

Ohio Assisted Living Association Update

February, March, April 2002

► *Ask an Attorney:* Rolf & Goffman Co., L.P.A.

*Occasionally in our newsletter, we will feature legal questions of concern to our membership and the assisted living industry. We will be asking firms throughout the State for their advice. This issue features, the firm of Rolf & Goffman in Cleveland, as our guests. The answers below were prepared by **Craig T. Haran** and **Christopher Tost** from Rolf & Goffman.*

*Mr. Haran developed the information on immigration laws and Mr. Tost answered the issues on overtime. The firm concentrates its practice in health law, and represents numerous nursing facilities, residential care facilities, hospitals, physicians, and other health care providers. **Aric Martin**, a member of that firm, has been a frequent speaker at our conferences and prepared the newly compliant resident agreement we have made available to members.*

What Are An Employer's Obligations To Verify a Prospective Employee's Right to Work Under U.S. Immigration Laws?

The Immigration Reform and Control Act of 1986 makes it unlawful for any employer, regardless of size, to hire, recruit, refer for a fee, or continue to employ an individual who by reason of nationality is not entitled to work in the U.S. (hereinafter "Unauthorized Aliens"). This important immigration law also requires employers to verify that its employees are entitled to work in the U.S. by completing the Employment Eligibility Verification Form from the U.S. Department of Justice's Immigration and Naturalization Service ("INS"), more commonly referred to as Form I-9.

Form I-9 mandates that employers must attest under penalty of perjury within three days of hiring that they have verified that a prospective employee is not an Unauthorized Alien and that they are entitled to work in the U.S. Employers may verify an individual's eligibility to work by examining legal documents produced by the prospective employee that establish both identity and employment eligibility. Examples of documents that establish identify and employment eligibility include a U.S. passport, certificate of U.S. citizenship, or a valid work visa. Alternatively, a prospective employee may also produce a state driver's license or other official ID card issued by a State or Federal agency that establishes identity *in combination with* a U.S. social security card, U.S. birth certificate, Native American tribal document, or a resident alien card to establish employment eligibility. Any documents produced by the prospective employee should be copied and filed with the completed Form I-9 in the employer's records, which should be retained as proof of compliance. Completing the Form I-9 provides employers with an affirmative defense in the event the government takes

action against an employer where it is later determined that it employed an individual who constituted an Unauthorized Alien.

A violation of the Immigration Reform and Control Act could result in an assessment of civil monetary penalties against an employer of not less than \$250 and not more than \$2,000 per Unauthorized Alien, and in the event of successive offenses, the employer could be hammered with civil money penalties of between \$5,000 and \$10,000 for each Unauthorized Alien employed. Engaging in a pattern or practice of violations could result in criminal charges being levied against the employer, which could result in up to six months imprisonment and thousands of dollars in criminal fines.

Form I-9, including detailed instructions for its completion, is available at the INS Website at www.ins.usdoj.gov/graphics/formsfee/forms/i-9.htm

Can an employee waive his/her right to receive overtime compensation?

No., the right to be paid overtime may not be waived. It is only in the limited cases where an employee is considered “exempt” (i.e., executive, administrative and professional employees; and those employees engaged in companionship services in a domestic setting – e.g. home health) that an employer’s obligation to pay overtime is lifted.

When determining the total number of “hours worked” in a workweek for purposes of the overtime calculation, are “rounding practices” (i.e., recording the employee’s starting time or stopping time to the nearest 5 minutes) acceptable?

Yes, “Rounding practices” are acceptable under both federal and state law so long as a reasonable attempt is made to fully compensate the employee for the total amount of time worked. In other words, if rounding practices are used, the employer should not adopt a practice of continually rounding down.

Are meal periods, rest periods and coffee breaks counted as hours worked?

Meal periods are not counted as part of an employee’s hours worked so long as they are at least 30 minutes in length, and the employee is “completely relieved of all duties, including inactive duties,” and no work is actually performed. However, rest periods and coffee breaks generally are considered as part of an employee’s hours worked if they last 20 minutes or less. If such periods are longer than 20 minutes, whether the period constitutes time worked depends on whether the employee may use the time as he/she chooses.