

**BEVERLY ENTERPRISES AGREES TO INSTALL  
LIFTING DEVICES NATIONWIDE AS PART OF A  
SETTLEMENT IN AN OSHA ERGONOMICS CASE**

On January 16, 2002 OSHA announced that it had reached a settlement with Beverly Enterprises Inc. ("Beverly") regarding the use of lifting devices in 270 Beverly facilities nationwide. While the settlement involves federal OSHA, presumably many of the 26 state OSHA programs will follow federal OSHA's lead on this ergonomics issue.

The settlement arose out of a case involving nursing assistants ("NA's") at five Beverly nursing homes in Pennsylvania. In the absence of an OSHA standard regulating ergonomics, OSHA had cited Beverly for a violation of the so-called "general duty" clause of the federal Occupational Safety and Health Act. OSHA contended that Beverly's methods of having Nurse's Assistants (NA's) lifting patients were "likely to cause LBP, a severe, chronic, and debilitating condition that constitutes serious physical harm" to the NA's.

Beverly contested the citation and the case was tried before the Occupational Safety and Health Review Commission ("Commission"). The Commission held that NA's who experienced lower back pain ("LBP") while lifting and moving residents in nursing homes were exposed to a recognized hazard in violation of the general duty clause. The Commission concluded "that there is a substantial likelihood that these NA's could suffer LBP as a result of their lifting activities and that the level of this risk is sufficient to require that Beverly implement corrective measures under section 5(a)(1)." The Commission also found that the hazard to Beverly's employees "was recognized", a requirement for establishing a section 5(a)(1) violation. In reaching this conclusion the Commission relied on "Beverly's employee training program 'Lift with Care' as well as memoranda and other correspondence from Beverly's officials...and [evidence] that experts familiar with the nursing home industry similarly recognize lifting and transferring of residents to be hazardous to NA's." The Commission also found, as required for a violation of section 5(a)(1), that the NA's were exposed to a risk of "serious physical harm." The Commission however, sent the case back to the trial judge to determine if there were feasible methods of abating the cited hazard. Beverly apparently thought that there were feasible abatement methods available and settled the case rather than appeal further from the Review Commission's decision.

The settlement requires Beverly to implement a site-specific lift program for each of its locations and to adopt the "Lift Program Policy and Guide", which includes a lift transfer and repositioning policy. Beverly also agreed to purchase mechanical and other lifting devices, friction-reducing devices and transfer belts to be used while repositioning patients. In addition, the agreement requires Beverly to train NA's in the proper use of all of the purchased equipment and to minimize the manual lifting of patients. During the five year term of the agreement, Beverly must submit semiannual reports to OSHA and SIEU describing its compliance progress. As to the 265 facilities that were not the subject of OSHA's citations, Beverly must, within five years, purchase all of the required

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equipment, completely implement the Lift Program Policy and Guide, and provide OSHA with a summary statement or checklist confirming completion of the purchases and activities.

Secretary of Labor Elaine L. Chao expressed her support of the settlement, stating that "we are pleased to resolve this matter and move forward with steps to eliminate hazards and better protect the employees of Beverly Enterprises." OSHA Assistant Secretary John L. Henshaw said "this agreement represents a major commitment to eliminate serious injuries and provide these employees the needed protection...." The comments of Secretary Chao and Assistant Secretary Henshaw may foreshadow OSHA's approach to ergonomics issues in the nursing home industry (and perhaps the entire healthcare industry), especially since Congress overturned OSHA's ergonomics standard in 2001.

While it now appears that OSHA is unlikely to propose a new ergonomics standard or even issue limited compliance guidelines, the settlement indicates the potential for enforcement of ergonomics principles under the general duty clause in the nursing home industry, especially now that the settlement effectively establishes "baseline" practices for addressing potential injuries to employees who lift patients. In cases involving other nursing homes, OSHA could use the Commission decision in the Beverly case to show that lifting patients is a recognized hazard in the industry that is likely to cause serious physical harm to employees. It is reasonable to anticipate that organized labor will encourage OSHA to pursue such enforcement efforts. Indeed, the Service Employees International Union ("SEIU"), which represented some of Beverly's employees participated in the settlement. If OSHA decides to pursue ergonomics general duty citations against other nursing homes, OSHA may be expected to seek company-specific documents and testimony to show that the company, in addition to the industry, recognized the hazards related to lifting patients. It is also possible that OSHA may attempt to extend lifting requirements to other segments of the entire healthcare industry if it views the hazards to be similar to those found in nursing homes.

If you have any questions concerning OSHA ergonomics enforcement in the healthcare industry, feel free to contact the attorney you normally call at Arent Fox or any of the attorneys listed.