



Client Alert

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CMS Issues Guidance to State Survey Agencies on Elder Justice Act Reporting

On June 17, 2011, the Centers for Medicare & Medicaid Services ("CMS") took its first wobbling steps toward addressing the practical aspects of the reporting requirements set forth in the Elder Justice Act ("EJA"). The guidance came in the form of a memorandum entitled "Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act," which was issued to State Survey Agency Directors. While addressing some important issues for the first time, the memorandum may have created additional uncertainties about the application of the law.

Background

Although the EJA legislation has been around for years in various iterations, it had managed to avoid enactment until it became attached to the 2010 healthcare reform law known as the Patient Protection and Affordable Care Act. Now law, the EJA represents the first federal attempt to coordinate the detection, prevention, and prosecution of elder abuse, neglect, and exploitation. The law authorizes nearly \$800 million in new spending initiatives designed to accomplish various long range goals toward these ends.

The EJA also establishes immediate obligations for long-term care facilities and personnel. Section 6703(b)(3) of the EJA, entitled "Reporting to Law Enforcement of Crimes Occurring in Federally-Funded Long-Term Care Facilities," establishes a new section 1150B of the Social Security Act. Section 1150B requires "covered individuals" to report the "reasonable suspicion" of a crime to one or more law enforcement agencies and to the Secretary of the Department of Health and Human Services. Reports are to be made within 24 hours after the suspicion has been formed, unless there has been serious bodily injury, in which case reports must be made immediately, but not more than 2 hours after forming the suspicion.

Covered individuals are owners, operators, employees, managers, agents, and contractors of long-term care facilities that received at least \$10,000 in federal funds during the previous year. The law obligates such long-term care facilities annually to notify each covered individual of their rights and obligations under the EJA and to post conspicuous notices in the facilities regarding the same. The EJA also includes significant penalties for non-compliance, including monetary fines and exclusion from participation in federal reimbursement programs, as well as a prohibition against retaliation for good-faith reporting. One of the greatest, and most obvious, drawbacks

with respect to Congress's EJA reporting mandate has been that no agencies – including HHS, CMS, state surveyor agencies, or any law enforcement agencies – seem to have had any idea about how the law is to be implemented, or what they are supposed to do with the reports once they are submitted.

CMS Memorandum to State Survey Agency Directors

The stated purpose of the June 2011 CMS memorandum is to “inform” state survey agencies of the EJA reporting requirements (which became law in March of 2010). Perhaps tellingly, CMS characterized its guidance thusly: “In order to promote timely application of the protections offered by section 1150B of the [Social Security] Act for LTC facility residents, we are explaining now the current obligations of LTC facilities 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 the application of the law.”

The memorandum sets forth both “required functions” and “additional advisable functions” for long-term care facilities. The “required functions” include: (1) Making an annual determination as to whether the facility has received \$10,000 in federal funds under the Social Security Act; (2) Annually notifying all covered individuals of their reporting obligations under the EJA; (3) Conspicuously posting notice of employee rights under the EJA; and (4) Eschewing retaliation against individuals who report in accordance with the EJA.

Under “additional advisable functions,” the memorandum provides that “[a] facility that effectively implements section 1150B” will take the following actions: (1) Coordinate with state and local law enforcement agencies to determine what actions are considered crimes; (2) Review adherence to current CMS and state policies and procedures for reporting incidents and complaints; and (3) Develop new policies and procedures for compliance with section 1150B reporting requirements.

One persistent question that the memorandum answers is how a report is to be made to the Secretary of HHS. Without any prior guidance, we are aware of facilities that have sent reports on behalf of covered individuals directly to Kathleen Sibelius via her government e-mail address. Perhaps this happened often enough to spur CMS's guidance, which clarifies that such reports are to be submitted to the state survey agency “in fulfillment of the statutory directive to report to the Secretary.” The memorandum also clarifies that multiple covered individuals may file a single report that is coordinated by the facility.

Somewhat less certain is the memorandum guidance on how the survey process fits with the 1150B reporting obligations. The memorandum offers suggestions on how noncompliance might be cited under existing survey tags, such as F226 (failure to develop and/or implement policies and procedures for reporting abuse/neglect) or F493 (governing body -- failure to establish/implement facility policies regarding management and operation of the facility). At the same time, the memorandum acknowledges that “[a]t the present time there are no CMS regulations that apply specifically to section 1150B responsibilities of covered individuals or facilities.”

Finally, the CMS memorandum specifically limits its discussion to nursing facilities, skilled nursing facilities, hospices that provide services in long-term care facilities, and ICFs/MR. While the statutory definition of long-term care facility is broad enough to apply to a variety of long-term care facility types (e.g., assisted



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living facilities that receive have received greater than \$10,000 per year in Medicaid waiver funds), there has been speculation that CMS's memorandum signals HHS's interpretation that the reporting requirements are limited to the providers referenced in the memorandum. This issue remains unsettled -- it may simply be that the provider types mentioned in the memorandum are the ones for which CMS provides survey oversight. It is far from clear that CMS's memorandum should be interpreted to indicate that assisted living facilities that receive Medicaid waiver funds would not be obligated to comply with the law.

To view a copy of CMS's memorandum, please click [here](#)¹.

1. http://www.cms.gov/Surveyscertificationgeninfo/downloads/SCLetter11_30.pdf

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