

Involuntary Discharge of Long-Term Care Residents – The “Nuts and Bolts,” Special Considerations, Real Life Examples...



October 27, 2011



Christopher M. McNally, Esq.



Overview



- Pitfalls and minefields;
- Process can be difficult, time consuming, costly, unpredictable, pro-resident, and can cause significant hardship to facilities;
- Worst-case outcome is the Office of Administrative Hearings can force you to keep a resident who is unable to pay
- Fees/expenses can be significant
- Lost revenue can be very difficult
- Time away from your staff, residents, and other responsibilities can cause hardship, as well.
- Try to avoid getting into situations where involuntary discharge is required (though sometimes it is inevitable despite the best efforts of your facility)



What Law Governs the Involuntary Discharge of a Nursing Home Resident?



- Federal Law
 - Code of Federal Regulations (42 C.F.R. §483.1, *et seq.*)
- State Law
 - COMAR (the Code of Maryland Regulations)
 - Comar 10.07.09, *et seq.*
 - Maryland Annotated Code (Health-General) §19-345, *et seq.*
 - Maryland Caselaw



The Residents' Bill of Rights and Involuntary Discharge

- COMAR §10.07.09.09 (F)(4) (Implementation of Residents' Bill of Rights)
 - “A Nursing Facility shall inform the resident and the appropriate legal representative , or interested family member, and promptly consult with the resident’s physician if any of the following incidents occur:
 - (4) a decision to transfer or discharge the resident from the nursing facility (emphasis added)
 - This clearly falls under the duties/responsibilities under the Residents' Bill of Rights

How does “COMAR” Define a Resident’s Discharge? (10.07.09.02)?

- Removal of a resident from a nursing facility when the nursing facility is no longer responsible for the resident’s care;
- Movement of a resident from a certified bed to a noncertified bed;
- Movement of a resident from a skilled nursing facility bed under the Medicare Program to a bed not certified under that program
- Movement of a resident from a bed certified only for Medicaid to a distinct part of the facility that is a skilled nursing facility under the Medicare Program

Manner in which Notice of Proposed Discharge or Transfer is Provided/ Basic Overall Content

- Notice is to be provided in writing (Md. Code, Health-General, §19-345.1(a))
- Standardized form requirements under Subsection (b) – the Department shall prepare and provide each facility with a standardized form that provides, in clear and simple language, at least the following information:
 - (1) Notice of the intended discharge or transfer of the resident;
 - (2) Each reason for the discharge or transfer;
 - (3) The right of the resident to request a hearing;
 - (4) The right of the resident to consult with any lawyer the resident chooses;
 - (5) The availability of the services of the Legal Aid Bureau, the Older American Act Senior Legal Assistance Programs, and other agencies that may provide assistance to individuals who need legal counsel
 - (6) The availability of the Department of Aging and local Office on Aging Long-Term Care Ombudsman to assist the resident; and
 - (7) The provisions of this section.

Resident Transfers and Discharges (COMAR 10.07.09.10)

- (A) A nursing facility may not involuntarily transfer or discharge a resident from the nursing facility unless the
 - (1) Transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing facility;
 - (2) Transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the health care or services provided by the nursing facility;
 - (3) Resident's presence endangers the health or safety of other individuals in the nursing facility;
 - (4) Resident has failed, after reasonable and appropriate notice, to pay, or to have paid under third-party payers, for a stay at the nursing facility; or
 - (5) Nursing facility ceases to operate or, in the case of a resident who receives Medicare or Medicaid services, when the nursing facility has been decertified or has withdrawn from the Medicare or Medicaid Program

Resident Transfers and Discharges

Notice Requirement

(COMAR 10.07.09.10 (C)) and Health-General §19-345.1(c), *et seq.*

- Time for Providing Notice:

- In General: 30 days before the facility involuntarily discharges or transfers a resident (COMAR 10.07.09.10(C)(1)(a) and Health-General §19-345.1(c))

- Exceptions to the 30 day rule:

- (1) Emergency situations such as a hospitalization (C)(1)

- Notice in emergency situations should be given as quickly as possible to resident, representative or interested family member ASAP

- (2) If the resident has not resided in the facility for 30 days, there is no requirement regarding an opportunity for a hearing (though reasonable notice is still required) - Health-General §19-345.1(e)(1)

- (3) Continuing Care Retirement Communities – 60 day requirement



Resident Transfers and Discharges Notice Requirement – To Whom Notice is Given (COMAR 10.07.09.10 (C)(1))

- The resident
- Resident's Representative
- The State Long-Term Care Ombudsman
- Department of Health and Mental Hygiene



Resident Transfers and Discharges

Notice Requirement – Contents of Notice

(COMAR 10.07.09.10 (D)(1 - 9))

- (1) Each reason for the proposed transfer or discharge
- (2) A statement that the resident has the right to request a hearing on a proposed transfer or discharge, and how to request a hearing pursuant to Regulation .13 of this chapter, except in the case of a discharge made pursuant to §A(5) of this chapter (i.e. where the nursing facility ceases to operate)
- (3) The name, address, and telephone number of the State's Office on Aging and local office on aging long-term care ombudsman;

Resident Transfers and Discharges

Notice Requirement – Contents of Notice

(COMAR 10.07.09.10 (D)(1 - 9)(Cont.)

- (4) The right of a resident to consult with any lawyer the resident chooses;
- (5) The name, address and telephone number of the Legal Aid Bureau, the Older American Act Senior Legal Assistance Programs, and other agencies that may provide assistance to individuals who need legal counsel;
- (6) For nursing home facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals

Resident Transfers and Discharges

Notice Requirement – Contents of Notice

(COMAR 10.07.09.10 (D)(1 - 9)(Cont.)

- (7) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals;
- (8) The effective date of the proposed transfer or discharge which, except as set forth in §C of this regulation, is at least 30 days after receiving the notice and at least 60 days after receipt of the notice if the nursing facility is part of a continuing care retirement center; and
- (9) The resident's rights concerning discharge, as set forth in Regulation .11 of this chapter

Resident Transfers and Discharges

Additional Notice and Procedural Requirements (COMAR 10.07.09.11)

- A facility may not involuntarily discharge a nursing home resident unless, within 48 hours before the discharge or transfer, the facility has done the following:
 - (1) Provided or obtained:
 - (a) A comprehensive medical assessment and evaluation of the resident, including a physical examination, that is documented in the resident's medical record,
 - (b) A post-discharge plan of care for the resident that is developed, if possible, with the participation of the resident's representative, and
 - (c) Written documentation from the resident's attending physician indicating that the transfer or discharge is in accordance with the post-discharge plan of care and is not contraindicated by the resident's medical condition

Resident Transfers and Discharges

Additional Notice and Procedural Requirements (COMAR 10.07.09.11)



- A facility may not involuntarily discharge a nursing home resident unless, within 48 hours before the discharge or transfer, the facility has done the following (cont.):
 - (2) Provided information to the resident concerning health care, including the right to:
 - (a) Accept or refuse medical treatment;
 - (b) Make an advance directive, including the right to make a living will and the right to appoint an agent to make health care decisions, and
 - (c) Revoke and advance directive

Required Notice at Time of Transfer (COMAR 10.07.09.11(B))

- With the exception of residents of a certified continuing care facility as set forth in §D of this regulation, at the time of transfer or discharge, the facility shall provide the resident and, when appropriate, the representative or interested family member with the following:
 - (1) A written statement of the medical assessment and evaluation and post-discharge plan of care required under §A of this regulation;
 - (2) A written statement itemizing the medications currently being taken by the resident;
 - (3) To the extent permitted under federal and State law, at least a 3-day supply of the medications currently being taken by the resident;
 - (4) Information necessary to assist the resident or the resident's representative in obtaining additional prescriptions for necessary medication through consultation with the resident's attending physician; and
 - (5) A written statement containing the date, time, method, mode and destination of the resident's discharge

Restrictions on Facility's Ability to Transfer (COMAR 10.07.09.11(C))

- A facility may not discharge or transfer a resident:
 - (1) Unless the resident or appropriate representative consented in writing to the discharge or transfer; or
 - (2) Except when the discharge or transfer:
 - (a) Is in accordance with a post-discharge plan of care developed under §A of this regulation;
 - (b) Is to a safe and secure environment where the resident will be under the care of a:
 - (i) Licensed, certified or registered care provider, or
 - (ii) Person who has agreed in writing to provide a safe and secure environment

Continuing Care Facilities – Special Considerations (COMAR 10.07.09.11(D))

- A continuing care facility certified under Article 70B, Annotated Code of Maryland, is not subject to §B of this regulation if the:
 - (1) Facility transfers a resident to a lesser level of care within the same facility in accordance with a contract between the facility and the resident; and
 - (2) Transfer is approved by the resident’s attending physician
- What is a “continuing care facility” under Article 70B?
 - “Continuing care facility” means a facility in which shelter and medical and nursing services or other health related services are made available:
 - (1) to an individual who is 60 years or older and not related by blood or marriage to the provider;
 - (2) for the life of the individual or for a period exceeding 1 year; and
 - (3) under a written agreement that requires a transfer of assets or an entrance fee, notwithstanding periodic charges

Duties and Responsibilities of Resident's Representatives in Conjunction with the Facility COMAR 10.07.09.11(E)

- If the requirements of A – D of this regulation have been met, the resident's representative, in conjunction with the facility, shall cooperate and assist in the resident's discharge planning, including:
 - (1) Contacting, cooperating with, and assisting other health care facilities considering admitting the resident; and
 - (2) Cooperating with government agencies, including applying for Medical Assistance for the resident

Abuse of Resident's Funds and the Attorney General (COMAR 10.07.09.11(F))



- If requested by a person during the process of transferring or discharging a resident, or on its own initiative, the Office of the Attorney General may investigate whether an abuse of a resident's funds contributed to the decision to transfer or discharge the resident, and may make appropriate referrals of the matter to other governmental agencies





Civil Money Penalties!!

COMAR 10.07.09.11(F)



- The Secretary may impose a civil money penalty not to exceed \$10,000.00 for each:
 - (1) Facility: Violation by a facility of its obligations under this regulation and Regulation .10 of this chapter; or
 - (2) Resident's Representative: Willfully or grossly negligent violation by a resident's representative of the representative's obligations under this regulation and Regulation .10 of this chapter.



Injunctive Relief Remedies

COMAR 10.07.09.11(I)

- A resident, resident's representative, resident's attorney, or the Attorney General, on behalf of a resident who believes that an involuntary discharge or transfer that violates this regulation is imminent or has taken place, may request appropriate injunctive relief from the appropriate circuit court
- Practical effect – the Circuit Court can intervene immediately and halt a transfer



Hearings for Transfers and Discharges

COMAR 10.07.09.13



- Hearing Request: (A) – A resident may request a hearing within 30 days of receiving a notice of an intended involuntary transfer or discharge as provided in Regulation .10C of this chapter;

Facility Discharge of Resident During Hearing Pendency

COMAR 10.07.09.13 (B)



- (B) Except in an emergency or when the resident has resided in a facility for less than 30 days, after a request for hearing has been filed, a nursing facility may not discharge or transfer the resident until:

- (1) A final decision is issued after the hearing and all requirements of Regulation .11 of this chapter are met; or
- (2) The resident consents to the discharge or transfer and withdraws the request for a hearing

Request for a Hearing by Resident - Procedure

COMAR 10.07.09.13 (C)

(C)(1) – The resident shall send a written request for a hearing to the Office of Administrative Hearings by the 30th calendar day after the resident receives the nursing facility's notice of the proposed transfer or discharge.

(2) After receiving the written request, the Office of Administrative Hearings shall schedule a hearing.

(3) The Office of Administrative Hearings shall conduct the hearing in accordance with COMAR 10.01.04 and 28.02.01

(4) The Department is not a party to a hearing conducted pursuant to this regulation. The parties are the nursing facility and the resident. Therefore, a hearing conducted pursuant to this regulation is not a “contested case” as defined in the Administrative Procedure Act, State Government Article §10-202, Annotated Code of Maryland

Requirement of Establishment of Escrow Account

COMAR 10.07.09.13 (D)



- A facility may require that an escrow account be established when the:
 - (1) Basis for a resident's discharge is nonpayment; and
 - (2) The resident continues to reside in the facility pending a final decision
- If an escrow account is required under §D of this regulation, the facility shall develop a policy and procedure that is acceptable to the Department concerning the establishment and disposition of funds from the escrow account.

Involuntary Transfer or Discharge of Resident – Additional Provisions Under State Statute §19-345 of the Health-General (Title 19 – Health Care Facilities) Article Related to Medicaid Facilities

- (b)(1) – A Medicaid Certified facility may not:
 - (i) Include in the admission contract of a resident any requirement that, to stay at the facility, the resident will be required to pay for any period of time or amount of money as a private pay resident for any period when the resident is eligible for Medicaid benefits; or
 - (ii) Transfer or discharge a resident involuntarily because the resident is a Medicaid benefits recipient.
- (2)(i) Except as provided in subparagraph (ii) of this paragraph, a Medicaid certified facility is presumed to be transferring or discharging a resident in violation of this subsection, if the resident is or becomes eligible for Medicaid benefits.
- (ii) A Medicaid certified facility is not presumed to be transferring or discharging a resident in violation of this subsection for transferring or discharging a resident for non-payment of services while the resident was ineligible for assistance under the medical assistance program

Requirement to have an attorney present

- Under Maryland Law, Corporations must be represented by counsel before the Office of Administrative Hearings
- Be sure to give counsel sufficient notice to allow them to prepare a defense, issue subpoenas, review records, interview staff



Mediation – An Alternative to a Full ALJ Hearing



- Mediation Works – If possible, it can save time, expense and expedite a transfer or resolution of the situation;
- Mediation is offered at no cost to the facilities with an experienced ALJ;
- Must be requested by the resident in request for hearing
- Give it a chance...
- Is a voluntary process (guided discussion in which the parties to the dispute are given an opportunity to arrive at a mutually satisfactory resolution)

Hearing on the Merits – What to Expect?

- ALJ Hearings are very similar to trials
 - Under oath and transcribed;
 - ALJ is a “quasi” judge who is empowered to make evidentiary rulings, consider factual and procedural arguments and make findings of fact
 - Witnesses will need to testify under oath;
 - Documents can be admitted, subject to rules of evidence;
 - Can be very long (and at times contentious)
 - Applicable Legal Standard: Preponderance of the Evidence
 - Subpoenas – 10 day requirement (documents vs. individuals)
 - Postponements – granted for only good cause – must be submitted no more than 5 days before hearing date
 - Hearing location is typically at the facility



Effect of Decision by Administrative Law Judge Under Health-General §19-345.1 (d)(3)

- ALJ will issue “Findings of Fact” and “Conclusions of Law”
- It is not a decision of the Secretary;
- Unless appealed, is final and binding on the parties
- Is not reviewable by the Board of Review of the Department; and
- May be appealed in accordance with §10-222 of the State Government Article as if it were a contested case but the appeal does not automatically stay the decision of the ALJ

Hearing on the Merits – What to Expect?

- Rulings:
 - Can be immediate or take several weeks (additional time/expense)
 - Decisions can be appealed by either aggrieved party to the Circuit Court (and thereafter to the Court of Special Appeals)
 - Standard of review on appeal - a decision by the ALJ will be overturned only under the following circumstances:
 - The decision was clearly arbitrary and capricious
 - Abuse of discretion
 - Not a new hearing on the merits - will only consider evidence from the ALJ

(Insert Letterhead)

October 10, 2015

Via Certified Mail, Return Receipt Requested and/or Hand Delivery

John Doe
1515 John Doe Way
Neverland, Maryland 21000

Re: Notice of Proposed Involuntary Discharge

Dear Mr. Doe:

This letter is to notify you of our intent to discharge you from this facility on or after 30 days from the date you receive this notice. (NOTE: If you are being discharged from a nursing facility which is part of a "Continuing Care Retirement Community" (CCRC) to a location outside of the CCRC, you are entitled to additional protections which are set forth in Article 70B of the Annotated Code of Maryland. If you have any questions about your rights as a CCRC resident, please contact the Maryland Department of Aging at (410) 767-1119).

The reason(s) for the proposed discharge or transfer are as follows:

- Your welfare and needs cannot be met in this facility.
- Your health has improved sufficiently so that you no longer need the services provided By this facility.
- The safety of individuals in this facility is endangered by your continued stay.
- The health of individuals in this facility is endangered by your continued stay.
- You have failed, after reasonable and appropriate notice, to pay (or to have paid under Medicare or Medicaid) for a stay at this facility.
- This nursing home is ceasing to operate.

You have a right to a hearing regarding this involuntary discharge. You may also request mediation. If you or your representative elect to request a hearing or a hearing and mediation, this request must be made within thirty (30) days of receipt of this notice of intended action. Please be sure to indicate

clearly whether you are requesting a mediation and a hearing or a hearing only. The request for a hearing, or the request for mediation and a hearing must be mailed to:

Docket Specialist Unit A
Maryland Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031

If both mediation and a hearing are requested, both will be scheduled. However, the mediation will be scheduled to take place before the hearing. A mediation meeting about your discharge would be held before a qualified mediator of the Office of Administrative Hearings ("OAH"). The mediator would informally discuss the basis for the discharge and assist you and the nursing home in reaching a resolution. Both you and the nursing home would have to agree to the resolution of this matter.

If the mediation is successful, the mediation agreement will constitute the final disposition and the hearing will be cancelled.

However, if either party is not satisfied with the proposed resolution, a hearing will then be held before an administrative law judge ("ALJ") at the OAH or at the nursing home. No information about the mediation, the proposed resolution, or the process can or will be revealed to the ALJ who holds the hearing. You may continue to reside in this facility pending the outcome of the hearing.

You have the right to consult with any lawyer, and we recommend that you seek legal counsel in this matter. There are legal assistance agencies, which may be able to help you including:

Legal Aid Bureau, Inc.
Nursing Home Program
29 W. Susquehanna Avenue, Suite 305
Towson, Maryland 21204-5201
1-800-367-7563
(410) 296-6705

Local Legal Aid Bureau
(Insert Address – each County has its own Legal Aid Bureau)

The Maryland Disability Law Center
1800 N. Charles Street, Suite 204
Baltimore, Maryland 21201

In addition, the following agencies may be of assistance to you in this matter:

Maryland Department of Aging
301 W. Preston Street, Suite 1007
Baltimore, Maryland 21201-2374
1-800-243-3425
410-767-1100

Local Office on Aging: (Check with local county)
Insert Address

A copy of this notice is being provided to the following persons and organizations at the same time that it is being given to you:

1. Your interested family member(s), guardian, or any other individual known to have acted as your agent and/or representative.
2. Your local Long-Term Care Ombudsman.
3. The Complaint Unit of the Office of Health Care Quality, Department of Health and Mental Hygiene, State of Maryland

A decision by an Administrative Law Judge on a proposed discharge or transfer of a resident, unless appealed, is final and binding on all parties. The decision may be appealed in accordance with §10-222 of the State Government Article but the appeal does not automatically stay the decision of the Administrative Law Judge.

Notwithstanding a final decision upholding a discharge, you may only be discharged if the following has occurred. Within 48 hours prior to your discharge, the facility must provide:

1. A comprehensive medical assessment and evaluation of you including a physical examination documented in your medical record;
2. A post-discharge plan of care developed where possible with you and your guardian, family or representative's participation;
3. Documentation by your attending physician that the transfer or discharge is in accordance with the post-discharge plan of care and that it is not contraindicated by your medical condition

In addition, you may only be discharged if the transfer or discharge is in accordance with the post-discharge plan of care and is to a safe and secure environment where you will be under the care of another licensed, certified, or registered care provider, or other person who has agreed in writing to provide you with a safe and secure environment.

In addition, at the time of your discharge, the facility must give you:

1. Your medical assessment and post-discharge plan of care;
2. A written statement itemizing the medications that you are currently taking;

3. To the extent permitted by law, at least a three-day supply of any medications that you are currently taking;
4. Information to assist you in obtaining additional prescriptions through consultation with your attending physician; and
5. A written statement of the day, time, method, mode and destination of your discharge.

(Note: If you are being transferred from a nursing facility which is part of a CCRC to a lesser level of care within the CCRC and the transfer is approved by your attending physician, the facility is not required to give you the 5 listed items above prior to your discharge.)

The facility must also provide you with information about your rights to make decisions concerning health care, including: (1) the right to accept or refuse medical treatment; (2) the right to make advance directives, which includes either making a living will or appointing an agent to make health care decisions; and (3) the right to revoke an advance directive.

If the facility meets its obligations as set forth above, please note that you, your guardian, family or representative must cooperate and assist in the discharge planning process by:

- (1) Contacting, cooperating with, and assisting other facilities considering admitting you; and
- (2) Cooperating with governmental agencies which includes applying for Medical Assistance for you.

If this facility violates any of its legal obligations regarding transfer and discharge, it may be subject to a substantial monetary penalty. Similarly, a member of your family or legal representative who fails to meet his or her obligations may also be subject to a substantial monetary penalty.

Very Truly Yours,

Jane C. A lot, RN, DCS
Director of Clinical Services

cc: Interested family members, guardian, or any other individual known to have acted as your agent and/or representative
Local Long Term Care Ombudsman
Complaint Unit, Office of Health Care Quality, Department of Health and Mental Hygiene, State of Maryland

Office of Administrative Hearings
Administrative Law Building
11101 Gilroy Road
Hunt Valley, Maryland 21031-1301
(410) 229-4262
Md. Relay: 711 Toll Free (800) 388-8805
Administrative Law Judge's Decision

Resident's Name: _____

Facility's Name and Address: _____

On _____, a hearing was held at the above-listed facility to determine whether the facility could transfer or discharge the above-listed individual in accordance with the provisions of the Maryland Health-Gen. Code Ann., Sections 19-345 through 19-345.2

Findings of Fact

After considering all of the evidence presented at the hearing, I find the following facts by a preponderance of the evidence:

CONCLUSIONS OF LAW AND ORDER

In accordance with my findings, I conclude, as a matter of law, that the proposed discharge meets the procedural requirements of Md. Health-Gen. Code Ann., Sections 19-345 through 19-345.2 and that the proposed discharge is for one or more of the following reasons:

- _____ (1) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- _____ (2) The transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the facility;
- _____ (3) The health or safety of an individual in a facility is endangered;
- _____ (4) The resident has failed, after reasonable and appropriate notice to pay for, or under Medicare or Medicaid or otherwise to have paid for, a stay at the facility; or
- _____ (5) The facility has ceased to operate.

Accordingly, the discharge is **APPROVED**.

(Date)

(s) _____
Administrative Law Judge

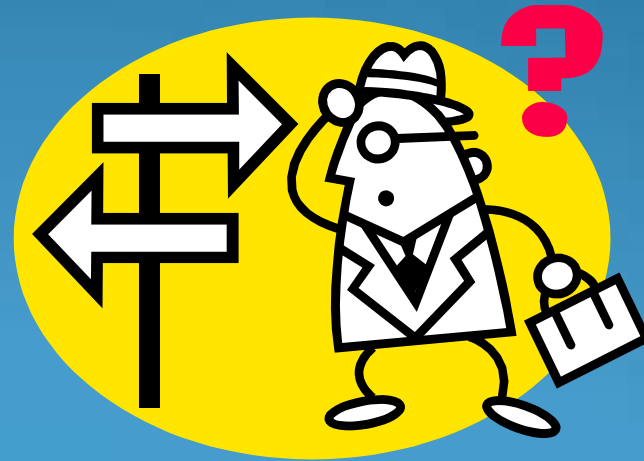
OR

In accordance with my findings, I conclude, as a matter of law, that the proposed discharge does not meet the procedure requirements of Md. Health-Gen. Code Ann., Sections 19-345 through 19-345.2 and, as a result, the proposed discharge is **NOT APPROVED**.

(Date)

(s) _____
Administrative Law Judge

Conclusion/Questions



BE SURE TO SEEK LEGAL COUNSEL!!!

The materials provided herein and information contained herein are provided for informational purposes only and do not constitute legal advice on any matter. The materials and information are not a substitute for obtaining legal advice from the reader's own lawyer in the appropriate jurisdiction or state. Moreover, nothing in these materials shall be construed to create an attorney-client relationship. You are urged to consult with counsel concerning your situation and any specific questions you may have. In addition, laws and regulations change or are amended frequently at the local, State and Federal level. While every effort has been made to ensure that the legal authority cited herein is current, you should always counsel with counsel and confirm that the specific provisions are still applicable to the extent they apply to a legal situation you are facing. While we would like to hear from you, we cannot represent you, or receive any confidential information from you, until we know that any proposed representation would be appropriate and acceptable, and not create any conflict of interest.