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## Headlines in Health Law

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### MOBILITY AID RESTRICTIONS COST SENIOR HOUSING PROVIDER OVER \$500,000

Policies restricting the use of mobility aids, such as walkers, scooters and motorized wheelchairs, will cost a senior housing provider more than \$500,000, according to the terms of a settlement between the provider and the federal government. On August 27, 2007, the United States Department of Justice entered into a consent order with the owner of several continuing care retirement facilities and assisted living centers to resolve a lawsuit arising out of policies that restricted the use of mobility aids<sup>1</sup>. In the lawsuit, the government alleged that Covenant Retirement Communities, Inc. and its subsidiaries had violated the Fair Housing Act by discriminating on the basis of disability. The complaint alleged that Covenant and its subsidiaries discriminated against people with disabilities by:

- prohibiting residents from using mobility aids, including canes, walkers, wheelchairs, motorized wheelchairs and motorized scooters, in the dining rooms of some facilities;
- requiring residents who use motorized mobility aids to purchase liability insurance;
- steering people who use mobility aids into assisted living, rather than independent living;
- requiring motorized mobility aids to be parked in exterior areas; and
- allowing residents to use motorized mobility aids only if (1) they pay for a test to determine whether they can safely operate the aid, (2) they attend training at their own expense, and (3) a doctor certifies the aid is necessary and they are fit to use it.

The settlement requires Covenant to abandon these policies and implement a new, non-discriminatory policy, which it must integrate into its resident handbook and application materials. Under the new policy, Covenant may no longer require residents who use motorized mobility aids to purchase liability insurance, restrict the use of mobility aids in common buildings, or require motorized mobility aids to be parked outside. Covenant also may not steer people with disabilities who use mobility aids to assisted living. Additionally, the settlement requires Covenant to provide its employees with fair housing training, ensure that its advertising does not discriminate against people with disabilities, and abide by certain record-keeping requirements. Finally, Covenant must set up a \$530,000 settlement fund for people who suffered as a result of the old policy, pay an additional \$250 to each person who was tested under the old policy, and pay the United States government a \$30,000 penalty.

<sup>1</sup>The full text of the order is available at <http://www.usdoj.gov/crt/housing/documents/covenantorder2.pdf>.

The Justice Department filed suit in this case under the Fair Housing Act ("FHA"), which contains several provisions on disability discrimination that pose a number of questions for senior housing providers. Among other restrictions, the FHA makes it unlawful to deny or make unavailable any dwelling because of a disability, or to discriminate based on disability in the "terms, conditions, or privileges" of a rental or sale<sup>2</sup>. An owner or landlord must make "reasonable accommodations" in their policies when necessary to provide a person with disabilities with the equal opportunity to enjoy the dwelling<sup>3</sup>. The FHA also prohibits advertising that indicates any preference, limitation, or discrimination based on disability<sup>4</sup>.

These prohibitions can conflict with restrictions on the use of mobility aids in a variety of ways. For example, the Justice Department alleged that Covenant violated the FHA by requiring residents who used motorized mobility aids to purchase liability insurance and by restricting their use in common buildings. It also alleged that Covenant violated the FHA by permitting residents to use motorized mobility aids only if they obtained a doctor's certification, attended training, and submitted to a test at their own expense.

However, not all restrictions on mobility aids violate the FHA. In the consent order, the government allowed Covenant to regulate the use of mobility aids under certain circumstances. The order states that Covenant may restrict the use of mobility aids only when there is a direct threat to the health or safety of the resident or others or when the use would result in substantial property damage. The order also allows Covenant to establish "reasonable traffic and parking rules," such as regulating the speed of motorized mobility aids and setting rules for yielding to pedestrians.

The order demonstrates the fine line that senior housing providers must walk between prohibited discrimination and permissible restrictions that are necessary to protect the health and safety of others. For example, under the consent order Covenant may not require people who use mobility aids to eat at specified tables in the dining room, but it may designate specific seating to ensure that mobility aids do not block ingress or egress of others in case of emergency.

In formulating policies regulating the use of mobility aids, senior housing providers may find it helpful to consider the following:

- Policies restricting the use of mobility aids should make clear that they are responding to direct health and safety threats. Other issues, such as staff convenience or marketing issues, should not be considered in implementing the policy.
- Where possible, document the threats to health and safety that necessitate the restrictions. For example, compile a record of accidents that have occurred and articulate why the particular restrictions are necessary to prevent them.
- Avoid creating restrictions based only on generalized judgments that mobility aids are "dangerous." Instead, clearly articulate the risks that the policies are designed to address.
- Avoid liability insurance requirements. Such requirements likely run afoul of the FHA because of the tenuous connection between these requirements and accident prevention.
- Regularly review admission agreements and mobility aid policies and practices to ensure that they comply with the FHA.
- Ensure staff are trained in the organization's mobility aids policy.

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<sup>2</sup>42 U.S.C. § 3604(f).

<sup>3</sup>42 U.S.C. § 3604(f)(3).

<sup>4</sup>42 U.S.C. § 3604(c). A "disability" includes any physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 3602(h).

As the senior housing industry grows, housing discrimination complaints are likely to increase as well. If you have questions concerning the FHA's requirements or if you need assistance with developing or revising your facility's mobility aid policy, please feel free to contact a member of Reinhart's Long Term Care and Senior Housing Practice Group.

Reinhart Boerner Van Deuren's Long Term Care and Senior Housing Practice Group serves long term care and senior housing providers in a variety of areas, including: regulatory compliance; survey and certification; accreditation; licensing; HIPAA; caregiver misconduct investigations; due diligence, mergers and acquisitions and other corporate matters; labor and employment; criminal and civil investigations by state or federal government agencies; litigation; contracts and daily operational issues.

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