

## Implications of the “Ed Thomas” bill

by *Tricia Hoffman-Simanek*

Senate File 2352 was signed into law on March 24, 2010 and amends Iowa Code § 229.22 effective July 1, 2010. Section 229.22 is the 48 hour hold provision that provides an emergency procedure to hospitalize a person with a serious mental impairment when there is no means to obtain immediate access to the district court for involuntary hospitalization. The amendments involve requirements of facilities/hospitals prior to discharging individuals:

- If there is an arrest warrant issued for, or charges pending against, the individual, law enforcement may request the magistrate to issue an order requiring the facility/hospital to notify the law enforcement agency about the discharge of the individual prior

to discharge. This request can be made at the time the magistrate is first contacted by the examining physician or by request later. A separate order may also be requested.

- If there is an arrest warrant issued for, or charges pending against, the individual, but there is no court order requiring law enforcement notification prior to discharge, an officer may provide written notice to the hospital/facility on a form prescribed by the department of public safety, requiring law enforcement notification prior to discharge. This notice shall be to the law enforcement dispatch by telephone and to the law enforcement agency by e-mail.
- Law enforcement must pick up the individual from the hospital/facility within 6 hours after

notification. However, as previously the case, the individual cannot be detained more than 48 hours from the time the magistrate’s order is dated (weekends and holidays excluded).

- Hospitals/facilities that do not inform the law enforcement agency of the discharge are subject to a civil penalty: \$1,000 for first violation and \$2,000 for subsequent violations. ■

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## Shuttleworth & Ingersoll establishes a health reform work group

Shuttleworth & Ingersoll is pleased to continue its tradition of assisting its clients in complying with new and changing legislation and regulations affecting them. Because the passage of the Patient Protection and Affordability Act as amended by the Health Care and Education Reconciliation Act brought about wide ranging changes in how health care is delivered and paid for, we have put together a multispecialty work group

of health, tax, benefit and employment lawyers to analyze the effects of the legislation on you as our clients.

In the months to come, we will be putting together executive summaries of how the legislation affects employers, their employees, and providers and will bring you up to date as governmental guidances are issued clarifying how the legislation is to be applied. Our summaries and updates will focus on what you need to do to

both comply with the legislation and benefit from its provisions.

If you have specific questions on the legislation or would like further information, please contact your attorney at S&I or Diane Kutzko, Chair of the Health Law Practice Group, who will refer you to the attorney with the expertise to respond to your questions. Diane can be reached at [dhk@shuttleworthlaw.com](mailto:dhk@shuttleworthlaw.com) or 319-365-9461. ■

## Misclassification of workers: What it means for health care providers

by Donald Johnson

Taxpayers often classify, or misclassify, their workers as “independent contractors” for various reasons, including simplifying the payroll process, minimizing the employer’s portion of payroll taxes, and misinterpreting the law. According to the Federal Government Accountability Office, the underpayment of social security, unemployment, and income taxes in 2006 due to worker misclassification totaled an estimated 2.72 billion dollars nationally. Although worker classification may also have an impact on a taxpayer’s employee benefits, worker’s compensation, and wage and hour matters, this article focuses on the classification of workers for payroll tax liability.

As a means to reduce this tax gap (i.e. the gap between what taxpayers voluntarily pay and what is actually owed), the Internal Revenue Service (“IRS”) has teamed up with the Iowa Workforce Development (“IWD”) to prevent the misclassification of workers. The IWD recently issued a report stating that within the first 6 months of its increased efforts, it has discovered nearly 120 employers that have misclassified workers. The wages paid to the misclassified workers totaled \$15.5 million, resulting in underpaid unemployment taxes of about \$712,000.

The determination of whether a worker is an employee is based upon all of the information that

provides evidence of the degree of control and independence the taxpayer has over the worker. A worker is generally an employee if the service recipient can control what will be done and how it will be done. However, if the recipient can control only the result of the work and not the means and methods of accomplishing it, the worker is generally an independent contractor.

The IRS has outlined a number of factors that taxpayers should consider when determining worker classifications. These factors are broken down into three main

***A worker is generally an employee if the service recipient can control what will be done and how it will be done.***

categories: behavioral control, financial control, and the relationship of the parties.

Within the category of behavioral control, the IRS looks for the presence of detailed instructions and training. Extensive instructions and the availability of training would lead towards an employee classification.

Within the category of financial control, a financial investment by the worker, the allocation of risk, and the timing of payments are key factors. An independent contractor will likely have invested his or her own money into the tools, equipment, and supplies necessary

to complete the work, thereby putting themselves financially at risk. An independent contractor is also likely to be paid on a project basis. In contrast, an employee generally relies upon the service recipient to provide the necessary tools, equipment, and supplies, has little financial risk involved in a project, and is paid on a systematic (bi-weekly, etc.) basis.

Within the category of the relationship of the parties, the permanency and exclusivity of the relationship and the importance of the role served by the worker are identifying factors. Although an independent contractor may perform similar work for various customers, an employee generally cannot. Also, an employee is more likely to perform a task that is essential to the business of the service recipient, as it is these tasks for which the service recipient will desire the most control.

The facts and circumstances test is not a bright line test, but it is often not as gray as most taxpayers believe. With budget concerns at the state and federal levels, taxpayers are likely to see more scrutiny from the taxing authorities. In support of the increased scrutiny, President Obama has provided an additional \$25 million to target worker misclassification in his 2011 budget. If you haven’t done so already, now would be the time to review your worker classifications to ensure compliance with the law.

If you have any questions about these issues or need further advice, email [dlj@shuttleworthlaw.com](mailto:dlj@shuttleworthlaw.com). ■

# Recent changes to Dependent Adult Abuse statutes

by Tricia Hoffman-Simaneck [phs@shuttleworthlaw.com](mailto:phs@shuttleworthlaw.com)

The Iowa Department of Human Services is the body responsible for receiving, investigating and making conclusions regarding reports of suspected dependent adult abuse.

## **Recent Changes**

The legislature made some changes to the statute (Iowa Code Chp 235B) relating to reports of Dependent Adult Abuse (DAA) in 2009. Those changes included:

- Changing definition of “sexual exploitation” of a dependent adult by a caretaker
- Revisions to the requirements for obtaining a court order
- Adds a new criminal penalty
- Regulates the registration of boarding homes
- Requires the Department to expunge rejected intakes after 3 years and unfounded reports after 5 years

The specific changes are discussed in greater detail below.

## **Sexual Exploitation**

The law used to define sexual exploitation as something done “for the purpose of arousing or satisfying the sexual desires of the caretaker or dependent adult.” That phrase has been removed from the statute. The definition now states that sexual exploitation “means any consensual or nonconsensual sexual conduct with a dependent adult which includes but is not limited to kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act.” The legislation also added a new section that defines exploitation to include the transmission, display or taking of electronic images of the unclothed areas mentioned above if it is not related to treatment or diagnosis or part of an ongoing assessment, evaluation or investigation.

## **Court order**

If a caretaker of a dependent adult refuses to allow provision of protective services, the Department may petition the Probate Court for an order enjoining the caretaker from interfering with the provision of services. The new law states the court must set the case for hearing within 14 days of the filing of the petition.

## **Criminal penalties**

Previously, the criminal penalties that could be brought against a caretaker were as follows:

1. Class C Felony if the caretaker intentionally commits DAA that results in a serious injury or physical injury
2. Class D Felony if caretaker recklessly commits DAA that results in a serious injury
3. Class D Felony if the caretaker exploits a dependent adult if the value of the property, assets, or resources exceeds \$100.00
4. Aggravated misdemeanor if the caretaker recklessly commits DAA if the abuse results in physical injury

5. Simple misdemeanor if the caretaker exploits a dependent adult but the value of the property, assets, or resources is less than \$100.00

The new law also adds a new potential criminal penalty:

6. Serious misdemeanor if the caretaker “otherwise intentionally or knowingly commits dependent adult abuse”

The breadth and extent of this newest criminal penalty is yet to be seen, but one can imagine a situation where there was no serious injury or physical injury to a dependent adult but a charge of DAA is brought nonetheless and the alleged perpetrator has to face this potential criminal charge as well.

## **Registration of boarding homes**

Boarding homes are premises used by its owner or lessee for the purpose of renting rooms to 3 or more persons not related to the owner where supervision or assistance with activities of daily living is provided. It does not include a facility, home or program subject to licensure or regulation by DHS, DIA or DPH. A penalty of \$500.00 is assessed for failure to timely register or submit occupancy reports.

## **Record expungement requirements**

The amendments also provide that DAA reports that are rejected for evaluation, assessment, or disposition for failure to meet the definition of DAA must be expunged 3 years from the rejection date.

Further, DAA information which is determined by a preponderance of the evidence to be unfounded must be expunged 5 years from the date it was determined to be unfounded.

## **Application to Facilities and Programs and Implication on Nurses**

As most facilities are aware, the legislature added a specific section in 2008 relating to “Dependent Adult Abuse in Facilities and Programs.” Iowa Code §235E.

The definition of dependent adult includes: “a person eighteen years of age or older whose ability to perform the normal activities of daily living or to provide for the person's own care or protection is impaired, either temporarily or permanently.” We have seen first-hand, however, a broad interpretation by the Department of Inspection and Appeals (DIA) regarding this definition – particularly in the assisted living (AL) environment where the DIA seemingly treats all AL residents as if they are automatically dependent adults.

We have also seen a broad interpretation of dependent adult abuse in a facility or program. “Dependent adult abuse” is defined in Iowa Code § 235E.1 as: certain acts or injuries that are the result “of the **willful misconduct or gross negligence or reckless acts or omissions of a caretaker.**”

While the statute requires at least gross negligence, we are seeing founded charges for what amounts to a mistake in

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clinical nursing judgment. The statute also allows for a report that meets the definition of DAA but which the Department determines to be "minor, isolated, and unlikely to reoccur," to be considered unfounded.

As a result of the inclusion of Facilities and Programs, we are seeing more reports made against nurses in hospitals, assisted living facilities, and nursing homes. An investigation by the DIA is a serious matter and serious consideration should be given to employing an attorney to help during the investigation. Interviews conducted by the DIA can impact the nurse in numerous ways, including future employment, investigation by the nursing board, malpractice claims, as well as criminal implications.

The long-term effects that such a report and a founded charge may have on a nurse's career cannot be emphasized enough. If a nurse or other caretaker is being investigated for DAA charges, we urge you to seek early legal advice, as well as have a lawyer present for the investigation and interviews.

**Proposed Legislation**

On March 22, 2010, the Senate

passed Senate File 2333 (it previously passed the House on March 19, 2010). The bill relates to health care facilities and programs and sets forth specific requirements for hospital inspectors, including a conflicts of interest policy and continuing education requirements. In addition, the bill states an inspector must inform the facility that the inspector is there investigating an alleged case of dependent adult abuse ("DAA").

Prior to any interviews, DIA must provide written notification to the person of interest that they are under investigation for DAA. The DIA must also inform of the person of: (1) the possible civil consequences of founded abuse; (2) the requirement that the DIA forward a report to law enforcement; (3) the person's right to legal counsel, union representation or other desired representative; and (4) the person's right to terminate the interview at any time. The person of interest must notify the DIA of his/her desire to have a representative present and cannot "unreasonably delay" the interview in order to secure their representative's presence. Because the interview cannot be unreasonably delayed, it will be

important to contact legal counsel immediately.

The bill also provides a fast track for the appeal process when a person is notified of a finding of abuse. The hearing shall occur within 60 days of the request for appeal, unless a request for an extension is agreed upon by all parties or for good cause. ■

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For more information about Shuttleworth & Ingersoll, its Health Law Practice Group, and the attorneys who practice in health law, please visit our web site at: [www.shuttleworthlaw.com](http://www.shuttleworthlaw.com)

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*This newsletter provides general information only and should not be construed as legal advice. You should not act in reliance upon the information contained in this newsletter without consulting an attorney about your specific situation.*

**Professional Liability Insurance for Nurses?**

by Connie Alt [cma@shuttleworthlaw.com](mailto:cma@shuttleworthlaw.com)

We are often been asked whether nurses employed by hospitals, clinics and nursing homes should carry their own malpractice insurance. In the past we have told those who ask that employers will provide coverage for any acts of a nurse during the scope of the nurse's employment. Therefore, it is usually duplicative coverage, but it costs so little that it is a cheap added security.

We have recently seen a very important additional benefit of such insurance: coverage for legal fees in defending licensing matters. Licensing matters include investigations and charges lodged by the Iowa Board of Nursing, and we have seen it apply as well to charges of Dependent Adult Abuse filed by the Department of Inspection and Appeals. This is a benefit well worth the small annual premium.

If purchasing insurance of this type, be sure to ask if the policy provides administrative/licensing board coverage, how much coverage is afforded (you want at least \$10,000), and what all would be covered. ■