Risk Conversations — A Senior Living Podcast: Episode 2

CAROLINE BERDZIK: The bottom line is, if any employee has a disability and they request an accommodation, the employer has to engage in something called the interactive process.

[INTENSE MUSIC]

SPEAKER 1: Welcome to Risk Conversations, a senior living podcast. Your host, Tara Clayton, is a consultant with Willis Tower Watson Senior Living Center of Excellence. She gained many insights from her prior experience as a litigator and in-house counsel. While no longer providing legal advice, she now offers clients strategic and useful risk management advice. Tara talks to industry partners about the challenges they face and the solutions they seek as part of our mission of helping seniors thrive.

[INTENSE MUSIC]

TARA CLAYTON: This episode is sponsored by MedPro Group's Senior Care Division. MedPro Group's Senior Care Liability Product combines 115 years of dedicated service to the health care community with their financial strength as a Berkshire Hathaway company. MedPro Group's Senior Care Division provides industry leading coverage for all aspects of this growing market segment. They are an important carrier partner of the Willis Towers Watson Senior Living Center of Excellence, and we thank them for their support.

[INTENSE MUSIC]

Hello, everyone and welcome to Risk Conversations, A Senior Living Podcast. This is a podcast where we discuss risk solutions to a variety of issues facing the senior living industry. I'm your host, Tara Clayton, and I'm a senior claim consultant and part of the Willis Towers Watson Senior Living Center of Excellence team. In today's episode, we're going to take a deep dive and discuss some of the common labor and employment issues facing the senior living industry, as well as how COVID has impacted those areas.

I'd like to go ahead and introduce our industry expert that is joining us today. I'm really excited to talk with her. It's Caroline Berdzik. She's a partner at Goldberg Segalla, and she's the chair of the firm's employment and labor group, as well as the health care group. And just recently, Caroline joined the firm-wide management committee, becoming the first woman to serve on the board. Caroline, congratulations, and thank you for joining me today.

CAROLINE BERDZIK: Thank you so much, Tara, for having me on the podcast. I've been practicing employment and labor law for over 20 years, with a heavy focus on clients in the senior care, health care, and post-acute industries. Prior to joining Goldberg Segalla eight years ago, I was the assistant general counsel for a large long-term care company with operations in nine states with business lines in skilled nursing, assisted living, independent living, home health, hospice, and long-term care pharmacy. So, I'm well versed in the industry, so to speak.

TARA CLAYTON: Yes, you are, and I love that you pointed out the in-house counsel experience that you have as well. I think adding that with private practice really gives you a greater insight into not just the laws, but how senior living providers can actually put those laws-- put things into place to meet those laws. So, thank you so much for joining today.

With that, there's several-- Caroline, there's several areas in labor and employment that impact senior living, and that providers need to know and understand and be able to navigate. And honestly, I feel like we could do a weeklong podcast on all of those different areas. So, for purposes of today, what I'd like to do is just outline some of those common areas that you see from your practice that are really impacting senior living.

I want to start off with, I know when I was in-house, one of the frequent claims that I would see come across my desk were investigations by the Department of Labor, particularly around wage and hour investigations. And so, I wanted to touch base with you, is that something you're seeing? Are you seeing increased activity? What are you seeing in the Department of Labor in wage and hour?

CAROLINE BERDZIK: Yeah absolutely, you hit the nail on the head. Wage and hour is always an area of concern for long-term care providers. The laws are very confusing. And many times, state and local laws are more favorable than federal laws. It's also a 24/7 business, which brings its own unique challenges. Some of the problem jurisdictions in particular include, but are not limited to, California, New York, New Jersey, and Florida.

Areas of concerns we note particularly in this industry, including practices such as rounding, meal breaks, and improper deductions for meal breaks that folks don't get, improper deductions from paychecks for uniforms, employees who are performing off-clock work that are not receiving compensation for that work, perhaps a nurse doing paperwork who's clocked out already, issues that arise during natural disasters-- in the Northeast, snowstorms, for example, or hurricanes-- where you have staff that needs to be there sleeping at the facility, for example. So, there's questions that come into play with on-call and sleeping time.

We also see concerns in the area of independent contractors being used improperly. Sometimes in the COVID environment, we've seen this crop up a bit more. Incorrect classifications, employees who are misclassified as exempt employees when they should be non-exempt employees.

The State Department of Labors have been particularly aggressive. The Federal Department of Labor under the Trump administration has been more quiet. Statute of limitations in these cases can be very long. In states such as New York and New Jersey, you can have six years' worth of claims, which is significant compared to other employment claims, which may be a two year look back.

Lawsuits, if brought by private attorneys, can be even more dangerous for senior care providers because of fee shifting and the collective and class actions, which means you may have a whole host of former and current employees seeking compensation under the wage and hour statutes. Also, there's little insurance coverage, if any, available for employers who have a department of labor audit or are sued in a class or collective action, which obviously should cause concerns. So, there are things that employers can do to mitigate against these types of common claims. Some of the things we recommend are reviewing your job descriptions on a frequent basis to make sure they accurately reflect the duties of the position. Making sure people are not working off the clock, that they are actually relieved from duties while taking meal periods. In states like New York, for example, that's extremely important.

Not engaging in automatic meal deductions or rounding practices. So, payroll audits, under the guidance and oversight of an attorney, is a good idea. And also making sure your handbook has policies which encourage employees to record all time worked and also hold employees

accountable who violate these wage and hour policies of accurate time recording. So, this is some of what we're seeing in this area and some suggestions we have for employers.

TARA CLAYTON: No, that's very helpful information. I did note early on, Caroline, you mentioned some of the more concerning state jurisdictions. And I think you pointed out, there's a Federal Department of Labor that we need to be concerned about with the federal laws, but there's also state laws that need to be looked at.

And you mentioned a couple of jurisdictions that you said were a little-- that were more concerning than others, specifically California, New York, New Jersey, and Florida. What is it about those jurisdictions that make them even more concerning outside of the normal concerns that we have with wage and hour laws?

CAROLINE BERDZIK: New York has a lot of different wage orders that are somewhat confusing in terms of frequency of pay for different employees. Also, New York has one of those long statute of limitations at six years, which can significantly add up if you have a class or collective action.

California has some unique laws, including the PAGA law, which allows attorneys to basically function as attorney generals and bring private causes of action for violation of wage and hour laws, and those have significantly increased in the last few years. So, California truly is a hotbed of wage and hour litigation.

New Jersey recently expanded its wage and hour laws. It also extended statute of limitations to six years, provides for some significant civil penalties as well. So, operators in these states really need to pay close attention to the state laws because typically that's what's going to get them into trouble, as opposed to the underlying federal laws, since the state laws are more protective of employees. And employees get the benefit always of the more protective laws, whether it's a state law or federal law.

TARA CLAYTON: Very helpful. One thing-- I don't know that all providers have had to go through a wage and hour investigation. I know they are very common, and we are seeing an uptick in those investigations, as you said, especially on the state side. So, can you just walk us through what should a provider who hasn't gone through this process, what can they expect if they get a wage and hour investigation from the Department of Labor?

CAROLINE BERDZIK: It's a significant endeavor. It takes a lot of time and energy to put together a response. And we always recommend to our clients that they should consult with an attorney if they are served with a letter. It may seem innocuous at first. Sometimes these audits are driven by an individual complaint, and other times they are random.

Usually, there are industry focuses at the state. Health care is typically an area of focus in a lot of states. But as I said, sometimes the audit may derive from one person making a wage and hour complaint, and then it just blows the lid off of everything.

They're going to want significant records, time keeping records. They ask for compliance with child labor laws as well. They look at your payroll. They may want to look at personnel files. Sometimes they actually want to come on site. I know we're in a COVID-19 environment and having a lot of desk audits. But they do want to interview employees, particularly hourly employees, to explain how the company handles different situations, if they feel that they've ever been shortchanged.

So, it's very unlikely that a provider will escape a wage and hour audit unscathed. So that's why it's important to analyze the documents that you're going to provide beforehand, so you understand where your problem areas are. It's not like you can recreate documentation, but I think you need to go in with eyes wide open. And a good attorney will frame these things and help a provider get into compliance to hopefully mitigate and negotiate with the Department of Labor in terms of any fines, or penalties, or assessments that come from the audit.

TARA CLAYTON: Great, thank you, Caroline. And back to the point you made earlier, there are a lot of employment insurance policies out there that don't provide coverage for wage and hour. I know there are specific products that can be purchased specifically to wage and hour claims, so something providers need to talk to their brokers about.

But to your point, I think having those practices in place that you mentioned, reviewing job descriptions, not working off-clock hours, those mitigation practices to help prevent the claim from happening, because it sounds like if you get an audit or an investigation, it's a very time-consuming and costly investigation that usually results in some type of settlement at the end.

CAROLINE BERDZIK: Yes.

TARA CLAYTON: Another area that I know when I was in-house that I would see frequent claims, particularly from the EEOC side, is allegations about violations of the Americans with Disabilities Act and failures to-- or allegations of a failure to accommodate within the protections of that act. So Caroline, I want to talk a little bit with you about what is the ADA, the Americans with Disabilities Act, and how do you see that act come into play with senior living providers?

CAROLINE BERDZIK: I would say ADA and state-related claims are the most common claims we see in the senior care industry in terms of discrimination claims, particularly on the failure to accommodate side. So, you can have two types of claims under the Americans with Disabilities Act.

You can have disability discrimination in and of itself. I was discriminated against because I have a disability, because I have a record of being disabled or having a disability, or because I'm perceived as having a disability. Some circuits also recognize something called an associational disability claim. If you have a family member who has a disability, and you may have to care for that loved one, we've seen successful claims where someone can assert an associational disability claim under the ADA.

The other claim, and very common claim in senior care, is a reasonable accommodation claim under the ADA, or its state law counterpart, or both sometimes. And a failure to accommodate claim is when an employee has a disability, and they request a reasonable accommodation from an employer.

Very commonly, we see this in the lifting restriction area. You have a CNA, who's pregnant, who has a 15-pound lifting restriction. The common response I hear from a lot of senior care providers is, oh, we can't accommodate that. We only accommodate worker's compensation related injuries for lifting. I mean, that gets into gender discrimination and pregnancy discrimination.

But the bottom line is, if any employee has a disability and they request an accommodation, the employer has to engage in something called the interactive process. They have to sit down, or pick up the phone, or email the employee and get a better understanding of what the disability is, what limitations the employee has, and if those limitations can be accommodated.

One common trap that a lot of employers fall into is they do not rely on medical documentation from the individual's doctor. So, they have this conversation. The employee says, I have this restriction, I can't do A, B, C, D, but they never inquire of the physician what it is based on the job description that the employee can or cannot do.

We always recommend that when this situation happens, an employer sends a reasonable accommodation form to the employee to provide to their physician with a copy of the job description. And there are very specific questions on this form for a physician to fill out. What items on the job description can or cannot be performed by the employee? What accommodations will assist that employee in being able to perform those functions? How long is the restriction going to last?

It's only until you receive that information can an employer really make an informed decision. Case law and the laws in general really err on the side of employers needing these accommodations and really doing their best to accommodate employees, and that causes some friction in the senior care industry because we need to staff our buildings in a certain way. And so if we have someone who can't perform their job and we may have to rely on agency temporarily or something like that, it can be a little bit tricky.

But the process needs to happen. The process needs to be documented. And sometimes these situations could go on for several months, if not longer. And what I found is that employers who are successful in defending against these claims have a very detailed paper trail, have afforded the employee accommodations, and it's the employee who then gets exposed as being a little slippery during the process.

So, this is an area we also do a lot of counseling work on pre-litigation to guide employers as they navigate the process. Beyond the Americans with Disabilities Act, there are a lot of state laws that require accommodations. I mentioned the example of the pregnant employee. Under the pregnancy discrimination laws in many states like New Jersey or cities like Philadelphia and New York City, there are specific accommodations that must be afforded pregnant employees. So although pregnancy in and of itself is not considered to be a disability, there are certain state and city laws which almost provide a super status to someone who is pregnant and requires the employer to accommodate things a little bit more than they would for other types of disabilities or medical conditions.

I think a common misnomer, too, that many employers have is, what exactly is a disability? And what I could tell you is under the very liberal interpretation of disability, almost anything qualifies as a disability, particularly under many state laws. So, it doesn't have to limit an essential function. It can still be a disability if it's temporary in nature, for example.

TARA CLAYTON: Caroline, I did want to highlight, you mentioned the importance of documenting the process. And I know that was, when I was in-house, one thing I saw sometimes we would struggle with, is the importance of documenting the discussions and the process. The other thing-- and I wanted to pick your brain a little bit-- is similar treatment. So, I've seen situations where, perhaps, we've given good staff accommodations. But we have an employee who maybe is not doing the job and has had some poor performance, maybe we haven't documented that poor performance very well, and now there's an opportunity to perhaps terminate the employee because of an inability to get the job done.

So, I want to just to talk with you a little bit about that area because I do see that as a common area, especially in the senior living space. What are your thoughts on this equal treatment or equal use of reasonable accommodations?

CAROLINE BERDZIK: Yeah, consistency is key in these situations with any type of discrimination claim. And yes, I agree, I do see circumstances where employers may say, well, this employee hasn't been performing well anyway. Well, unfortunately, that's something the employer should have been acting on before the employee became disabled because they have to put whatever feelings or sentiments they have aside about that employee's performance and how they've been performing, and they have to address what the medical condition or disability is, what the requested accommodation is, and whether the employer can accommodate what's being requested.

If you start to play favorites, you're going to run into problems. And it's going to be deemed pretextual when you terminate that employee and you don't accommodate them, because many times these employees have a long list of everybody else who was accommodated who had a similar medical issue, or maybe not even a similar situation. And it really puts you in a bad situation on these disability discrimination claims and trying to defend them if you engage in those practices.

TARA CLAYTON: Great, yeah. And when you say pretextual, just for our audience members who aren't attorneys, essentially what you're saying is it's going to be assumed that you are discriminating against that employee because you've given reasonable accommodations to others in the past. Correct?

CAROLINE BERDZIK: Right, that the true reason why that person was terminated was because of the fact that they had a disability and requested accommodation and not because there was a poor performer, because if you've had provided those accommodations in the past, there would be no reason why, if the circumstances dictated an accommodation, why you should not have provided that. So yes, pretextual, legal term of art but very important in any type of discrimination case.

TARA CLAYTON: Well, and speaking of discrimination, so another alleged violation is in the realm of Title VII of the Civil Rights Act of 1964 and the discrimination retaliation claims there. So same discussion, Caroline, what do you see with those violations in the senior living space and some recommendations that you have?

CAROLINE BERDZIK: So, sex discrimination-- and I talk more in terms of sexual harassment-- is something that's brought under Title VII. We do see those cases from time to time in the senior care space. But straight on sex discrimination based on someone's gender, not as common because the industry is slightly more female-dominated than others.

So, we see more age discrimination cases. I see this particularly. Some facilities have long-term maintenance directors or CNAs that have been there for 30, 40 years. They started at a very young age, and they get to the point that they really are not able to perform the job as well as they did. Maybe the physical demands are a bit much. So that person gets terminated or gets laid off if there is a reduction in staff. So, we do see those age claims.

Another interesting claim we see more in the senior care space, believe it or not, are national origin discrimination claims. And that's because the staff is extremely diverse. So, I've seen situations where, for example, a Haitian CNA may say that the Jamaican director treated her in a bad manner because of her national origin.

And when I was in-house, there were some situations where I had to deal with, on the nursing staff, some disputes between nurses, LPNs, RNs, or even CNA staff with respect to differences

in national origin and feeling of favoritism in terms of certain employees of a national origin being able to take vacation days and others getting assigned worst shifts. So that's something I think that's a little bit unique in terms of other industries that I work in. But I would say retaliation is always the worst claims under Title VII.

The underlying discrimination may be bogus and not able to be proved, but if an employee complains that they are being discriminated against and wind up being terminated for whatever reason shortly after lodging that complaint with human resources or the payroll manager or the administrator, you have a very difficult time as an employer fighting that claim because of the proximity in time from the protected activity, which is the report of discrimination or harassment, and the adverse employment action, which is the termination.

So, I always say to folks that many times with these discrimination claims, it's the retaliation claims that have the value. The underlying discrimination claim may not have much meat to them.

TARA CLAYTON: What are some suggestions for listeners when they have those employees who have lodged some type of discrimination claim? What are some best practices or some considerations they need to be implementing to help mitigate getting a retaliation claim?

CAROLINE BERDZIK: Most employers like to ignore these employees because they have a lot of complaints, but you have to investigate those complaints. You have to speak with that employee and get them to commit to what their specific, detailed allegations are. Many times they make broad, sweeping statements. I feel that I'm being treated unfairly. I believe I'm working in a hostile work environment. I feel that I'm being harassed.

You need to peel away the layers of the onion and get that employee to provide specific details on how they feel they're working in a hostile work environment or being harassed. Those are terms of art, and they're also legal terms. But most folks don't understand that you only have a viable legal cause of action if harassment or a hostile work environment is based on a protected class-- your race, your gender, your religion, your age.

So, people toss those words around, and I think sometimes supervisors become numb to what they're hearing, and they don't escalate it. So I always say, supervisors, if you become aware, if an employee is saying these things, if you don't know how to handle it, escalate it to HR or your

superiors so it could be looked into. Ask that employee if there are any witnesses. Ask them to write down what their complaints are if they're willing to do so.

And then once you're done with your investigation and you have not been able to conclude that there has been any actionable harassment or discrimination or retaliation, have a sit-down with that employee and indicate that we reviewed all your concerns. We're not able to corroborate any of the allegations or find that there has been a violation of any of the laws, but we want to remind you that if something else happens, we encourage you to bring it to our attention to look into. And we also want to remind you that we have a no retaliation policy in our handbook, which says if you bring a complaint in good faith, you are not to be retaliated against.

I think that that's something many times that has to be focused on with supervisors, because sometimes if they get wind that employees have made a complaint about them, even if the complaint has no basis, they act in a retaliatory manner. Supervisors need to understand that in most states, they are subject to individual supervisory liability. Granted, it doesn't exist under Title VII, but most states have it. They can be sued individually in their role as a supervisor in these lawsuits.

I also recommend training. Training is very important for employers of all sizes, and many states now require anti-harassment training. Respect in the workplace training is something that I'm seeing become more common. California has spoken about workplace bullying and having some training in that regard.

So, we do a lot of education in the senior care space because of the care that is delivered. It's a good idea to have education on the HR front, too, so employees understand what is and isn't harassment and hostile work environment and retaliation. And also more importantly, that they know that they could report these issues and that the employer will investigate their complaints.

TARA CLAYTON: Yeah, that's great points. I think that the thorough investigation is extremely important, we see that on the professional liability side, but obviously on the employee side as well, and then the training piece and documenting all of that investigation and training that you've done to support yourself down the road.

Caroline, I want to turn now to a couple of other laws that I think senior care or senior living providers should be in the loop on. We love our acronyms in employment law, from the FMLA,

the EEOC, the ADA. And I want to bring up a couple of more acronyms, specifically the federal law GINA-- G-I-N-A-- and then the Illinois State law of BIPA-- B-I-P-A. Can you talk to us how those two laws impact the senior living space?

CAROLINE BERDZIK: So, GINA is a 2008 law. It's the Genetic Information Nondiscrimination Act. In short, it bans discrimination on the basis of genetic information. It specifically bans employers from asking for results of genetic tests, the results of an employee family member's genetic test, and an employee's family medical history. It only applies in the employment and health care context, and it covers individuals without an underlying condition. That's how it differs from the ADA.

So if you have a family history of cancer, for example, and your employer takes an adverse action against you because they're aware of that family history and they're concerned, oh wow, this person may get cancer and they're going to ring up our premiums for our health insurance, and they decide not to go forward with the hire, for example, or to terminate that person, that falls under GINA.

Interestingly, although it's been around a long time, only 12 lawsuits have been filed to date by the EEOC. And in fact, there has not been a single successful lawsuit alleging discrimination by an employer using genetic information. There have been some settlements that the EEOC touted over the years, but none since 2017. So, it's taken a bit of a back seat.

But back in 2013, there was a settlement with the Founders Pavilion, which was a former New York nursing and rehabilitation center, which paid $370,000 to settle a discrimination lawsuit. Here it was alleged that Foundations Pavilion requested family medical history as part of its post-offer pre-employment medical exams of applicants.

So I think the real takeaway there, obviously, there are physical forms that many employees have to fill out post-offer in the senior care industry. Don't ask any questions about family medical history, you will avoid liability. It will be interesting to see if GINA resurfaces now after COVID-19. I'm not really anticipating that, but it's a law that's on the book that had a lot of attention at the time that it came out but faded into the background.

On the other hand, BIPA is picking up steam. That's the Illinois Biometric Information Privacy Act. This statute, believe it or not, was enacted over 12 years ago, but litigation under its private

cause of action has spiked in recent years. Many BIPA claims are brought in the employment context. And they're typically putative class actions that consist of current and former employees that assert that employers have used, collected, or stored biometric data, such as fingerprints or facial recognition scans, in violation of the statute.

We know that many timekeeping mechanisms in the senior care space have moved toward biometric data. So, this is an area, I think, that the industry is somewhat susceptible to. If you violate BIPA, you could be held to damages of $1,000 for each negligent violation, or $5,000 for each reckless or intentional violation and attorneys' fees and costs. So, with a collective action, this could add up significantly. And if you think of every time punch as a violation, that's a lot. There was a case that came out not too long ago, which was against a nursing home in Illinois. And again, the plaintiff and other employees alleged that this facility required them to use a time clock system that scanned their fingerprints without properly providing notice, providing a publicly available retention policy, or obtaining a written release from the employees.

The defendants, the nursing home, and owners moved to dismiss the claims, saying that they were subsumed by Illinois' Compensation Act, which is their Workers' Compensation Act. The court said, not so fast, because it's a claim for statutory damages. And that is what the appellate court focused on. So, the appellate court, though, refused to address whether Workers' Compensation Act would preclude a claim for actual damages alleged by a plaintiff, as opposed to statutory damages.

So, this is an area for employers in Illinois to be concerned about. We anticipate other states passing similar laws. If you're going to use biometric data, fingerprints, things of that nature, you need to follow the state laws in terms of protecting that private information of your employees. You need to secure releases. There may be some employees that reject having you store their biometric data, and you'll have to deal with that as it comes along.

But in many of these cases, it just seems that employers are not familiar with the requirements of a law such as BIPA, and that's how they wind up getting into trouble, because if they had just followed the prerequisites and had a policy, had a retention information in that policy, and also had to sign off from the employee, there would be no cause of action.

TARA CLAYTON: Great point. Caroline, you mentioned how COVID potentially could come into play, especially with GINA. But I'd like to pivot here at the end on-- we've covered several

areas, and I wanted to get your insight and your thoughts on how COVID either has already affected some of these employment areas we've discussed from what you've seen, or how you anticipate there could be an effect. So, I'll open it up to you first where you would like to start.

CAROLINE BERDZIK: So, one area I wanted to mention where we're seeing some claims, particularly in the health care area, is the EFMLA, or the Extended Family Leave under the Coronavirus Families First Act. Initially when the regulations came out, there seemed to be a blanket exemption for health care providers.

That was tightened up by the Department of Labor regulations, which state that it should be narrowly construed for health care providers, so basically just those folks in a nursing home, for example, that are providing hands-on care. You're not going to be able to deny this leave to maintenance workers, to dietary workers, to a payroll clerk, or something of that nature. So that changed. Not all folks understood that change or knew that it happened. So, I think we're going to see some legal action in that area.

I think we're going to see situations where employees are bringing claims under the ADA or under state disability discrimination laws for failure to accommodate them for whatever they needed time off for-- COVID, quarantining, things of that nature. I would like to think that this industry is more sensitive to accommodating those requests because of the vulnerable population that's in the building.

One area, I think, that's going to be very interesting, and that's the area of vaccines. If you look at the cases that have played out on vaccines throughout the years, two types of objections an employee can make to an employer who requires a vaccine. They can make a religious exemption and say that my religion precludes me from getting this vaccination, or they can say that there is a medical reason why they cannot have that vaccination.

In 2018, there was a case that an employer won in the Eighth Circuit Court of Appeals against this employee who refused to have an MMR vaccination. She was concerned, apparently, because she alleged, she previously had a severe case of mumps and had many allergies and chemical sensitivities.

And what the court basically found there is she really wasn't able to provide any concrete proof of this. It was more her subjective belief. So, she wound up being terminated, and the court

upheld the termination based on her refusal to have that vaccination. They found that the organization had demonstrated the safety need for its employees to have that vaccination.

Two years ago, there was a case, I believe, in Michigan where an employee, who was a nurse, refused to get an influenza vaccination that the health care provider stated was mandatory. And interestingly enough said, I want to wear a mask instead. The employer said, no dice, terminated this employee, and there wound up being a settlement. I think it was close to $70,000. So, the employee did receive some compensation.

There's no vaccine that is required per se. I mean, to go to school or to hold certain jobs, you may be required to have an immunization record. So, I think this is going to be very interesting for employers to figure out how they're going to handle this.

I think employers are going to have to deal with and manage how to handle those employees who may not want to be vaccinated, particularly those employees who already had COVID-19. And the science is unclear if you've already had it how long your immunity may last and if you may need to get an immunization or not. So, I think that that's an area that we can anticipate seeing things in.

OSHA-- OSHA is in overdrive right now in terms of the senior care industry. I'm working with quite a few clients. OSHA was criticized probably the most out of any federal agency of being behind the eight ball in terms of guidance to employers. They're making up for lost time now. So they're doing a lot of audits-- these are desk audits at this point in time-- of employers that have reported employee deaths from COVID-19. As we in the senior living space, there have been employees who have passed away. And what they're focusing on in particular is fit tests, respiratory programs, and they're issuing citations for failure to have those things.

What I want to tell employers are there are viable defenses to be asserted here, and we work with clients in this space pushing back. We see OSHA is issuing some of these citations outside of the required time period, probably because they're a little bit understaffed at this point in time.

So, I think we're going to see an increase in OSHA activity from the private side of things with whistleblowing. And we've seen some cases already being brought in New Jersey, for example-- whistleblower actions. New Jersey has one of the most protective whistleblower statutes in the country at the state level. It's called the Conscientious Employee Protection Act.

So if an employee has a reasonable, good faith belief that a law, a statute, or public policy is being violated, and they report it internally or externally-- they don't have to externally report it-- and they suffer an adverse employment action, which doesn't necessarily even have to be a termination-- it could be a change in their shift that they're working-- they can bring this cause of action.

And what we're starting to see are our employees are alleging that they've return to the workplace, they don't feel safe, other employees are working around without masks, for example-- maybe in an office setting-- or that the employer is not cleaning as often as they should, or PPE is not as available as it should be, and they've complained about it, and either they were terminated or they suffered some other type of adverse employment action. So, this is another area that I think is going to be impacted significantly, and we're just starting to see that litigation come in.

TARA CLAYTON: Great, super helpful information. I think circling back to the vaccine part just wanting to stress, it feels like we're seeing employment law changes at warp speed right now, especially as it relates to COVID. So I just really want to stress to our listeners, making sure that you're continuing to work with your HR department and your outside counsel to ensure that you're staying abreast of what the new laws and new guidance from the EEOC may be on certain topics, like vaccination.

So, with that, Caroline, this has been super helpful, a ton of great information. I know there was a lot for us to cover, so I really appreciate the overview of some of these key laws that senior living providers need to be aware of and then some takeaways on some practices that they can put in place to help mitigate. So Caroline, thanks for joining.

CAROLINE BERDZIK: Well, thanks so much for having me today.

TARA CLAYTON: And one other thing I wanted to leave the audience with, Caroline, is, where can listeners find more information about you and your firm?

CAROLINE BERDZIK: Sure. Well, our website, www.goldbergsegalla.com. You could look me up personally, our employment and labor and long-term care practice groups. I am also on LinkedIn and happy to link in with other professionals in the senior care industry.

TARA CLAYTON: Awesome. And to our listeners, thank you guys for listening in. If you'd like to learn more about some of the issues we've discussed today, be sure to check us out at www.willistowers watson.com/seniorliving. There, you'll find a white paper that we've co-authored with Caroline and her firm, Goldberg Segalla. We get a little more in-depth about the wage and hour area that we discussed today and some best practices and considerations for senior living providers in dealing with the wage and hour area.

You can also find our virtual symposium content at the same web address, including our recent webinar by JoAnne Carlin and Rhonda DeMeno on current COVID updates for senior living providers. Finally, be sure to hit subscribe on the podcast, so you don't miss any of our upcoming episodes. With that, thank you, everyone, for tuning in. I hope you'll join us next time for our next risk conversation.

[INTENSE MUSIC]

[INTENSE MUSIC]

SPEAKER 1: Thank you for joining us for this Willis Towers Watson podcast featuring the latest thinking on the intersection of people, capital, and risk. For more information, visit the Insights section of willistowerswatson.com.

[INTENSE MUSIC]