

LTC PROFESSIONAL

NEWS AND VIEWS YOU CAN REALLY USE



THE ADELMAN ADVANTAGE

by Rebecca Adelman

The Patient Protection and Affordable Care Act – Part II: Elder Justice Act

What You Need to Know Now About Reporting Reasonable Suspicion of a Crime in Long-Term Care Facilities

In last month's article, we highlighted key provisions of the PPACA that will most directly affect nursing homes particularly of Title VI, Subtitle B "Nursing Home Transparency and Improvement" ("Transparency Act"). This month, in Part II, we focus on the Elder Justice Act ("EJA") and one of the most significant features of the EJA which imposes notification and reporting requirements on individuals affiliated with a nursing home.

As part of the passage of the March 2010 health care reform, Congress enacted the EJA and among several items included is a reporting requirement imposed upon individuals affiliated with a long-term care facility that receives at least \$10,000 in annual federal funds entitled "Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities". The EJA has broad definitions that require most long-term care facilities and their employees and other "covered individuals" to submit a report. On June 17, 2011, CMS released supplemental guidance concerning the obligations for reporting "reasonable suspicions of crimes" to State Survey Agency Directors and updated on August 12, 2011 with a "Questions and Answer document". The memo and update (CMS S&H: 11-30-NH) is a "must-read" for all organizations. Official regulations have

not been released. Fines may be imposed and possible exclusion from the federal programs if a "covered individual" fails to report. The amendments became effective March 23, 2011 and facilities are under a current obligation to comply with the law as it is plainly written without any delay that might be occasioned by waiting for any administrative rule-making process that might further clarify application of the law.

Who is Required to Report?

A "covered individual" is defined as anyone who is an "owner, operator, employee, manager, agent or contractor of a long-term care facility". This definition would also include a volunteer or contractor and even remotely involved contractors or vendors could arguably be included in the definition.

Note: A "Long-Term Care (LTC) Facility" is defined as a "residential care provider that arranges for, or directly provides long-term care". Thus, nursing homes, personal care homes and family care-givers could be subject to reporting requirements if they receive more than \$10,000 in federal funds.

What Must Be Reported?

A "covered individual" must report both

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KESSLER'S CORNER



by Chip Kessler

Game Changers

Every so often in sports something occurs during the course of an athletic competition that changes the way the contest turns out. It might be a key hit with the bases loaded, two outs, and the batter down in the count in a baseball game ... perhaps it's a key stop when the opposition's at the goal line on a fourth and one and doesn't score during a football game. If you're a sports fan, you've no doubt seen what amounts to a "game changing" play several times.

Game changers also take place in the real world too. A case in point for our purposes here is the CMS SNF PPS Final Rule which became a reality for many nursing facilities last month. I won't spend time going over the many facets of this "game changing" rule except to say that if your building isn't up to speed on these critically important changes - you're *behind the eight-ball* as the saying goes. (See the back page for some help in this regard.)

What I do want to touch on is the cornerstone of what the new rule means:

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to CMS and to law enforcement any “reasonable suspicion” of a crime against a resident or individual otherwise receiving services from the facility.

- 1) If the crime involves “serious bodily injury” (e.g. extreme physical pain, substantial risk of death, protracted impairment or loss of the functions of a bodily member, organ or mental faculty, any injury requiring medical intervention, or certain kinds of sexual abuse), then the report must be made within two hours of forming the “reasonable suspicion”;
- 2) Otherwise the report must be made within 24 hours of forming “reasonable suspicion”.

Note: The law is unclear as to what constitutes “reasonable suspicion of a crime” – the central term consequential to the operation and penalty scheme of the EJA. The FAQ does offer that the law does not specify “first-hand knowledge”.

Notification

A participating LTC facility must:

- 1) Annually notify each covered individual of that individual’s reporting obligations;
- 2) Conspicuously post, in an appropriate location, a notice for its employees specifying the employees’ rights including the right to file a complaint under the EJA.

Note: The facility may not retaliate against an individual who lawfully reports a “reasonable suspicion of a crime”. The posted notice must include a statement that the employee may file a complaint with the state against an LTC facility that retaliates against an employee.

Penalties

If a covered individual violates the reporting requirements:

- 1) GENERAL
 - A) The covered individual shall be subject to a CMP of not more than \$200,000;
 - B) CMS may make a determination in the same proceeding to exclude the covered individual from participation in any Federal health care program.
- 2) INCREASED HARM - If the covered individual violates the reporting requirement and the violation exacerbates the harm to the victim of the crime or results in harm to another individual:
 - A) The covered individual shall be subject to a CMP of not more than \$300,000;
 - B) CMS may make a determination in the same proceeding to exclude the covered individual from participation in any Federal health care program.
- 3) EXCLUDED INDIVIDUAL – During any period that an individual is classified as an excluded individual, an LTC facility that employs the individual shall be ineligible to receive Federal

funds.

- 4) EXTENUATING CIRCUMSTANCES – CMS may take into account the financial burden on providers with “underserved populations” in determining the CMP. An “underserved population” is generally defined as an area with a shortage of elder justice programs.

CMS Guidance to SAs Regarding Effective Implementation of the Reporting Requirements

SAs will be evaluating the following “Additional Advisable Functions”:

LTC facility coordination with state and local law enforcement to determine what actions are considered crimes in their political subdivision;

LTC facility adherence to existing CMS policies and procedures for reporting incidents and complaints and abuse, neglect and misappropriation of resident property. The identification of a possible crime during survey or a complaint investigation may trigger a review of the LTC policies and procedures for reporting;

LTC facility development of policies and procedures for EJA reporting to ensure compliance including the prohibition of retaliation against any reporting employee;

Multiple covered individuals may file a single report relating to the same suspected crime. It is advisable to individually identify multiple people submitting a single report;

Covered individuals should supplement the original report if a crime is suspected after the report has been made.

Survey Guidance

SAs are instructed by CMS to distinguish between three types of possible violations: 1) Events giving rise to a suspected crime; 2) Allegations of individual failure to report; and 3) Allegations of the LTC facility’s failure to comply with the EJA requirements.

Possible Deficiency Citations

Note: At the present time there are no CMS regulations that apply specifically to the EJA reporting responsibilities of covered individuals or facilities. Consequently, SAs will focus on: 1) The events giving rise to the reports made under this section; and 2) The LTC facility’s responsibilities under existing CMS conditions and requirements is to report incidents, prevent abuse or neglect, provide quality care and a safe environment, train staff and similar duties of direct relevance to safety and quality of care.

Example of Deficiencies: An allegation that a covered individual did not report or was not informed of their duty to report could lead to a determination that the facility did

not comply with existing Federal requirements for reporting incidents or provide training and have certain policies and procedures in place.

SNF/NF - Sec. 483.13(c)-F226 – Failure to develop and/or implement its policies and procedures for reporting abuse/neglect; Sec. 483.75(d)-F493 - Governing Body – Failure to establish/implement facility policies regarding the management and operation of the facility.

Hospice - Sec. 418.52(b)(4) – L508 – The hospice must ensure that all alleged violations involving abuse and neglect are reported immediately; Sec. 418.112 ©(8) – L771 – The hospice and SNF/NF or ICF/MR must have a written agreement that includes a provision stating that hospice must report all alleged violations of abuse and neglect by anyone unrelated to the hospice to the SNF/NF or ICF/MR administrator within 24 hours of the hospice becoming aware of the alleged violation.

ICF/MR - Sec. 483.420 (d)(2) – W153 – The facility must ensure that all allegations of abuse and neglect as well as injuries of unknown source are reported immediately to the administrator or other officials.

Note: THE EFFECTIVE DATE OF THE EJA REPORTING IS IMMEDIATELY. CMS is drafting guidance about the civil monetary penalty component.

What Are Best Practices for Implementation of the EJA Effective Immediately?

There are many uncertainties about the EJA that may or may not be clarified by CMS guidance. LTC facilities must broadly interpret the EJA mandates in order to avoid possible enforcement penalties and the SAs begin the process of assessing and investigating the various aspects of the EJA.

Consider these recommendations and immediate implementation:

- Establish a relationship and work closely with local and/or state law enforcement agencies to:
 - Identify “crimes”; and
 - Develop a protocol for reporting suspected crimes.
- Evaluate current policies and procedures regarding reporting abuse and neglect and other incidences and insure compliance with CMS regulations;
- Develop and implement new policies and procedures regarding the rights, obligations and procedures relating to the EJA to include:
 - The LTC facility’s interpretation of the EJA;
 - An outline the manner and timing of reporting incidents;
 - The manner in which management will be informed of a report having been filed;
 - An outline of the crimes covered by the reporting;

- When “reasonable suspicion” can be formed;
- Prohibition against employee retaliation for making reports.
- Establish a notification protocol alerting covered individuals of their reporting obligations to include:
 - Notifications to be made on an annual basis;
 - Contractors are to be notified through contracts;
 - Post a sign notifying employees of their rights under the EJA.
- Develop and implement a protocol for timely submission of report to CMS and these reports should be made to the SA through established lines of communication.
- Privacy protections must be established for residents and controls established to control the internal disclosure of reported events.
- Employees and contractors must be screened to prevent the LTC facility from hiring “excluded” individuals to include:
 - Investigation of non-excluded status of employees and contractors on applications;
 - Employee retention policies stating that excluded employees are subject to termination;
 - Contractual provisions that allow a release to the LTC facility if the contractor is excluded.

How Will the EJA Impact Litigation?

The FAQs do not provide much additional information about the reporting requirements that would allow for a complete evaluation of the impact on litigation. The question was posed “Can facilities be held liable in a civil or criminal case if a covered individual does not report suspicion of a crime?” CMS responded “This is a question for the Courts, not one that CMS can answer.” There are many more unanswered questions.

There are many concerns raised about the impact that the expanded EJA reporting could have on litigation particularly related to statements made in written and oral discovery (depositions) about what constitutes “reasonable suspicion” and if the LTC facility (through a covered individual”) should have formed a basis for reporting. While the scope of this presentation does not include the potential exposure for LTC facilities and individuals who did not report, there is no doubt that these issues will arise as the EJA is enforced. It is possible, for example, that during the course of a lawsuit caregivers are deposed about the condition of a resident (bruising, injury of unknown origin, etc...) and questioned about their obligation to report under the EJA, notification of their obligations and

namely that it will cause an 11.1% rate cut. In other words: you start out the month of November 2011 already 11.1% in the hole revenue-wise from this time last year. But I don't need to tell you this. You know it! Now what are you going to do about it? Your options:

- 1) Be Frustrated and Limp Along Hoping Your Facility Gets By
- 2) Realize Your Building Has to do Something to Survive, But Still Do Nothing in the End
- 3) Resolve to Make Certain Your Facility Emerges Stronger Than Ever and Take Appropriate Action

If you're in the first two categories, I don't have anything for you. However if you're one of the men or women reading this who understands you now stand at the crossroads and want to come out on the winning side, I want to share some things I've discovered about the changing nursing facility landscape ... and why certain buildings will survive while others will be left in the dust. You've seen it before: the once thriving mall or shopping center that's now basically a ghost town; the hotel which used to have a parking lot full of cars and now has a for sale sign in front; the nursing home that has closed its doors. Is your facility destined to be next?

I recently spoke to a very successful operator of nursing facilities in multi-states about the CMS Final Rule and in particular what the 11.1% rate cut means. Here's his reply:

"The 11.1% cut needs to be a wake-up call for the nursing facility industry, if anything good is to come out of it. Because of this rate reduction, we can't keep doing things as we have been and expect to survive let alone be successful. This is serious stuff because such a drastic cut can negatively affect the number of facility staff on duty, and as a result, the care we provide to our residents! We have to pull ourselves out of the past because the nursing home business is changing and we have to change with it. It's going to be the nursing facilities that can adapt to these changes with the right game-plan in place to maximize every single revenue stream they've got which are going to meet the upcoming challenges and thrive; the other buildings are going to be shells of their former selves and be on the road to ruin."

This gentleman left me with these final words:

"I have a message to administrators, directors of nursing, social service directors, CNAs, nursing facility management companies and everyone else that's connected with our vitally important profession- the only people who are going to save the nursing facility industry is ourselves!"

Strong words indeed. So much so in fact that he left me with an overwhelming desire to see to it that no nursing facility has to fail, even though you are now facing some very tough times! You do need a game plan, an action plan if you will, to make up any revenue shortfalls, but also as important I believe is a reaffirmation for you and everyone of your fellow staff members as to **why you choose to become a part of the nursing home profession in the first place**. Clearly, this is no time for wimps; it's time for people that want to roll up their sleeves and meet the task at-hand!

I immediately went to work and put together a DVD program for these crucial times. It's titled *The 11.1% Solution* and if I say so myself it's the best work I've ever done! I'm going to give everyone in long-term care a message you need to hear on the first DVD, then in DVD #2 I'm joined by Vicki Flatt one of our nation's foremost experts on bringing more new residents into your facility via third party/managed care partnerships plus Vicki presents proven tips, techniques and strategies to insure your building's relationships with important referral sources like hospital discharge planners and local physicians are rock solid ... because let's face it in these "game changing" times, you must leave no stone unturned in getting every resident you can.

I urge you to visit www.extendedcareproducts.com or call me personally at 1-800-807-4553 to discover what *The 11.1% Solution* means to the future success of your nursing facility. Will you do this? Only you can answer, just like it's up to you to decide whether or not your building will enjoy success in these game changing times, or your days ahead are filled with worry and fear.

Chip Kessler is General Manager of Extended Care Products, Inc. He has developed and produced some 18 staff development and training programs, as well as risk management programs for nursing facility and assisted living use. Included among these programs is "The Complete Crisis Communications Plan" on DVD. Discover more at www.extendedcareproducts.com.

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rights, knowledge about policies and procedures and training and if they formed a "reasonable suspicion" of a crime or should have formed one. If a covered individual responds to any of these questions and establishes there may be a violation of the EJA, the SA can investigate and possibly assess a penalty if a violation is found. There are no protections from this type of discovery to the LTC facility in litigation. In fact, the EJA is a road map for Plaintiff's attorneys to establish possible violations of the EJA as they have done in the past with Adult Protection Act claims and the duty to report. The EJA, however, is far stricter in its requirements and harsher in penalties.

Contact your Department of Health to see what additional reporting forms or guidance it may have relevant to the EJA. Our firm is working with facilities and local law enforcement in this area to assure compliance with the reporting requirements consistent with best practices. The CMS memo and update are found at http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter11_30.pdf.

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'Tis the Season to be Careful...

Holiday Fire and Life-Safety Tips

By Stan Szpytek, President

Fire and Life Safety, Inc.

The holidays can certainly be a wonderful time of year at long-term care, assisted living and senior housing properties. It is a much-anticipated season full of decorations and celebrations. During this joyous time, it is important for individuals and organizations to maintain a clear focus on safety-related matters and not to forget to use common sense and good judgment when transforming their properties into "Winter Wonderlands." Here are some basic tips to remember:

Exits: It is imperative that all exits within your building are kept free and clear of any obstructions. Items like holiday trees or rearranged furniture should never partially or totally compromise an exit. Do not let "seasonal design" impede function or code requirements. All exits must remain completely accessible at all times.

Electricity: It's easy to get caught up in the holiday spirit and pull a "Clark Griswold" (the Chevy Chase character in the movie "Christmas Vacation" that decorates every square inch of his house with outrageous holiday lighting). Some properties may not have the electrical capacity or proper amount of electrical outlets to support elaborate lighting or electronic decorations. It is critical not to overload electrical outlets or use unsafe wiring arrangements. Again, do not let function impede on design or safety. Use good common sense when setting up electric decorations. If it looks unsafe, it probably is. Do not get carried away with extension cords and only use approved sockets strips or surge protectors with built-in circuit breakers to safely expand the use of your building's electrical delivery system.

Live Decorations: While "live" decorations like trees and wreaths add a certain ambiance to the season, they are unsafe and likely prohibited by code in commercial and public buildings. If you have ever seen a dry holiday tree burn, you understand the ferocity and potential disaster that it represents. As a firefighter, I responded to several serious fires involving holiday trees and the results were always the same- extreme property damage and serious injury to building occupants. It is recommended that you keep live holiday decorations outside of your building; even if you receive items like wreaths as gifts. These items are very dangerous and may represent a code violation if they are discovered within your building.

Open Flame: Candles come in every shape, flavor and size. Simply stated, "Candles start fires." There has been an alarming increase in candle-related fires in the last three years that clearly defines how dangerous these items really are. As a safety advocate and former fire marshal, my training, experience and common sense requires me to advise you that the "benefit is simply not worth the risk." If candles are used within your building, they must be constantly monitored and given plenty of clearance. Never place candles near plants, flowers, decorations

or any other combustible materials. The occupants of buildings that I responded to over the years that experienced a fire involving a candle never imagined the destruction and disruption within their home or business that such an innocent item could cause.

Fire Protection Systems: You may think that fire sprinkler head or smoke detector on the ceiling is a great spot to hang some garland, mistletoe, or other holiday decorations but, **THEY ARE NOT!** In accordance with code, nothing can be hanging or attached to these critical life-saving devices. Resist the urge to use features of fire protection systems (sprinkler heads, smoke detectors, horn / strobes, pull stations, etc.) as anchor points. These devices must be maintained in a condition that is free and clear of all obstructions that could compromise their performance during an emergency situation.

Now, I know what you're thinking, "This safety guy is taking all of the fun out of the holidays." In fact, I share these tips with you to make sure that your holidays are full of fun, joy and laughter; not disaster. Please remember to incorporate common sense and "safe practices" in your holiday cheer.

About the Author



Stan Szpytek is the president of **Fire and Life Safety, Inc. (FLS)** based out of Mesa, Arizona and is the Life Safety / Disaster Planning Consultant for the Arizona Health Care Association as well as a disaster planning consultant for the California Association of Health Facilities (CAHF). **FLS** is a consulting firm that provides loss control, risk management and emergency preparedness programs for businesses of all types with special focus

on healthcare facilities and senior living communities. Stan is a former deputy fire chief and fire marshal with a Chicago area fire department having served with the agency for 26 years. His firm's assessment and training programs are designed to assist clients with disaster planning and recovery programs that will help ensure viability during a crisis. For more information please visit www.EMAllianceusa.com, www.FLSafety.org, e-mail at Firemarshal10@aol.com or call Stan directly at (708) 707-6363.

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