

JUNE 30, 2021

*If you have any questions
about this Advisory,
please contact:*

MAUREEN WEAVER
203.498.4384
mweaver@wigginc.com

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY FOR VIRTUAL VISITATION AND MONITORING IN NURSING HOMES

On June 16, 2021, Governor Ned Lamont signed into law **Public Act No. 21-55**, *An Act Strengthening the Bills of Rights for Long-Term Care Residents and Authorizing the Use of Resident Technology for Virtual Visitation and Virtual Monitoring* ("PA 21-55"). Connecticut now joins certain states across the country that have enacted statutes or regulations on the use of video monitoring in nursing homes. Unlike many other state laws, however, Connecticut's new law addresses rights and obligations concerning resident use of technology in general, for communication and virtual visitation as well as for monitoring.

PA 21-55 draws on lessons learned during the COVID-19 pandemic when in-person visitation in nursing homes was significantly limited. Connecticut's Nursing Home and Assisted Living Oversight Working Group, which was established in response to COVID-19's impact on the long-term care setting, recommended that the Connecticut General Assembly enact legislation addressing visitation in the long-term care setting as well as resident access to the technology of their choosing, with provisions in place for roommates and privacy. At the same time, the growing prevalence and capabilities of communication technology devices raised concerns among nursing home providers that technology used for virtual communication and visitation could be deployed to secretly

monitor resident care, capturing images and sounds of other residents and staff without sufficient dignity, privacy and consent protections.

PA 21-55 responds to these recommendations and concerns. It affords nursing home residents the right to install and use technology as they would in their own homes, but also sets out rules for how the technology is used. The law prohibits use of technology for covert monitoring. Use of technology for monitoring is permitted only if the resident provides prior notice to the facility, obtains consent where required and complies with other specific requirements.

In this Advisory, we first summarize PA 21-55's provisions addressing the use of technology for virtual visitation and monitoring in the nursing home. These provisions take effect on October 1, 2021. Next, we summarize sections of PA 21-55 that contain related amendments to the statutory bill of rights for residents of nursing homes, as well as residential care homes, chronic disease hospitals and managed residential communities. Finally, we discuss a related law that takes effect on October 1, 2021, concerning the use of images and recordings obtained through resident use of technology in employee discipline matters and in Department of Public Health investigations.

CONTINUED

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY IN NURSING HOMES

Use of Technology for Virtual Visitation and Virtual Monitoring in Nursing Homes

Use of technology for virtual visitation and monitoring is addressed in Section 3 of PA 21-55. That section applies only in the nursing home setting. It does not apply in other settings such as assisted living because assisted living services in Connecticut are provided in the managed residential community, which is considered a private residence under Connecticut law. As such, these residents are free to install and use technology in their private residences.

RIGHTS AND RULES FOR RESIDENTS AND THEIR REPRESENTATIVES

The law states that the nursing home resident has the “right to use technology of the resident’s choice that facilitates virtual monitoring or virtual visitation” subject to certain requirements. If the resident is not capable of exercising this right, a “resident representative” may do so on the resident’s behalf. PA 21-55 defines a “resident representative” as a court appointed conservator of the person or guardian or an appointed health care representative; if there is no conservator of the person or health care representative, then a person whom the resident has designated in a written document signed by the resident and included in the resident’s records on file at the facility may serve as the resident’s representative, and if there is no such written document, a legally liable relative or other responsible party can act on the resident’s behalf.

If a resident or resident’s representative wishes to install and use technology for virtual visitation or monitoring, the following requirements apply:

- **Resident Responsible for Expenses.** The resident is responsible for expenses involved in the purchase, activation, installation, maintenance, repair, operation, deactivation and removal of the technology and
- **No Privacy Right Violations.** The technology and any recordings or images obtained from it may be used by the resident and the person communicating with the resident only in a manner that does not violate any individual’s right to privacy under state or federal law and that complies with requirements set out in PA 21-55.

If a resident or the resident’s representative wishes to use technology for virtual monitoring, including situations where technology is already being used to enable virtual visits but the resident or representative later decides to put it to use for monitoring, the following additional requirements apply:

- **Posted Notice of Monitoring.** A “clear and conspicuous notice” must be placed on the door of the resident’s room, indicating that technology intended for and enabling virtual monitoring may be in use.
- **Detailed Notice to Roommate(s).** If technology will be used for virtual monitoring in a shared living situation, advance notice must be provided to the roommate or representative

CONTINUED

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY IN NURSING HOMES

of the roommate specifying the type of technology, the proposed location of the device, its intended use, intended hours of operation and whether the device can record audio or visual or be activated remotely.

■ **Written Consent from Roommate(s).**

The resident or representative wishing to install a device for virtual monitoring must then obtain written consent of all roommates or their representatives for use of the technology for virtual monitoring; if any roommate withdraws consent, use of the technology must cease until consent is obtained and the resident or representative must notify the facility, in writing, no later than seven days after the roommate withdraws consent.

■ **Written Notice to Nursing Home.**

The resident or representative must file a signed, written notice with the nursing home along with a copy of the roommate's consent not less than seven days before installing or using technology for virtual monitoring.

The notice must:

(A) identify the type of technology, its intended use, intended hours of operation and location in the resident's room,

(B) state whether the technology is capable of recording audio or video or being activated or controlled remotely,

(C) acknowledge that the resident is responsible for the purchase, activation, installation, maintenance, repair, operation, deactivation and removal of the technology, and

(D) include a waiver of all civil, criminal and administrative liability for the nursing home (PA 21-55 contains a separate provision, discussed below, providing that the nursing home is immune from liability in connection with use of the technology).

PA 21-55 specifically exempts cellular mobile phones used primarily for telephonic communication and tablets not used for virtual monitoring from these requirements, but these devices cannot be used in any way that will violate an individual's right to privacy.

NURSING HOME RESPONSIBILITIES

■ **Internet Access.** Under PA 21-55, the nursing home must provide Internet access, electricity and a power source for technology used for virtual visitation or virtual monitoring at no cost to the resident. However, the obligation to provide Internet access is based on certain conditions:

(A) the nursing home must include the cost of providing Internet access in cost reports filed with the Department of Social Services for purposes of Medicaid reimbursement,

(B) the cost is reimbursable to the facility if the Department of Social Services determines it is eligible for reimbursement,

(C) the Department of Social Services may use any available COVID-19 provider relief funding provided by the federal government to the State to provide grants-in-aid for nursing homes for Internet upgrades

CONTINUED

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY IN NURSING HOMES

(provided this use of funds is approved by the federal government), and

(D) *the nursing home may assess a prorated portion of any unreimbursed cost of Internet upgrades to a privately paying resident using the technology.*

A resident is also permitted to procure his or her own Internet connectivity. In that case, the nursing home may not charge the resident for any cost of facility Internet infrastructure upgrades necessary for resident use of technology.

- **Facility Notice.** The nursing home must place a conspicuous notice (i) at the entrance to the facility indicating that technology enabling virtual monitoring or virtual visitation may be in use in some residents' rooms and (ii) on the door of any resident's room where technology will be used for virtual monitoring.
- **Roommate Refusal of Consent.** If a resident's roommate refuses to consent to use of technology for virtual monitoring that may capture video or audio of the roommate, the nursing home must work with both the resident and the roommate to seek an appropriate accommodation with the roommate's consent. If the roommate continues to refuse consent, then the facility must work with the resident wishing to use the technology for virtual monitoring to develop an alternative, which may include transfer to another room with a roommate who is willing to consent, provided an appropriate room is available and the resident pays the difference in price if the new room is more costly than the resident's current room.

FACILITY POLICIES AND PROCEDURES

PA 21-55 permits a nursing home to establish policies and procedures on use of technology for virtual monitoring. Those policies and procedures may address the following six areas:

- **Placement of the technology.** Facility policy and procedures may require that any technology device be placed in a conspicuously visible, stationary location in the resident's room (but such a requirement does not apply to cellular mobile telephones used primarily for telephone communications or tablets not used for virtual monitoring).
- **Restrictions on location of video/audit recordings.** Policies and procedures may place restrictions on use of technology to record video or audio outside the resident's room or in any shared common space.
- **Compliance with life safety code/fire protection requirements.** The policies may also require that the installation, placement and use of technology comply with applicable life safety code and fire protection requirements.
- **Privacy.** The nursing home may address limitations on use of technology for virtual monitoring in its policies and procedures when such use will interfere with resident care or privacy, unless the resident, roommate or his or her resident representative consents to such use.
- **Internet service disruption.** The policies and procedures may provide that the facility can limit the use of technology in the event of a disruption to the facility's Internet service.

CONTINUED

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY IN NURSING HOMES

■ **Facility actions for noncompliance.**

The nursing home may include in its policies and procedures the actions that it will take for failure to comply with applicable federal, state and local laws or facility policy on use of technology. These policies and procedures must set out the process by which a resident may appeal any facility actions.

(2) roommate consent forms and (3) forms addressing withdrawal of roommate consent. The Office of Long-Term Care Ombudsman must develop the standard forms in consultation with nursing home facility representatives and the Department of Public Health.

Finally, PA 21-55 authorizes the Commissioner of Public Health to adopt regulations to implement the PA 21-55's provisions addressing use of technology for virtual visitation or virtual monitoring.

NURSING HOME IMMUNITY PROTECTIONS

PA 21-55 explicitly immunizes a nursing home from any civil, criminal or administrative liability for the following:

■ **Privacy Right Violations.** The facility is immune from such liability for violations of privacy rights of any individual under state or federal law that is caused by a resident's use of technology.

■ **Damages to Resident's Technology.** The facility is also immune from liability for damage to the resident's technology, including but not limited to any malfunction not caused by the nursing home's negligence.

■ **Use, Interception or Disclosure.** The immunity protection also extends to situations in which audio or video produced by the resident's technology is inadvertently or intentionally disclosed to, intercepted or used by an unauthorized third party.

Bill of Rights Amendments

Section 1 and 2 of PA 21-55 amend statutes setting forth the bill of rights for residents of nursing homes, residential care homes, chronic disease hospitals and managed residential communities. The amendment establishes the resident's right to treat his or her living quarters in these settings as his or her home, including the right to purchase and use technology of the resident's choice such as technology to facilitate virtual visitation, so long as operation and use of the technology does not violate any individual's right to privacy under state or federal law. In addition, PA 21-55 has added a separate provision to the bill of rights for nursing homes, residential care homes and chronic disease hospitals addressing the resident's right to present grievances. These sections take effect on July 1, 2021. As a result, the long-term care providers covered by these requirements (nursing homes, residential care homes, chronic disease hospitals and managed residential communities) should make sure they have amended their resident bill of rights to incorporate the new requirements.

REGULATORY IMPLEMENTATION

The new law provides that the Office of the Long-Term Care Ombudsman may provide standard forms on its Internet web site for (1) resident notice to the facility of the resident's plan to install and use technology for virtual monitoring;

CONNECTICUT ENACTS NEW LAW ON USE OF TECHNOLOGY IN NURSING HOMES

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

EMPLOYEE ACCESS TO IMAGES FROM VIRTUAL TECHNOLOGY USED IN NURSING HOMES

On July 12, 2021, Governor Lamont signed into law a related Public Act, Public Act No. 21-160, "An Act Concerning Access to Recordings and Images from Technology Used by Nursing Home Residents for Virtual Visitation and Virtual Monitoring" ("PA 21-160"). This law takes effect October 1, 2021.

PA 21-160 grants employees of nursing homes, as well as employees of nursing home contractors the right to view evidence of recordings or images that is alleged to establish a basis for disciplinary action by the nursing home when that evidence is obtained through the resident's use of technology for virtual visitation or virtual monitoring. Such evidence may be used only for the purpose of defending against the disciplinary action. Both the nursing home and the employee must treat the recordings or images as confidential and must refrain from disseminating the evidence to any other person except as required by law. Any copy of the recordings or images must be returned to the resident when no longer needed to defend against the disciplinary action.

The new law also permits the LTC Ombudsman, without consulting with the nursing home, to ask a resident about the existence of any recordings or images taken from technology used for virtual visitation or virtual monitoring that could corroborate an abuse or neglect allegation.

Finally, PA 21-160 allows a resident or their representative to voluntarily release any recordings or images so long as doing so would not infringe upon another's privacy rights. The Act also establishes that the only instances where a nursing home facility, its agent or its employee, may solicit or request such recordings or images from a resident or their representative, are for the purpose of conducting investigations surrounding allegations of abuse or neglect based upon such recordings or images. Moreover, if DPH initiates a complaint investigation based on a recording or image taken through virtual visitation or monitoring, DPH is authorized to provide a copy of any images or recordings to the nursing home that is the subject of their investigation.

PA 21-160 uses the same definitions of "resident," "resident representative," "technology," "virtual visitation" and "virtual monitoring" that appear in PA 21-55.