



# Elder Law Newsletter

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## Employment laws apply to in-home care providers

By Dan Grinfas

Your client has decided to hire an individual or individuals to provide in-home care. What rules and regulations apply? A myriad of employment laws come into play, depending on the number of workers hired and the nature of their employment. Here are some of the key issues you and your client should consider:

### Civil rights issues and legal hiring practices

Before starting the hiring process, your client would be wise to develop a position description listing any minimum qualifications and essential job functions. It's also advisable to have a detailed job application form. Job interview questions should be focused on the applicant's skills, experience,

training, and ability to perform the essential job functions. Oregon and federal laws prohibit inquiries about disabilities, workers' compensation claims, age, race, national origin, pregnancy, religion, and other protected classifications.

Question and answer sheets on "Protected Classes" and "Pre-Employment Inquiries" are available on the BOLI Web site at [www.boli.state.or.us/technical/taindvem.html](http://www.boli.state.or.us/technical/taindvem.html). The same section contains Q&A sheets relating to family leave laws, employees with disabilities, military leave and other civil rights categories.

Your client should be aware of the different thresholds for coverage under various civil rights laws.

Anti-discrimination laws related to age, race, color, sex, religion, marital status, and national origin apply to all Oregon employees of one or more employees. ORS 659A.030.

Other regulations relating to civil rights, the Americans with Disabilities Act, and the Family Leave Act won't apply to most of your clients, since these laws cover employers with many employees.

### Post-offer requirements

Form I-9 must be completed within three days after hiring an employee to verify work eligibility. Contact the Immigration and Naturalization Service for forms and more information: 800.870.3676, [www.ins.us.doj.gov](http://www.ins.us.doj.gov).

All employers must report new-hire information within 20 days for purposes of child-support tracking. In Oregon, employers report to the Department of Justice, Child Support Division, New-Hire Reporting. For forms and more information: 503.378.2868 or [dcs.state.or.us](http://dcs.state.or.us).

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### Wage and hour issues

Because of the passage of Ballot Measure 25, the Oregon minimum wage increases from \$6.50 to \$6.90 as of January 1, 2003. The new law requires annual adjustments based on the Consumer Price Index, with the first adjustment to take effect on January 1, 2004. However, your client's employee may be exempt.

Companions to the elderly or infirm are exempt from Oregon and federal minimum wage and overtime laws when employed in or about the private home of the person by whom the companion is employed. 29 CFR §552.6, ORS 653.020(14), OAR 839-020-0004(11). To qualify for the exemption, the employee must spend 80 percent of his or her time in the companionship services, which may include meal preparation, bed making, washing of clothes, feeding, bathing, etc. The employee may perform other general household work, so long as it is incidental and does not exceed 20 percent of the total weekly hours worked. "Companionship services" does not include services performed by trained personnel such as a registered or practical nurse.

Even if your client's employee is subject to the minimum wage, your client may agree with the worker to exclude up to eight hours of sleep time and bona fide meal periods when the employee works shifts of 24 hours or more. 29 CFR §785.20, OAR 839-020-0042(2). Also, when an employee resides on the premises, any reasonable agreement between the employer and employee as to hours worked will be accepted. OAR 839-020-0042(3). If a non-exempt employee is required to live on the premises as a condition of employment, the employer must pay minimum wage in addition to the value of the lodging. OAR 839-020-0025.

Wage and hour laws won't apply if the worker is an independent contractor, but it's unlikely that the worker your client hires will meet the eight required tests under ORS 670.600. See *article on page 3*.

Caution clients about paying in cash or paying "under the table," even if the employee requests it. ORS 652.110 does permit payment in cash or negotiable instrument, but if your client chooses to pay in cash, he or she should have the employee sign a receipt, must provide a wage state-

ment or pay stub with itemized information (ORS 652.610(1), (2), OAR 839-020-0012), and must maintain payroll records showing all daily and weekly hours worked by non-exempt employees. Under ORS 652.120, every employer must establish and maintain a regular payday. Paydays must be scheduled no more than 35 days apart, and an employee's first paycheck must be available within 35 days of hire.

See [www.boli.state.or.us/technical/tafaq.html](http://www.boli.state.or.us/technical/tafaq.html) for information on legal and illegal payroll deductions and final paycheck deadlines.

### Tax issues

Do withholding requirements apply, or can your client simply pay employees and issue a 1099 form at the end of the year? This again raises the independent contractor versus employee question, and certain "casual" labor may not be subject to withholding requirements. Federal tax withholding information is available from the Internal Revenue Service in its Publication 926: *Household Employer's Tax Guide*, which you can download from the Web at [www.irs.ustreas.gov/pub/irs-pdf/p926.pdf](http://www.irs.ustreas.gov/pub/irs-pdf/p926.pdf) or obtain by calling 800.829.1040. For information on Oregon employer taxes, see [www.dor.state.or.us/InfoC/206-627.html](http://www.dor.state.or.us/InfoC/206-627.html) or call the Oregon Dept. of Revenue at 503.378.4988.

Employers who pay \$1,000 or more in cash wages in a calendar quarter to employees who work in a personal residence are required to provide unemployment insurance coverage for their workers. You can download information on this from the Oregon Employment Division's Web site at [findit.emp.state.or.us/tax/pubs/uipub207.pdf](http://findit.emp.state.or.us/tax/pubs/uipub207.pdf)

Your client may be best served by engaging a payroll service to deal with issues like withholding, reporting, garnishments, and wage assignments. Another option is hiring through a caregiver agency, which takes care of taxes and related reports. Of course, in that case the hourly rates charged will be higher.

### Workers' compensation

Home health workers are not "subject employees" under workers' compensation rules, meaning that an employer may – but is not obligated to – provide workers' compensation coverage. ORS 656.027(1). This might change in 2003 for 13,000 homecare workers who receive state funding, as they may soon be subject to a collective bargaining agreement. Service Employees International Union Local 503, representing these workers, is currently in mediation with the Homecare Commission and the Department of Human Services. A contract might also affect wage and benefit obligations if your client hires one of these union-represented workers.

For general employee coverage requirements and daily rates for employees, contact the Oregon Workers' Compensation Division at 800.452.0288 or check its Web site at [www.oregonwcd.org](http://www.oregonwcd.org).

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## Employer tax information from the Web



### IRS

[www.irs.ustreas.gov/taxtopics/page/0,,id=16278,00.html](http://www.irs.ustreas.gov/taxtopics/page/0,,id=16278,00.html)

If you pay a household employee cash wages of \$1,300 or more in the year 2002, you generally must withhold Social Security and Medicare taxes from all cash wages you pay to that employee. You are not required to withhold Federal income tax from wages you pay a household employee. However, if your employee asks you to withhold Federal income tax and you agree, you will need Form W-4, *Employee's Withholding Allowance Certificate*, and tax withholding tables.

If you withhold or pay Social Security and Medicare taxes, or withhold Federal income tax, you will need to file Form W-2 after the end of the year. You will also need a Form W-3. To complete Form W-2 you will need both an employer identification number and your employee's social security number.

If you pay cash wages to household employees totaling \$1,000 or more in any calendar quarter, you generally must pay Federal unemployment tax (FUTA) on the first \$7,000 of cash wages you pay to each of your household employees.

If you must file Form W-2 or pay Federal unemployment tax, you will also need to file a Schedule H, *Household Employment Taxes*, after the end of the year with your individual income tax return.

You can avoid owing tax with your return if you pay enough Federal income tax before you file, to cover both the employment taxes for your household employee and your income tax. If you are employed, you can ask your employer to withhold more Federal income tax from your wages during the year. You can also make estimated tax payments to the IRS during the year, or increase the payments you already make.

For more information, refer to Publication 926: *Household Employer's Tax Guide*.

### Oregon Department of Revenue

[www.dor.state.or.us/InfoC/206-627.html](http://www.dor.state.or.us/InfoC/206-627.html)

Oregon income tax withholding is not required for household employees. However, Oregon income tax can be withheld if the household employee asks you to withhold and you agree. In order to determine withholding, the employee must complete federal Form W-4, *Employee's Withholding Allowance Certificate*. Domestic service in a private home is exempt from Tri-County Metropolitan District (TriMet) and Lane Transit District (LTD) taxes.

### Oregon Employment Department

[findit.emp.state.or.us/tax/pubs/uipub207.pdf](http://findit.emp.state.or.us/tax/pubs/uipub207.pdf)

Oregon Employment Department Law covers domestic employers who employ one or more individuals and pay cash wages of \$1,000 or more in a calendar quarter, in either the current or preceding calendar year. For unemployment tax purposes, domestic employers do not include non-cash compensation (i.e. room and board) as wages. When domestic employers meet this criterion, they must register with the Employment Department, file an annual tax report, and pay unemployment taxes.

### Independent contractor status

When determining if an individual is an independent contractor or an employee, the U.S. Supreme Court and the Oregon courts have found the following elements most significant:

1. The nature and degree of control by the principal. Did the worker have the right to determine the method by which the work would be performed, and was the recipient of services interested only in the ultimate result? The more employer control that exists, the more likely it is that the worker would be considered an employee.
2. The extent to which the services in question are an integral part of the employer's business. If the worker's services are the same as or similar to work done by regular employees, the relationship is more likely to be perceived as an employment relationship.
3. The permanency of the relationship. The longer the job lasts, the more likely it could be thought of as an employment relationship.
4. The amount of the worker's investment in facilities and equipment. Contractors usually furnish their own equipment, tools, and materials, and have much more of an opportunity for profit and loss than do employees.
5. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the independent enterprise.
6. The ability to hire others to help complete work. While employees generally cannot hire others on their own initiative, contractors are usually free to employ their own assistants.
7. The extent to which the worker performs work for others while working for the employer. If the worker only has one "customer," it is more likely to be perceived as an employment relationship.
8. The ability of the worker to set his/her own schedule and determine his/her own hours. The more control the worker has over this, the more likely it is to be perceived as an independent contractor relationship.

Source: Oregon Bureau of Labor and Industries; [www.boli.state.or.us/technical/taindivem.html](http://www.boli.state.or.us/technical/taindivem.html)

# The quest for continued independence at home

By Ellen Bick, Seniors Real Estate Specialist

The goal of more than 90 percent of Americans age 65 and older is to remain in their current residences. This AARP research, done in 2000, shows a strong preference on the part of our senior citizens to be independent and to maintain a self-directed quality of life. This goal of independence also remains important for those who develop a disability that limits their activities. Whether a home needs adjustments due to a disability or merely to accommodate the changing needs of the elder, there are many simple steps that can be taken to make an elder's life happier and more independent.

An elder has several choices to continue living independently. The first is to look at the current home and decide what modifications must be made to accommodate comfort, convenience, safety, or a disability. Universal design, a building strategy used by many builders, suggests:

- Widen doorways and closets to 36 inches to accommodate a wheelchair or walker.
- Raise electrical outlets to 18-24 inches above the floor so less bending is required.
- Increase lighting levels around the house, especially the kitchen over the sink and under the cabinets. (Did you know that by age 60 we need three times as much light as we did at the age of 20?)
- Vary counter heights.
- Raise the dishwasher to make loading easier.
- Install grab bars in the bathroom or where needed.
- Install a seat in the shower.
- Provide extra hand rails or ramps to facilitate accessibility.

Other modifications could be low pile carpeting, good heating and insulation, pullout shelving, levers instead of doorknobs, less clutter, repair of loose steps and hand rails.

Prioritize the needed repairs or modifications and decide which can be accomplished by the resident, family, or friends. The rest may require a qualified licensed contractor. Get written estimates and a written contract. There are organizations and financing options to help

accomplish these home repairs. Some minor changes can provide dramatic results.

A second choice to enable a senior to live independently would be a move into a smaller home with the needed features. It is important to focus on the neighborhood and its services if a move is in order. Consider proximity to family, stores, medical facilities, transportation, exercise and recreation, safety and security, and whether pets are welcome. Often, modifications can be made to the new home before the move takes place.

In addition to home modifications, there are other options to consider that enable continued independent living. One alternative might be the concept of shared housing, where the elder shares his or her home with someone who can act as a companion and who can help with cleaning and cooking. Other community programs like Meals on Wheels, municipal transportation, and home health aides can make a major improvement in lifestyle. With a common-sense approach and the use of local and national resources, our senior citizens can live longer independent lives.

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## Local and national resources

**[www.bridgestomobility.com](http://www.bridgestomobility.com):** Free referral service for elders to prescreened contractors who are experienced with mobility and livability issues

**[www.seniorsrealestate.com](http://www.seniorsrealestate.com):** Web site devoted to seniors' real estate issues

**[www.livingafter50.com](http://www.livingafter50.com):** Web site devoted to many elder issues and services in the greater Portland area

Legacy and Providence health systems publish a brochure on services for seniors, which provides pages of referrals to agencies in the greater Portland area. Call 503.335.3500.

**[www.aoa.gov](http://www.aoa.gov):** Administration on Aging Web site

**[www.aarp.org](http://www.aarp.org):** American Association for Retired Persons Web site

**[www.eldercare.gov](http://www.eldercare.gov):** Locator service for local services for elders

**[www.ncoa.org](http://www.ncoa.org):** National Council on Aging Web site, promotes the well-being of older people

**[www.benefitscheckup.org](http://www.benefitscheckup.org):** Web site to help elders find programs which may pay for health care and other essential services

## Hiring an in-home caregiver

By Carole Barkley, Elder Law Newsletter Editor

Elders and people with disabilities may need various amounts and types of assistance in order to remain in their homes. The assistance can take the form of occasional help with yard work and repairs, regular help to clean the house and do the laundry, someone to administer medications, or 24-hour coverage for a person who is unable to do most of the activities of daily living. Often, when the health of one spouse fails, the role of caregiver falls to the other spouse, who may need help in order to avoid burnout and endangering her or his own health. Respite care, transportation, meals, and other services may be available from organizations in the community. When occasional help and community services are not enough, the elder or disabled person, the family, or the fiduciary may decide to hire a caregiver. The services to be provided will help to determine what qualifications the caregiver should have. For example, experience or training may be required if the caregiver will be preparing meals for a person who has diabetes. A Certified Nursing Assistant (CNA) designation is not a requirement for a competent in-home caregiver, but experience and training are relevant.

### Find good candidates

Good places to start the search for a caregiver are the elder's doctor, the social services department of a nearby hospital, or the county Area Agency on Aging. Hiring someone through a classified ad in the newspaper can be risky. Checking the applicant's background can be difficult. Also, giving the elderly or disabled person's telephone number or similar information in an ad for an in-home caregiver can make a vulnerable person into a target.

One option is to get a caregiver through an agency. This is similar to getting a temporary office employee through a "temp" service. The caregiver is an employee of the agency that conducts the screening and has the legal responsibilities of an employer. (Be aware that some employment laws treat the arrangement as a "joint employment" scenario, and the work-site employer can be secondarily liable for violations of civil rights or harassment and for wage claims.)

The agency chooses which caregiver to send, and may not send the same person each time. There is backup if a caregiver becomes ill or quits without prior notice, and an unsatisfactory caregiver can be quickly replaced. It is important to check on the agency's reputation and its screening procedures for caregivers. It is a good idea to check with the local Area Agency on Aging office for any complaints that involve the agency.

Legacy Healthcare System's Caregiver Services is a major source for finding and hiring caregivers. This Portland program offers a training class for caregivers and maintains a list of its graduates. Legacy screens references and does an Oregon criminal background check. (Legacy is investigating the possibility of adding a check for Washington convictions.) Although this is the only training program of its kind in the state, some professional caregivers will consider moving for an assignment.

### Interview the applicants

When a person has found some candidates for the position of in-home caregiver, he or she should plan to interview five to ten people, using the same general process and questions. There may be a ten-

dency to hire quickly, if the family is eager to resolve the situation. However, being cautious and thorough in the hiring process is important. The state of Oregon provides no oversight of in-home caregivers.

Some professionals in the field recommend interviewing potential caregivers three times:

- on the phone
- in a neutral place without the elder or disabled person present
- in the home with the elder or disabled person and other family members present.

They suggest telling the applicant exactly what a typical day would be like, and describing the duties of the job. Having the applicant fill out an employment application form creates a record of basic information about him or her, and provides an example of the person's ability to follow written and verbal instructions. Getting the applicants to talk about themselves and asking questions that are open-ended, that cannot be answered with a simple "yes" or "no" are useful techniques. For example:

- Tell me why you want to be an in-home caregiver.
- Describe your experience caring for a person with memory loss (or the particular health problem of the elder or disabled person).
- What training have you had?
- Why did you leave your last position?
- Are you physically able to perform the essential functions listed on our job description? Tell me how you've successfully performed these duties in your previous employment.
- What help do you expect the family to provide?

Look for clues that indicate whether the applicant is a compassionate person. Patty Linger, Program Coordinator for Legacy Caregiver Services advises, "If anyone has even a twinge of doubt, don't hire that person!"



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## Hiring an in-home caregiver

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### Have a contract

Linger advises the employer to have a basic written contract with the caregiver. Many people are inclined to overlook this step, and this is certainly an area where an attorney could provide some help. The contract can be very simple, or it can incorporate a care plan prepared by a medical professional. At a minimum, it should include:

- Salary
- Hours to be worked
- Provisions for days off, vacations (and whether they are paid), and sick leave
- Who is paying income taxes, FICA, etc.
- Detailed care requirements (even to the level of trimming toenails)
- Whether or not the caregiver is responsible for dispensing medication
- Mileage payments if the caregiver is to transport the elder or disabled person to the doctor or elsewhere in the caregiver's vehicle
- Any household duties, such as meal preparation and laundry
- Who will be directing the care, and the people to whom the caregiver is authorized to give information about the elder's or disabled person's condition

Linger recommends hiring a new caregiver on a temporary basis. At the end of two weeks, assess the situation. The agreement can be terminated if the person does not seem right for the job.

Dan Grinfas, an attorney with the Oregon Bureau of Labor and Industries advises that when entering into a written contract, the employer should take care not to defeat at-will status.

### What it costs

According to Linger, the going rate of \$12 an hour before taxes usually covers basic care, companionship, socializing, and some light housework. When lifting and bathing are added to the duties, expected pay goes to \$15 to \$16 an hour. If the caregiver is to be on duty 24 hours a day, the employer is expected to provide room and board, in addition to a salary. There are some employer taxes which apply. If one gets a caregiver through an agency, the agency will take care of the taxes, and the overall rate charged to clients will be about \$18 an hour, with a three-hour minimum.

### Follow up

Plan to reassess care needs at regular intervals. With frail elders and people with disabilities, the situation can change quickly. The best person for the job at one stage may not be the best person at another stage. For example, the person may become unable to move around, and the physical demands on the caregiver may increase.

A caregiver who spends a lot of time with an elder or disabled person is often the first to notice a change in health or mental state. This highlights the importance of establishing a method to communicate regularly with the caregiver.

It is also a good idea for a family member or trusted friend to drop in when the caregiver is there, to observe the interaction between caregiver and elder or disabled person. Any attempt by a caregiver to block access to family and friends is a cause for concern. Elders and disabled persons who receive in-home care are vulnerable to undue influence, abuse, and financial exploitation.

## Resources for in-home caregivers

### Caregiver Listing

Legacy Caregiver Services

1015 NW 22nd Ave, N-310; Portland OR 97210

503.413.7706; caregiver@lhs.org

Listing of individuals who have completed two-day training class, undergone a criminal background check, and have submitted references. Single list available for \$5 contribution. Three-issue subscription \$10; six issues \$20. E-mail subscription free.

*Hiring in-home Help* by Louise Dunn, MPA. This guide is available for \$4 from Legacy Caregiver Services.

### Monthly caregiver series for family and professional caregivers

Topics include:

- Natural and normal changes of aging
- Safe management of prescriptions and OTC medications
- Is the mental file cabinet too full or is it dementia?
- Infection
- Personal care

Second Tuesday of each month. 5:30 - 7:30 p.m.

Dinner at 5:15; respite care during training

\$10 per person (no one turned away due to lack of funds)

Marie Smith Center; 4616 N Albina, Portland

503.335.9980

### Taking Care of You: Powerful Tools for Caregiving

Series of six classes to help family members who care for elders with chronic conditions cope with challenges and stress

Contact Jean McFalls, Program Assistant

Legacy Caregiver Services, Portland

503.413.8018

**Lifting devices and custom wheelchairs** designed to fit a person and his or her environment can make transport easier. Medicare will often pay for these, as long as they are prescribed by a physician.

Some Goodwill stores recycle equipment such as bath chairs, wheelchairs, and commodes to caregivers free of charge.

# How to avoid financial exploitation by a caregiver

By Stephanie A. Merhib

**F**inancial exploitation happens to people of every age and income. Seniors and people with disabilities can be especially prone to financial exploitation, due to their trusting manner and easy accessibility. They can be isolated and lonely. These populations are not viewed as being good witnesses. Their mental capacity can change suddenly. There may be confusion due to a stroke, dementia, or an untreated infection. They may die before a case goes to trial.

When hiring an in-home caregiver, your clients should be aware of steps they can take to make financial exploitation less likely. They should also be aware of indications that an elder may be the victim of financial abuse. Share the following tips with your clients.

*Note: all of the following suggestions depend on the physical and cognitive functioning of the elder. Some will maintain more control over their finances than others.*

## General guidelines

Do not borrow, lend, or accept gifts of money with your caregiver.

Never authorize the caregiver to use your credit card.

Never sign your property away, especially in exchange for lifetime care.

Keep track of caregiver hours on a calendar. Make sure the number of hours billed matches the number of hours worked.

Write a contract for the caregiver to sign.

Be as specific as possible with the expectations of the caregiver and her or his role in regard to money and care.

Record all receipts in a financial log, attaching the receipts.

Set up rules about people visiting the caregiver.

## At home

Do not leave checkbook, ATM/Debit cards, or cash in plain view.

Use a post office box or locked mailbox.

Do not let your caregiver into your home when you are not there.

Use a locked box or safe deposit box for jewelry and valuables you do not wear.

Store all narcotic medications in a locked box.

Use a medication log to assure meds are given and at the correct times and correct dosages.

## Bank accounts

Sign a Durable Power of Attorney or set up a trust with your attorney to plan for when/if you become incapacitated.

Direct deposit Social Security benefits and other income into a bank account.

Do not open a joint account with anyone.

Cancel your ATM or debit card if you do not use it.

Do not give out account or income information over the phone.

Do not give out your PIN or write it on your card or anywhere it will be easily found.

## Bill paying/handling money

Use a locked box for checkbook, credit cards, and petty cash. (Keep one key; give a spare to a trusted person.)

Use automatic bill paying services or pay with a check or money order.

Have a trusted person pick up the mail if you are not able.

Have a trusted person assist with paying bills, looking over the account monthly or as needed.

Have one person become familiar with the bills you normally pay and review the bills for amounts that differ.

Look at phone bills to see if unauthorized calls are being made, how long and what times.

Check bank and credit card statements monthly for inconsistencies.

Look at cancelled checks to make sure the caregiver is not paying personal bills out of your accounts.

Do not tell anyone where you hide money in your house.

Use a bank; don't hide large amounts of money in your house.

## Preparing for incapacity

Have a trusted family member or attorney keep copies of all-important documents.

Put a compensation clause in your Power of Attorney documents.

Take photos of your jewelry, valuables, and keepsakes and have a trusted person or attorney keep a copy.

Do not sign documents under pressure, or without consulting with your attorney or a trusted person.

Inform your attorney that you have a caregiver, and what role she or he plays in regard to money.

## How family and friends can help

"Drop in" for unscheduled visits on a regular basis, to assure the caregiver is there when expected and performing duties as expected.

Pick up medications at the pharmacy and fill "med-minder" weekly.

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**How to avoid financial exploitation by a caregiver***Continued from page 7*

Visit with the elder frequently when the caregiver is not present and ask the elder about the care received.

Check shopping receipts for purchases the elder cannot or does not eat; compare to food in the home.

When checking account statements, look for purchases made at places the elder could not or would not go and check to see if purchased items are actually in the elder's home.

Be aware of the people visiting the caregiver.

If the elder is cognitively impaired, and there is cash around, have the caregivers count the petty cash at shift change and record the amounts.

Speak with the primary care physician about seeing the elder alone at all visits. If necessary, the caregiver can join the client to get medication instructions and other things needed.

**Indicators of financial abuse/exploitation**

Utilities are turned off for lack of payment.

Phone bill is higher than normal, with calls to areas and numbers not familiar to the elder.

Inability to buy clothing or medications due to lack of funds.

Caregiver refuses to spend money on elder.

Anxiety about, lack of interest in, or avoidance of discussion of financial affairs.

Transfers of assets or property to the caregiver or his/her family.

Frequent and/or expensive gifts for the caregiver.

Frequent or expensive purchases of items the elder does not use (e.g. video games, big-screen television).

Purchases of merchandise that is not at the elder's residence.

Elder's "papers," bank statements, credit cards are missing.

A recent will or trust names the caregiver.

Caregiver's name added to bank accounts, investments, and/or deed to home/property.

Elder unaware of monthly income; family and friends also unaware.

Elder always needs money by end of the month.

Elder signs a loan, a mortgage, buys a new car.

Frequent checks made out to "cash" or to the caregiver.

Elder signs blank checks.

Checks are out of order.

Checks made out in "round" amounts (i.e., \$20.00, \$140.00, instead of \$34.56, the amounts most bills and groceries come to).

Signatures on checks do not appear to be the elder's.

Sudden use of ATM or debit card in places the elder does not or cannot go.

Elder unaware of reason for appointment with attorney or bank.

Elder unaware of documents signed.

Caregiver isolating the elder, not allowing family and friends to visit.

Caregiver not giving privacy to the elder when visitors are around.

The elder defers to the caregiver instead of answering questions himself or herself.

Caregiver seems more interested in money issues than providing care.

*Stephanie A. Merhib is a coordinator for the Adult Protective Service Program and Guardianship Program of the Oregon Department of Human Services, Seniors & People with Disabilities Office of Licensing & Quality of Care. She has worked with elders in the community for more than nine years, providing case management, crisis intervention, and protective service intervention, while assisting elders to stay safely in their own homes with dignity. She can be reached at 503.947.5121 or Stephanie.A.Merhib@state.or.us*

**Medicaid and in-home services**

While the state of Oregon makes the payments to the in-home care providers, it considers them to be employed by the clients who are getting the services. The client is responsible for hiring, supervising, firing, getting the employment forms filled out, and having a care plan that shows that 20% or less of the provider's time will be spent performing general household work. The state Senior and People with Disabilities (SPD) office pays the employer's share of FICA and FUTA, and withholds the employee's share of FICA. SPD does not withhold any income taxes. See OAR 411-030-0060.



## Neglect often coupled with financial exploitation

By Stephanie A. Merhib, Adult Protective Services

A family member, friend, or caregiver may assume a caregiving role in order to get at an elder's money. This person may withhold food, water, heat, attention, affection, or care to get the money. It is not true that the perpetrators of financial crimes target rich people. They target people of every income level and of every nationality, in private homes and facilities. Neglect often leads to deterioration of the elder's condition to the point of permanent placement in a nursing facility or early death. Tell your clients to get family members or friends involved in protecting an elder or person with a disability. They should ask what assistance he or she needs and is concerned about. They should not allow isolation, and should call Adult Protective Services or law enforcement if there are signs of abuse or neglect.

### Signs/indicators of neglect

- Skin disorders and rashes
- Bedsores (decubitus ulcers)
- Untreated injuries or other medical problems
- Poor hygiene
- Hunger, malnutrition, dehydration
- Pallor, sunken eyes or cheeks
- Absence of necessities: food, water, clothing, heat
- Absence of prescribed medications, old or expired medications
- Lack of clean bedding or clothing
- Unsanitary or unsafe living conditions
- Absence of needed dentures, eye glasses, hearing aids, walkers, wheelchairs, cane, commode; or these items are placed out of reach of elder
- Elder left alone for long periods of time when physically or cognitively impaired
- A change in physical appearance or habits and routines

### Questions to ask

- Does elder keep in daily or weekly contact with family and/or friends?
- Is the elder afraid to talk with the caregiver present?
- Is the elder dressed appropriately for the weather and time of day?
- Has there been a change in the elder's cognitive abilities?
- Does the elder need medical attention?
- Is medical equipment within reach or otherwise accessible?
- Is the caregiver there when you visit during her work hours?
- Is the caregiver monopolizing the conversation?
- Does the elder look to the caregiver to answer your questions?
- Is the elder afraid of the caregiver?
- Has there been an unplanned, sudden weight loss?

## Check homeowner insurance for caregiver coverage

By Larry Culbertson

If your client chooses in-home care, advise him or her to review the homeowner insurance policy to see what coverage it provides against damages resulting from injuries to a home health care provider who is on the premises to provide professional services.

There is no standard insurance contract language to rely upon, so the language of the individual policy must be reviewed by an insurance agent and/or a legal advisor who specializes in property and casualty insurance. It is important to know what coverage the policy offers and whether it is sufficient protection against the potential risks associated with having a health care provider in a private home.

### Common contract treatment for homeowner insurance

- Premises Medical Coverage will commonly extend to any person who is on the premises with the insured's permission. It is not necessary to prove negligence to collect damages, but there usually is a limited dollar benefit, which is restricted to necessary medical expenses.
- Personal Liability Coverage presents a little bit of a "slippery slope" for homeowners. First, personal liability is a negligence-based coverage -- damages must have resulted from an insured's negligence. (For example, your teenager left his skateboard at the bottom of the stairs.) Second, there also may be limits or exclusions in the contract for claims brought by any employee of an insured, or by a person either covered by workers' compensation or entitled to be covered by workers' compensation. Beyond these caveats, I believe such claims would be treated the same as claims brought by any other independent contractor coming onto your premises.

Again, protection or lack of protection will be determined by the insurance contract language. It's a good idea for clients to review their homeowner policies with knowledgeable advisors before employing a home health care provider.

*Larry Culbertson is manager of the Consumer Advocacy Unit of the Oregon Insurance Division.*

**Important elder law numbers**

January 1, 2003

<p><b>Supplemental Security Income (SSI) Benefit Standards</b></p>	<p>Eligible individual ..... \$552/month</p> <p>Eligible couple ..... \$829/month</p>
<p><b>Medicaid (Oregon)</b></p>	<p>Asset limit for Medicaid recipient ..... \$2,000</p> <p>Burial account limit..... \$1,500</p> <p>Personal needs allowance in nursing home..... \$30/month</p> <p>Room &amp; board rate for community-based care facilities..... \$453.70/month</p> <p>OSIP Maintenance Standard for person receiving in-home services ..... \$553.70</p> <p>Long term care income cap..... \$1,656/month</p> <p>Community spouse minimum resource standard..... \$18,132</p> <p>Community spouse maximum resource standard ..... \$90,660</p> <p>Community spouse minimum monthly maintenance needs allowance ..... \$1,493/month</p> <p>Excess shelter allowance ..... Amount above \$448/month</p> <p>Food stamp utility allowance used to figure excess shelter allowance ..... \$261/month*</p> <p style="text-align: right;">*\$186 without heating and cooling cost</p> <p>Average private pay rate for calculating ineligibility for applications made after October 1, 2002 ..... \$4,300/month</p>
<p><b>Medicare</b></p>	<p>Hospital deductible per illness spell ..... \$840</p> <p>Skilled nursing facility co-insurance for days 21-100..... \$105/day</p> <p>Part B premium..... \$58.70 /month</p> <p>Part B deductible ..... \$100/year</p>

**Briefly noted...**

**Court voids guardianship for lack of notice**

The Oregon Supreme Court recently ruled that the failure to notify a minor child’s father of the petition seeking guardianship of the child rendered the guardianship void when the father later challenged it. The court held that the notice provisions in ORS 125.060 and 125.065 are mandatory, and found that the petitioners could have ascertained the father’s name and address by using reasonable diligence. The opinion in *Middleton v. Chaney*, 335 Or 58 (2002), can be found on the Internet at [www.publications.ojd.state.or.us/s49145.htm](http://www.publications.ojd.state.or.us/s49145.htm).

**2003 figures for taxability of long term care insurance**

In the Summer 2002 edition of the newsletter, Section member Shirley A. Bass wrote an informative article on the favorable tax treatment given to qualified long term care (LTC) insurance policies under IRC Sec. 213. The projected limits for 2003 on deducting qualified LTC insurance premiums as a medical expense under IRC Sec. 213 are as follows:

Age	Projected Limit for 2003
40 or younger	\$250
40+ to 50	\$470
50+ to 60	\$940
60+ to 70	\$2,510
70+	\$3,130

Benefits paid under an LTC insurance policy for qualified long term care on a “per diem” basis are excluded from taxable income in 2003 up to a projected \$220 per day or the actual costs incurred for the long term care services, whichever is higher.

**Rules for Medicare appeals process under review**

On November 15, the Centers for Medicare & Medicaid Services (CMS) published proposed rules to implement changes to the Medicare appeals system made by the Beneficiaries Improvement and Protection Act of 2000 (BIPA), (Pub. L. No. 106-554). See, 67 Fed. Reg. 62478 (Oct. 7, 2002). Visit the CMA Web site at [www.medicareadvocacy.org](http://www.medicareadvocacy.org) to learn more about the proposals. Comments are due January 14, 2003.

## Resources for elder law attorneys

### Events

#### How HIPAA Can Help or Hurt Your Client

Multnomah Bar Association CLE

Tuesday, January 21, 2003

3:00 – 5:00 p.m.

World Trade Center Auditorium, Building 2, 26 SW Salmon, Portland

For registration, call the MBA at 503.222.3275 or register online at

[www.mbabar.org/mbaForms/cle-reg.html](http://www.mbabar.org/mbaForms/cle-reg.html)

#### Revocable Living Trusts

Multnomah Bar Association CLE

Tuesday, January 28, 2003

3:00 – 5:00 p.m.

World Trade Center Auditorium, Building 2, 26 SW Salmon, Portland

For registration, call the MBA at 503.222.3275 or register online at

[www.mbabar.org/mbaForms/cle-reg.html](http://www.mbabar.org/mbaForms/cle-reg.html)

#### NAELA UnProgram

January 31 – February 2, 2003 or

February 7 – 9, 2003 (2 identical programs)

Dallas, Texas

NAELA members gather for a weekend of brainstorming, networking, and exchange of ideas and forms. Contact

Jenifer Mowery at 520.881.4005, x114 or [jmowery@naela.com](mailto:jmowery@naela.com)

#### Representing Individuals in Need of Long-Term Care & Related Concerns

Washington State Bar Association CLE

Friday, January 31, 2003

Seattle Center

[www.wsba.org/cle/2003/03381.htm](http://www.wsba.org/cle/2003/03381.htm)

#### Real Life Disability Law Issues & Answers

Oregon State Bar CLE

February 28, 2003

Information: Call 503.684.7413, or toll-free in Oregon at

800.452.8260, ext. 413

[www.osbar.org](http://www.osbar.org)

#### Estate and Distribution Planning for Retirement Benefits: The Intensive All-Day Workshop featuring Natalie B. Choate

Friday, February 28, 2003

8:40 a.m. – 5:00 p.m.

Oregon Convention Center, Portland

Sponsored by Oregon Law Institute

To register by phone using a credit card, call OLI at 503.768.6580 or

800.222.8213. Or download registration form at

[www.lclark.edu/org/oli/03\\_02\\_28.html](http://www.lclark.edu/org/oli/03_02_28.html)

#### Two-hour program on elder law issues

Marion County Bar Association CLE

April, 2003

Willamette University

[www.marioncountybar.org/cle.html](http://www.marioncountybar.org/cle.html)

#### Elder Law

April 25, 2003

Sponsored by Oregon Law Institute

Oregon Convention Center, Portland

Details TBA

#### NAELA 2003 Advanced Practitioner Pre-session Program

May 14, 2003

Fontainebleau Hilton Resort

Miami Beach

#### “MIAMI AdVICE”

#### 2003 NAELA Symposium

May 14, 2003

Fontainebleau Hilton Resort

Miami Beach

#### National Alzheimer’s Disease Education Conference

July 20 – 23, 2003

Chicago

Web site: [www.alz.org/AboutUs/](http://www.alz.org/AboutUs/WhatWeDo/EduConf.htm)

[WhatWeDo/EduConf.htm](http://www.alz.org/AboutUs/WhatWeDo/EduConf.htm)

#### Monthly Elder Law Discussion Group

Meets second Thursday: Legal Aid Services, Downtown Portland

Details: Cathy Keenan 503.224.4086

#### Elder Law Internet Discussion List

All Section members who supply an e-mail address to the Oregon State Bar are subscribed to the Elder Law Section's electronic mail distribution list. The purpose of the distribution list is to facilitate communication among members of the Section.

Send a message to all members of the Elder Law Section distribution list by addressing it to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org).

Replies are directed by default to the sender of the message *only*. If you wish to send a reply to the entire list, you must change the address to: [eldlaw@lists.osbar.org](mailto:eldlaw@lists.osbar.org).

Include a subject line in messages.

Be polite. Do not post any defamatory, abusive, profane, threatening, offensive, or illegal materials.

Sign your messages with your full name, firm name, and appropriate contact information. Email addresses alone do not provide the necessary identification.

Do not send attachments.

## Medicaid Alert

The State of Oregon is planning major cuts to the Medicaid program for people who need long term care services. The Seniors and People with Disabilities office (SPD) is considering several possible plans for the cuts.

One plan would cut services to all but the most dependent Medicaid recipients (those at service levels 1 to 3). Another would cut all Medicaid recipients who have incomes of more than the SSI rate (\$545 per month in 2002, \$552 per month in 2003).

Notices will be sent to the affected Medicaid recipients beginning January 1, 2003. Some of the cuts would be effective February 1, 2003; others would be phased in later in the year. According to state sources, the proposed cuts could be avoided if Measure 28 passes.

Members of the Elder Law Section are working on strategies and options for clients, and will post information on the Section's Internet discussion list as it becomes available. Section members who have registered their e-mail addresses with the Bar can subscribe to the discussion list by sending the following message to [listserv@lists.osbar.org](mailto:listserv@lists.osbar.org): `Subscribe eldlaw<yourname>`.

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## Newsletter Board

The *Elder Law Newsletter* is published quarterly by the Oregon State Bar's Elder Law Section, Jennifer Wright, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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