-19 vaccination
  - Claims often filed *pro se*
  - Claims are usually three-pronged:
    - Discrimination under the ADA for being *regarded* as having a disability.
    - Retaliation under the ADA for opposing the employer's COVID-19 vaccination policy.
    - Illegally requiring medical inquiries and examinations that are not job-related or consistent with business necessity.



# RESIDENTIAL HEALTHCARE FACILITIES AS EMPLOYERS

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- **Litigation**

- Claims of this type have been rejected by two District Courts in the Second Circuit.
  - Sharikov v. Philips Medical Systems MR, Inc., -- F. Supp. 3d --, 2023 WL 2390360, 22-cv-00326-BKS-DJS (N.D.N.Y. Mar. 7, 2023)
  - Librandi v. Alexion Pharm., Inc., 2023-WL 3993741, 22-cv-1126-MPS (D. Conn. Jun. 14, 2023)





# RESIDENTIAL HEALTHCARE FACILITIES AS EMPLOYERS



- **Litigation**

- Claims of this type have been similarly rejected by courts in other Circuits
  - Bobner v. AstraZeneca, -- F. Supp. 3d --, 2023 WL 3340466 (N.D. Oh. May 9, 2023)
  - Schneider v. Cnty. of Fairfax, 2023 WL 233305, at \* 4 (E.D. Va. Mar. 2, 2023)
  - Gallo v. Washington Nationals Baseball Club, LLC, 2023 WL 2455678 (D. D.C. Mar. 10, 2023)
  - Shklyar v. Carboline Co., 616 F. Supp. 3d 920 (E.D. Mo. 2022); aff'd 2023 WL 1487782 (8th Cir. Feb. 3, 2023)
  - Applegate v. St. Vincent Health, Inc., 2023 WL 3603975 (S.D. Ind. May 23, 2023)
  - Ludstrom v. Contra Costa Health Services, 2022 WL 17330842 (N.D. Ca. Nov. 29, 2022)
  - Linne v. Alameda Health Sys., 2023 WL 3168587 (N.D. Cal. Apr. 28, 2023)

# RESIDENTIAL HEALTHCARE FACILITIES AS PROVIDERS



- Statutory Developments
  - Pay Transparency Laws
    - Several states and localities have passed laws requiring employers to disclose wage or wage ranges to prospective candidates and/or current employees

# RESIDENTIAL HEALTHCARE FACILITIES AS PROVIDERS



- Locations with Pay Transparency Laws
  - California
  - Colorado
  - Connecticut
  - Maryland
  - Nevada
  - Jersey City, New Jersey
  - New York (Whole State Effective 9/17/2023), New York City, Westchester County, and Ithaca, New York
  - Cincinnati, Ohio and Toledo, Ohio
  - Rhode Island
  - Washington

# RESIDENTIAL HEALTHCARE FACILITIES AS PROVIDERS



- New York Pay Transparency Law
  - Applies to employers with four or more employees
  - Applies to all positions that will be performed, at least in part, in New York
  - Requires employers to disclose “compensation ranges” in advertisements and job postings, including for new hires and internal promotions
  - The range is the lowest and highest annual salary or hourly range of compensation that the employer believes in good faith to be accurate at the time of posting
  - Job postings must also include job description
  - Employers must maintain a history of compensation ranges and job descriptions

# RESIDENTIAL HEALTHCARE FACILITIES AS PROVIDERS



- Best Practices to Comply with Pay Transparency Laws
  - Develop accurate job descriptions for each role in the organization
  - Conduct an internal audit of current pay practices to determine current salary ranges for each role in the organization, determine if there are any pay equity issues for existing employees, and identify any steps that need to be taken to remedy those issues
  - Ensure that ranges are accurate and specific to job descriptions

## RESIDENTIAL HEALTHCARE FACILITIES AS PROVIDERS

- Statutory Developments
  - Federal law does not prohibit size discrimination
  - With limited exceptions, the vast majority of courts have held that obesity is not a disability under the ADA or state level equivalents unless it is caused by an underlying health condition (e.g., diabetes).
  - In recent years, some courts have held that obesity could fall in the “regarded as” disabled category
- Expansion of Protected Classes under New York City Human Rights Law
  - Legislation has been signed into law amending NYCHRL 8-101 and 8-107 to prohibit discrimination on the basis of a person’s height or weight in employment, housing, and public accommodation
  - Exceptions



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# RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS

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## RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Residential Healthcare Facilities are places of public accommodation under the ADA and many state laws
- Under ADA and applicable laws, it is unlawful for a place of public accommodation to deny services because of any person's actual or perceived disability



## RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- OUD is recognized as a disability that is protected under the ADA
- 28 CFR 35.108(b)(2) – specifically includes drug addiction among other physical mental impairments

## RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Medically Assisted Treatment (“MAT”)
- The determination whether an impairment substantially limits a major life activity is made without regard to the effect that ameliorating measures—including medication—may have on the impairment. 42U.S.C. § 12102(4)(E)(i); 28 C.F.R. § 35.108(d)(1)(viii).
- Common MAT
  - Methadone
  - Suboxone

# RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Increased investigatory and enforcement activity into alleged ADA violations against various industries for having policies prohibiting services to persons with OUD who receive MAT
- Industries/Sectors Impacted
  - Indiana Board of Nursing
  - Massachusetts Department of Corrections
  - Massachusetts Trial Courts
  - Private Sector Residential Healthcare Facilities in Colorado, Massachusetts, and Virginia
  - Private Sector Orthopedic Surgeon Practice in Massachusetts

## RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Penalties for Non-Compliance with ADA Requirements
  - Damages to affected patients
  - Civil fines
  - Continuing monitoring and oversight by the U.S. Attorney's Office

## RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Investigations lead by Civil Divisions from the U.S. Attorney's Office
- Most active jurisdiction has been the U.S. Attorney's Office for the District of Massachusetts
- Increased investigatory action in other states, including New York
- Anticipate continued scrutiny over policies that refuse to treat patients with OUD who receive MAT

# RESIDENTIAL HEALTHCARE FACILITIES AS CARE PROVIDERS



- Best Practices to Avoid Investigations
  - Eliminate any policies that prohibit treatment of persons with OUD that receive MAT in an absolute sense
  - Conduct an individualized assessment for patients who are identified as having OUD and receive MAT to determine whether acceptance of that patient would constitute an undue burden
  - Preserve records of any such individualized assessment if there is a denial of the patient to demonstrate the basis for an undue burden in the event of a claim or investigation



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