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New Crime Reporting Requirements for Long-term Care Facilities

The “Elder Justice Act” provisions of the Patient Protection and Affordable Care Act (the federal health care reform law) include new crime reporting requirements for long-term care facilities. The requirements took effect when the President signed the health care reform law on March 23, 2010. Although the reporting requirements are in effect now, several questions about implementation remain unanswered. Following is a summary of the new requirements, a discussion of open questions and our recommendations for compliance.

OVERVIEW OF REQUIREMENTS:

Each individual who is an owner, operator, employee, manager, agent or contractor of a long-term care facility (a “Covered Individual”) that receives at least \$10,000 in federal funding under the Social Security Act is required to report any reasonable suspicion of a crime against a resident of, or a person receiving care from, the facility. The report must be made to the Secretary of the Department of Health and Human Services (“HHS”) and local law enforcement, and strict time limits apply.

- If the suspected crime results in serious bodily injury, the report must be made **immediately and in no event later than 2 hours after forming the suspicion.**
- If the suspected crime does **not** result in serious bodily injury, the report must be made **no later than 24 hours after forming the suspicion.**

The law does not specify how the reports to HHS and law enforcement should be made (e.g., online, by telephone or in writing). It

also is not clear what information must be included in the report.

In addition, the law:

- requires long-term care facilities to annually notify Covered Individuals of their reporting obligations. The law does not specify how the annual notification should be given;
- prohibits long-term care facilities from retaliating against an employee who reports or causes a report to be made under the law’s provisions; and
- requires long-term care facilities to conspicuously post a sign in the facility specifying the rights of employees under the new law. The sign must include (i) a statement that an employee may file a complaint with the Secretary against a facility that violates the non-retaliation provisions, and (ii) information about how to file a complaint.

FACILITIES AFFECTED:

The new federal law affects “long-term care facilities” that receive at least \$10,000 in federal Social Security Act funding (for example, from Medicare or Medicaid) in a calendar year. As a result, chronic and convalescent nursing homes (including nursing homes within continuing care retirement communities) and rest homes with nursing supervision that meet the \$10,000 threshold must comply with the law’s requirements. It is not clear whether other categories of providers are considered “long term care facilities” under the law.

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The new federal reporting obligation not only covers suspected crimes against residents of a long-term care facility, but it also applies to suspected crimes against other persons receiving care from the facility. This means that suspected crimes against non-residents, such as individuals who receive outpatient rehab services from a nursing facility, must also be reported.

STIFF PENALTIES FOR VIOLATIONS:

The law provides for stiff penalties against individual owners, employees, managers and others, as well as against the facility, for violations.

Specifically, a Covered Individual who fails to make a required report, or to report within the required timeframe, is subject to a civil money penalty of up to \$200,000, or up to \$300,000 if the failure to report (or to timely report) exacerbates the harm to the victim of the crime or results in harm to another individual. The Secretary also has discretion to exclude the Covered Individual from participation in federal health care programs. During any such period of exclusion, a facility that employs the excluded Covered Individual is not eligible to receive Medicare or Medicaid or other federal health care funds.

A facility that unlawfully retaliates against an employee for making a report to be made is subject to a civil money penalty of up to \$200,000, or exclusion from participation in federal health care programs for a period of two years, or both.

MANY OPEN QUESTIONS:

Although the new requirements are in effect now, additional guidance is needed to clarify some aspects of the federal law. For example:

- As noted above, it is not clear how

facilities should make the required reports and what information they need to include.

- It also is not clear which facilities are considered “long term care facilities” under the law. In addition, questions remain about the new law’s reach to other services provided by long-term care facilities.
- “Covered Individuals” include owners, agents and contractors of a facility. However, it is not clear who is considered an “agent” or “contractor” for purposes of the new law. It also is not clear who is considered the “owner” of a non-profit facility.
- The Secretary of HHS is required to specify the form of the sign to be posted in long-term facilities specifying the rights of employees and the manner in which they may file complaints with the Secretary of HHS for alleged violations. However, the Secretary has not yet issued a sample sign.
- Many questions also arise about how the new federal reporting requirements relate to existing federal and state reporting requirements.

RELATIONSHIP TO OTHER STATE AND FEDERAL REPORTING REQUIREMENTS:

The new federal reporting requirements do not change existing requirements under Connecticut law to report to the Department of Public Health (“DPH”), the Department of Social Services (“DSS”), and local law enforcement authorities. Under Connecticut law:

- Nursing homes must immediately report any allegation of abuse to DPH, initiate an investigation within 24 hours, and file

a written report with DPH within three days.

- Long-term care providers must report to DSS, within 72 hours, any reasonable suspicion or belief that a resident or an elderly person has been abused, neglected, exploited or abandoned.
- The administrator of a nursing home is required to report to local law enforcement any alleged crime (which includes abuse of an elderly person) committed by a resident or a person employed by or visiting the facility.

Additionally, federal law already requires nursing facilities to:

- report immediately (within 24 hours) to the administrator and to DPH any allegation or incident of abuse, neglect, mistreatment, injury of unknown source or misappropriation of resident property; and
- investigate, and report the results of the investigation to the administrator and to DPH within five working days.

These state and federal requirements remain in place. However, under the new federal law the report to local law enforcement now must be made *within 2 hours* of forming a reasonable suspicion of the crime if the crime results in serious bodily injury, and *within 24 hours* of forming the suspicion if the crime does not involve serious bodily injury. In addition, the requirement to report to law enforcement no longer applies solely to nursing home administrators. It now applies under federal law to all other employees, as well as to all owners, operators, managers, agents and contractors of a long-term care facility that receives at least \$10,000 in federal funding. Covered Individuals now must also report suspected crimes to the Secretary of HHS, within

the same time periods, and face potential penalties for noncompliance.

RECOMMENDED ACTION:

- Determine whether your facility receives at least \$10,000 in federal funding (which includes Medicare and Medicaid reimbursement).
- Review policies and procedures and revise them as necessary to reflect the new federal reporting requirements. While individuals are held responsible for making reports under the new requirements, it will be important to designate a single individual such as the administrator to be responsible for making sure that all reports are made. However, policies and procedures should emphasize individual responsibility to ensure prompt reporting to the administrator.
- Educate Covered Individuals about their reporting obligations. Facilities may need to use a variety of educational

tactics to ensure that the message reaches *all* Covered Individuals (*i.e.*, owners, operators, employees, managers, agents and contractors).

- Establish a plan for annually notifying Covered Individuals about their reporting obligations. For example, consider incorporating a description of the requirements into annual training sessions and employee manuals, and devise other notification strategies to reach owners, contractors and agents. What works for one group of Covered Individuals may not be effective for others. Vary the content of the notification and the method of delivery as appropriate for the particular group of Covered Individuals targeted (*e.g.*, employees versus owners).
- Post a sign in a conspicuous location in the facility that specifies the rights of employees under the law. Until the Secretary provides guidance on the content and form of the sign, facilities may post the following notice in a place where employees are likely to see it:

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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- ❑ When the Secretary issues guidance specifying the form of the sign, update the sign to conform to the guidance.
- ❑ Look for future guidance and/or regulations from HHS on how suspected crimes are to be reported under the new law and what information must

be included in reports. Also look for future guidance from DPH on how these reports will be coordinated with reports that are already mandated under federal and state law.

If you have questions about this Advisory, please contact

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