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CMS Provides Guidance on the Elder Justice Act's Reporting Requirements

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On June 17, 2011, CMS issued [guidance](#) [PDF] on the Elder Justice Act's reporting requirements for long-term care facilities, promulgated over a year ago in section 6703(b)(3) of the Affordable Care Act (ACA). This serves as welcome news for the long-term care community, which has patiently struggled to comply with the law's manifold vagaries while operating under the threat of its harsh penalties. On August 12, 2011, CMS's guidance memorandum was supplemented to include a question and answer (Q&A) section.

Elder Justice Act (EJA, or the "Act") section 6703(b)(3), which adds section 1150B to Title XI of the Social Security Act, imposes notification and reporting requirements that broadly apply to long-term care facilities receiving at least \$10,000 in annual federal funds during the prior year. Each covered individual—defined as an owner, operator, employee, manager, agent or contractor of a long-term care facility—must report to the U.S. Department of Health and Human Services (HHS) and local law enforcement, "any reasonable suspicion of a crime . . . against any individual who is a resident of, or is receiving care from, the facility." In addition, owners and operators of facilities must annually notify covered individuals of their reporting obligations and must post a sign describing employee rights under the EJA. Finally, facilities are prohibited from retaliating against employees who report under the Act.

New CMS Guidance

CMS's guidance was released in the form of a Survey and Certification (S&C) memorandum to state survey agency directors entitled "Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act."

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In recognition of the fact that clarifying regulations have yet to be implemented, CMS states that its memorandum is intended to explain “the current obligations of LTC facilities to comply with the law as it is plainly written” While further guidance remains pending, SAs are directed to focus on “the events giving rise to reports” and the “LTC facility’s responsibilities under existing CMS conditions and requirements 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.”

The following comments and observations relate to the S&C memorandum and the supplementary Q&A:

Scope: The S&C memorandum only addresses the applicability of the reporting requirements to nursing facilities, skilled nursing facilities, hospices that provide services in LTC facilities, and intermediate care facilities for the mentally retarded. The Q&A section provides that assisted living facilities “are not included under this statute at this time.” Considering that the EJA’s expansive terms could apply to the overwhelming majority of long-term care facilities, this may be an indication that CMS intends to narrow the scope of the law’s applicability. This clarification is very important in the context of assisted living programs who receive Medicaid funding under waiver programs.

LTC Facility Responsibilities: The S&C memorandum organizes the responsibilities of long-term care facilities into required functions and additional advisable functions.

- A facility is required to: (1) annually determine whether it received at least \$10,000 in federal funds under the Social Security Act in the preceding year; (2) annually notify its covered individuals of their reporting obligations; (3) conspicuously post a notice for its employees specifying their rights under the EJA; and (4) refrain from retaliating against reporting employees.
- In order to effectively comply with the EJA, a facility is advised to: (1) coordinate with state and local law enforcement to determine what actions

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are considered crimes; (2) review existing facility protocols to ensure that they correspond with current CMS and state policies and procedures for reporting incidents and complaints; and (3) develop new policies and procedures that ensure compliance with the 1150B reporting requirements.

Reporting Protocol: The most helpful information in the S&C memorandum and the Q&A portion concern reporting protocol and procedure.

- Reports should be submitted to the state survey agency as well as to one law enforcement agency. It is now clear that the state survey agency is the proper recipient of reports required to be made to HHS; direct reports to CMS or HHS are not necessary.
- While covered individuals with knowledge of a suspected crime may file a single report of the incident in accordance with facility policy, a facility cannot prevent its employees from filing separately. Each report should include the name of the reporting individuals as well as the date and time of their awareness of the incident. A report may be subsequently updated to include new information from additional covered individuals.
- The statute does not require the use of a specific form; reporting may be done by “telephone, email, fax or other means within the specified timeframes of the law.”
- Covered individuals have an independent obligation to report the suspicion of a crime directly to local law enforcement and the state survey agency. In order to encourage safe and secure reporting, facility policies should not require the internal disclosure of individual reports. Nevertheless, federal regulations already require facilities to ensure that all alleged instances of mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and other officials in accordance with current law.
- Reporting requirements are based on real (clock) time and not business hours. This means that the reporting requirement is not suspended over weekend or holiday periods.

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- Events involving falls, injuries of unknown cause or resident-on-resident abuse should be evaluated on a case-by-case basis. Such events are reportable where there is a reasonable suspicion of a crime.

Survey Guidance: State survey agencies are instructed to adhere to the “standard CMS protocols for assessing and, as appropriate, investigating all reported complaints and incidents.” In the continued absence of regulations specific to the 1150B reporting requirements, CMS posits that transgressions may be cited under current deficiency citations, such as § 483.13(c)-F226 (failure to develop and/or implement its policies and procedures for reporting abuse/neglect) and § 483.75(d)-F493 (governing body-failure to establish/implement facility policies regarding the management and operation of the facility).

Template Poster for Facility Notification Requirements

The EJA requires that a facility must “conspicuously” post a sign drafted “in a form specified by the Secretary” that explains employee rights under the law. The S&C memorandum provides the following guidance on the signage requirement:

1. The poster should explain an individual’s right to file a complaint with the state survey agency if the individual feels that the facility has retaliated against an employee or individual who reported a suspected crime under the EJA, and how to file such a complaint with the state survey agency;
2. The sign may be posted in the same area that the facility posts other required employee signs, such as labor management posters.
3. Size and type requirements for the sign should be no less than the minimums required for the other required employment-related signs.

Since HHS has yet to release its model poster, groups have been developing their own templates. For example, template posters have been provided by the American Health Care Association (AHCA) ([available here](#)) and LeadingAge ([available here](#)) that long-term care facilities may utilize. Although they have not been officially approved by CMS or any law enforcement agencies, the templates refer to each aspect of the EJA’s notification requirements and contain the most salient and up-to-date guidance. In order to properly use the templates, a facility

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will need to insert facility-specific information, including contact information for the state survey agency and local law enforcement agencies. In addition, a facility should make detailed reference to its unique reporting policy and protocol.

Uncertainties Remain

The S&C memorandum and supplementary Q&A serve as helpful steps in the right direction toward the goal of clarifying the EJA's reporting requirements. The guidance provides practical insights on reporting protocol and confirms that reports should be made to the state survey agency (instead of CMS or the Secretary) as well as to a law enforcement agency. Unfortunately, however, uncertainties surrounding the reporting requirements continue to predominate. Critical questions remain over the meaning of "reasonable suspicion of a crime" and the scope of the notification requirements. CMS has indicated that focused guidance on the law's civil monetary penalty component is forthcoming. In the meantime, long-term care providers are encouraged to review the practice pointers set forth in the article, "[Compliance with the Elder Justice Act's Reporting Requirements: Cautionary Tactics in the Face of Continuing Uncertainty](#)," in which the authors further discuss the EJA's reporting requirements.