

Elder Justice Act: Mandatory Reporting of Crimes, Enforcement Uncertainty

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The Health Care Reform legislation passed on March 23, 2010 (known as the Patient Protection and Affordable Care Act or PPACA) included a new reporting requirement for certain long-term care providers. The reporting requirement is in PPACA as part of the Elder Justice Act and it amends the Social Security Act ("The Act"). The reporting requirement immediately took effect on March 23, 2010.

CMS Enforcement Uncertain

In email correspondence on December 8, 2010, Cindy Graunke, Director of the Division of Nursing Homes for the Centers for Medicare and Medicaid (CMS) informed the American Health Care Association (AHCA) that CMS will not be enforcing the new reporting requirements unless and until there is funding to do so. Specifically, Ms. Graunke's email states: "Basically, the provisions of the Elder Justice Act have not been funded. Until they are funded this provision will not be implemented. So it is true the Department is not implementing it as there are no regulations or procedures at this time. That doesn't mean that at some time in the future this will be funded and regs (sic) developed and it implemented." Other than this recent informal email there is no formal guidance from CMS regarding enforcement.

The California Association of Health Care Facilities (CAHF) is planning to confer with the local CMS Region IX to confirm whether they also plan not to enforce the reporting requirements locally. Additionally, before relying on this informal communication from CMS, facilities may want to consider that even if CMS is not enforcing the reporting requirements, elder abuse plaintiff attorneys may still claim a cover up as well as a multitude of other transgressions if the facility does not comply with the requirement.

Given the uncertainty, facilities will want to carefully weigh the decision as to whether they will comply with the new law. For those facilities that plan to continue to comply, this article provides a summary of the applicability and implications of the law.

Applicability

Of course, there already was a federal reporting requirement and many states also have laws requiring reporting of elder abuse, so it will be important for long term care facilities to understand what is different about this new law. Previously, federal law regarding reporting only pertained to acts committed within the facility and required the facility to ensure that individuals reported to facility administrators and that reports were then made "in accordance with state law" (42 CFR 483.13). The new law requires that all "covered individuals" report to the Secretary of the Department of Health and Human Services (HHS) and local law enforcement any "reasonable suspicion" of a crime against a resident or person who is receiving care from a "federally funded long-term care facility" (42 USC 13206-25).

The reporting requirement applies to long-term care facilities and defines long-term care facility as a "residential care provider that arranges for, or directly provides, long-term care."

The inclusion of “residential” in this definition means that the reporting requirement only pertains to residential facilities, but would not apply to other long-term care providers such as adult day care, home health, or therapy providers. Additionally, the Act defines “long-term care” as including the provision of supportive services for individuals who are unable to engage in one or more activities of daily living, thus including assisted living facilities.

However, the reporting requirement only applies to long-term care facilities if they also receive over \$10,000 in federal funds under the Act annually. This would, of course, include funds through Medicare or Medicaid, including Medicaid waivers, but may also include funds received through a resident’s social security income benefits. If a facility receives over \$10,000 in federal funds, the reporting obligation exists with regard to all residents, not just those on whose behalf the facility receives federal funds.

Another point to consider is how this requirement applies to organizations having multiple facilities, where some of the facilities receive over \$10,000 in federal funds annually and others do not. Because the definition of long-term care facility refers to “providers,” it suggests that this requirement would apply only to those facilities that are enrolled as “providers” in a federal program. So, the reporting obligation would not apply to all facilities simply because of a common ownership.

Covered Individuals

The Act requires reporting by all “covered individuals” that have a reasonable suspicion that a crime has occurred. That Act defines covered individuals as including the owners, operators, employees, managers, agents, and contractors of a long-term care facility.

This is one of the areas that the reporting requirements may be more expansive than some state laws. It extends to the agents and contractors of the facility, beyond the employees. The Act does not limit the definition of agents or contractors, so this could be read to extend to even the occasional agent or contractor of the facility; like a plumber. It could also be interpreted as extending to other providers that lease space on a facility’s grounds, such as a provider of therapy services. There are notice requirements in the Act, which require the facility to notify all covered individuals, including agents and contractors, of their duty to report. Thus, the facility will need to notify the occasional plumber or therapy provider of their duty to report.

The reporting obligation is not satisfied by the covered individual merely informing the owner or operator; the covered individual must inform local law enforcement and the Secretary of HHS. This may be different from some state law, or what actually happens in practice at some facilities, where it is just the facility administration that does the reporting. Under the Act, all covered individuals who have a reasonable suspicion that a crime has occurred have an *individual obligation* to report that suspicion to both local law enforcement and the Secretary of HHS.

Of course, this means that numerous individuals at the facility may be required to submit reports about the same incident. Subsequent regulations may clarify whether one report per facility will suffice.

Reasonable Suspicion of a Crime

The Act requires that covered individuals report any reasonable suspicion of a crime against any individual who is a resident of, or is receiving care from, the facility. There are no specific parameters as to what constitutes reasonable suspicion, and it’s possible that subsequent regulations may offer some additional clarity here, but even without further guidance, providers should continue to do what they are likely already doing in cases of suspected elder abuse. They should use their judgment on a case-by-case basis to determine whether there is reasonable suspicion of a crime occurring, erring on the side of reporting.

Indeed, there can be gray areas here. A resident with dementia may claim that someone stole something from their room, when they have really misplaced it. Or an employee may falsely accuse someone of committing a crime against a resident for dishonest reasons. As with many current state reporting requirements, providers will have to use their judgment in these cases, but remember that there may be significant penalties for failing to report.

Crime is defined by the law of the applicable political subdivision. Again, this may be broader than some state laws which require reporting of elder abuse and may define elder abuse a bit more narrowly than crime generally. For instance, even embezzlement against a resident’s personal funds or the suspicion of vandalism against a resident’s home outside of the facility would be reportable. Unlike the previous federal law and some state laws, the Act’s reporting requirement is not limited to crimes occurring at the facility, the Act extends to crimes committed against a resident even outside of the facility.

Timing of Reports

Perhaps the most onerous implication of this new law is the requirement regarding the timing of reporting; it is quicker than most existing state laws. The new law requires that the report be submitted within two (2) hours after forming the suspicion of crime if the event results in serious bodily injury. Two hours is quick considering that in the first 2 hours after a resident has suffered serious bodily injury related to a

possible crime, the facility may be trying to do a number of other things like making sure the resident is getting appropriate care, investigating what happened, and trying to get things back under control at the facility. In the midst of all this, the law now requires that the report also be made in that first 2 hours! And even if there is no serious bodily injury, the report is still required very quickly – within 24 hours. And remember also that this reporting obligation pertains to each covered individual separately, so each covered individual would technically be required to submit a report within this quick time period.

Method of Reporting

The new law requires reporting to both the Secretary of HHS and local law enforcement. Again, this is likely to be different from many state laws, which may only require reporting to a state agency and perhaps either to the police or an ombudsman.

Although the reporting requirements are detailed in some aspects, they are fairly vague with regard to the method of reporting. The content of the report is not specified in the law. Also the method of reporting – writing, phone, online is not specified. Simply by the 2-hour requirement, however, it seems safe to assume that reports to local law enforcement are expected to be made by phone, quickly. But for the report to HHS, there is no phone number provided, no website address to receive reports, and no form provided. HHS may at some point develop a form for this purpose, but until that time, one approach may be to submit a brief letter to HHS from the facility administrator which states the nature of the suspected crime, the resident victim, and then names of all individuals with knowledge about the incident who would be otherwise be required to report.

Retaliation

The Act also contains an affirmative prohibition, preventing facilities from retaliating against an employee who reports or causes a report to be made. Notably, the retaliation prohibition pertains more narrowly to retaliation against an employee, rather than simply a “covered individual”. Retaliation under the act includes:

- Discharging, demoting, suspending, threatening, harassing an employee
- Denying a promotion or other employment-related benefit to an employee
- In any other manner discriminating against an employee in the terms and conditions of employment
- Filing a complaint or a report against a nurse or employee with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or employee

Penalties

The penalties for failing to report are specific to each covered individual who fails to report and may be up to \$300,000 if the failure to report exacerbated harm to the victim and up to \$200,000 otherwise. Additionally, the covered individual faces possible exclusion from the federal programs, and during any period for which a covered individual is classified as an excluded individual, a facility that employs such individual shall also be ineligible to receive federal funds under the Act. This could have dramatic consequences for facilities.

Additionally, there are penalties if the facility retaliates against an employee for reporting. The penalties may be up to \$200,000 and possible exclusion from the federal programs for a period of two years.

Notice of Rights and Duties

Long-term care facilities that are covered by this act, are required to notify all covered individuals annually of their duty to report suspected crimes. As mentioned before, the reporting requirements took effect on March 23, 2010, when the bill passed, so if a facility has not yet made this notification, it should do so immediately.

Given the wide variety of covered individuals, facilities may want to consider varying their notice depending on type of covered individuals they are trying to notify. For instance, for some covered individuals a letter may be a good method of annual notification. The facility may also consider adding the requirements to its employee handbook, putting up a poster, or conducting annual training sessions.

Additionally, facilities are required to post a sign – in a conspicuous place regarding the rights of employees to be free from retaliation. The sign must also inform the employees that they may file a complaint of retaliation with the Secretary of HHS. The Act states that HHS will specify the form for this sign, but as of December 2010, HHS had not done so, and the requirement to post the sign is still effective. So in the meantime, we suggest facilities post a basic sign using the language from the Act itself. A sample notice is provided at the end of this Article.

Implications Now

Given the new reporting requirements, there are a number of immediate implications for long-term care facilities. The following provides a quick

checklist of action items:

- Determine which facilities receive over \$10,000 in federal funds under the Act
- Notify immediately and then annually all personnel connected to such facilities of their duty to report crimes
- Consider asking local law enforcement to educate personnel regarding what constitutes a crime
- Update personnel reporting policies and internal training and education programs
- Consider including provisions regarding reporting obligations in employment and vendor contracts
- Draft guidelines regarding to whom personnel should report if they suspect commission of a crime
- Post a temporary sign detailing the rights of personnel to be free from retaliation (until HHS issues form for sign)
- Ensure that prospective personnel are not excluded from participating in federal health care programs and require certification of such
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- Post a temporary sign detailing the rights of personnel to be free from retaliation (until HHS issues form for sign)
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Sample

NOTICE TO EMPLOYEES

Pursuant to Section 1150B(d) of the Social Security Act (the "Act"), a long-term care facility may not:

(A) discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee; or

(B) file a complaint or a report against a nurse or other employee with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or employee,

for making a report, causing a report to be made, or for taking steps in furtherance of making a report, of a suspected crime against a resident of, or a person receiving services from, the facility as required by Section 1150B of the Act.

An employee may file a complaint with the Secretary of the U.S. Department of Health and Human Services ("HHS") against a long-term care facility that violates the employee's rights under Section 1150B of the Act. To file a complaint with the Secretary of HHS, write to U.S. Department of Health and Human Services, 200 Independence Avenue, S.W., Washington, D.C. 20201, or call 1-877-696-6775.

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