

Reporting Reasonable Suspicion of a Crime Under the Elder Justice Act



Anne Leeb, LNHA, Esq.
Anne Leeb, LLC

The Elder Justice Act, part of the Patient Protection and Affordable Care Act of 2010, requires “covered individuals” who work in long-term care (LTC) facilities to report crimes against residents.¹ This Act was passed on March 23, 2010 and it was effective immediately but no regulations have been issued. On June 17, 2011, the Centers for Medicare and Medicaid Services (CMS) published a memo to the state survey agency directors discussing the Elder Justice Act and the memo was revised on August 12, 2011.² This article will summarize the memo and will explain who is included in the requirement, what they have to report, when they have to report it, and the consequences for not reporting.

Who Does This Include?

A LTC facility includes:

- Nursing facilities
- Skilled nursing facilities
- Hospices that provide services in LTC facilities, and
- Intermediate Care Facilities for the Mentally Retarded (ICFs MR).³

It does not include assisted living facilities at this time.⁴ Facilities must determine whether they received at least \$10,000 in Federal funds during the preceding fiscal year to be covered under the Act.⁵

A “covered individual” (CI) means an owner, operator, employee, manager, agent, or contractor.⁶ Note: the facility itself does not have to report. The Act is based on independent reporting.

Notify Covered Individuals

A LTC facility must annually notify each CI of that individual’s reporting obligation.⁷ Examples of notifying individuals include sending a letter to the CI or an in-service attendance sheet.⁸ In addition, a LTC facility must post a notice specifying the employee’s rights, including the right to file a complaint against the facility that retaliates against the employee.⁹ The notice must be placed in the same location as other similar employee signs and the size and font requirements must be no less than similar employee signs.¹⁰

Reporting Requirements

Each CI must report to the Ohio Department of Health (ODH) and one or more law enforcement entities any reasonable suspicion of a crime against any individual who is a resident of, or is receiving care from, the facility.¹¹ If the events that cause the suspicion result in serious bodily injury, the CI shall report the suspicion immediately, but not later than 2 hours after forming the suspicion. The term “serious bodily injury” is defined as an injury involving extreme physical pain, substantial risk of death, 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.¹² If the events do not result in serious bodily injury, the CI shall report the suspicion not later than 24 hours after forming the suspicion.¹³

There are no specific requirements for how a CI should report.

Covered individuals may call ODH at the same number set-up to receive complaints, send an email, or submit a fax.¹⁴ There is also no form adopted by ODH. If multiple covered individuals have the same suspicion regarding a particular incident, they may file one report. While an employee does not have to tell the employee’s supervisor or administrator of the crime, if it involves alleged mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property, the employee has to report it to the administrator.

Penalties

If a CI fails to report, he or she will be subject to a civil money penalty (CMP) of not more than \$200,000 and may be subject to exclusion from participating in any Federal health care program.¹⁵ If a LTC facility employs an excluded individual, that facility would be ineligible to receive any Federal funds.¹⁶

A LTC facility may not discharge, demote, suspend, threaten, harass or deny a promotion to an employee because they report.¹⁷ If a LTC facility does take action “against an employee, the facility will be subject to a CMP of not more than \$200,000 or the facility may be excluded for 2 years, or both.¹⁸

Possible Survey Citations

Although federal regulations have not been written to address the Elder Justice Act, there are other requirements to address reporting incidents, preventing abuse and neglect, providing quality care and a safe environment, and training staff. Possible survey citations for nursing homes include: F226 for failing to develop and/or implement its policies and procedures for reporting abuse and neglect; and F493 for failing to establish or implement facility policies regarding the management and operation of the facility.¹⁹ Possible survey citations for ICFs/MR include: W153 for failing to ensure that all allegations of mistreatment, neglect or abuse, as well as injuries of unknown source, are reported immediately to the administrator.²⁰

Develop Policies and Procedures

The CMS memo advises facilities to coordinate with their local law enforcement agency to determine which actions are considered crimes.²¹ Also, review existing facility policies and procedures to ensure they match State and Federal requirements for reporting incidents and complaints.²² Finally, develop policies and procedures that ensure compliance with the Elder Justice Act.²³ Some of the elements that should be in your policy include:

- Coordinate with law enforcement
- Notify covered individuals
- Post required notice
- Avoid retaliation

Be on the lookout for regulations that will perhaps give more clarification on this Act.

Anne Leeb, LLC specializes in long-term care.

¹ Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111- 148, 124 Stat. 119 (Mar. 2010) (codified at 42 U.S.C.).

² CMS: S&C: 11- 30- NH. 3-23 Id.