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Health Care Bulletin

LONG-TERM CARE FACILITIES' OBLIGATIONS FOR REPORTING SUSPECTED CRIMES*

In June 2011, the Centers for Medicare and Medicaid ("CMS") released supplemental guidance concerning long-term care facilities' obligations for reporting reasonable suspicion of crimes. Official regulations have yet to be released. Reporting is statutorily mandated by Sections 6701–6703 of the Patient Protection and Affordable Care Act of 2010, H.R. 3590 ("PPACA"). The obligations are included under the "Elder Justice Act" provisions within PPACA.

This statutory obligation to report applies to nursing home owners, operators, employees, managers, agents, and contractors ("covered individuals") in long-term care facilities receiving at least \$10,000 in federal funding. Covered individuals must report any reasonable suspicion of a crime (as defined by local law) against facility residents, or individuals receiving care at a facility. Reports must be made to both the Secretary of the Department of Health and Human Services ("DHHS") and to one or more local law enforcement entities.

A covered individual's failure to report can result in a fine of up to \$200,000 and possible exclusion from federal programs, including Medicare and Medicaid. When a violation exacerbates harm to the crime victim or harms another person, a covered individual may be fined up to \$300,000 and may face exclusion.

The statute prescribes two different timing requirements for reporting. If the suspicious events result in serious bodily injury, the report must be made immediately, but not later than two hours after the suspicion is formed. If the suspicious events do not result in serious bodily injury, the report must be made no later than twenty-four hours after the suspicion is formed.

The statute defines "serious bodily injury" as involving extreme physical pain; involving substantial risk of death; involving protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.

Employers are prohibited from retaliating against employees who file reports of suspected crimes. Employers found to be in violation of the anti-retaliation provision may be fined up to \$200,000 and may be excluded from federal programs, including Medicare and Medicaid.

All facilities subject to these reporting requirements must conspicuously post a notice specifying the rights of covered individual-employees. The notice must state that an employee may file a complaint with the DHHS against a facility; explain how to file such a complaint; and state that an employee may also file a complaint if the facility retaliates against the employee for reporting suspicion of a crime.

Tips for effectively implementing and communicating these reporting requirements include:

- (1) Coordinate with local law enforcement to determine what is a crime.
- (2) Review existing incident and complaint reporting protocols.
- (3) Develop new policies, procedures, and protocols when necessary to ensure compliance with these reporting requirements.
- (4) Multiple covered individuals with reporting responsibilities relating to the same suspected crime may (but are never required to) file a single report. Because each covered individual is responsible for fulfilling their own reporting obligation, it is advisable to individually identify multiple people submitting a single report.
- (5) Covered individuals who become aware of a suspected crime after a report has been made should supplement

the original report with additional information, including the names of the covered individuals and the date and time they became aware of the suspected crime.

The CMS guidance memorandum is available at:
http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter11_30.pdf.

For more information on the obligations of the Elder Justice Act and reporting of crimes, health reform, or Medicare and Medicaid program integrity initiatives in general, please contact a member of Benesch's Health Care Department:

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