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The Illinois Authorized Electronic Monitoring in Long-Term Care Facilities Act—What It Means for Long-Term Care Providers in Illinois

BY DAVID ALFINI AND ADAM GUETZOW

Pressure from families on elected officials has led some states to pass legislation allowing electronic monitoring of resident rooms in long-term care facilities. The monitoring presents numerous legal and logistical issues for the facilities. On Jan. 1, 2016, Illinois will join New Mexico, Oklahoma, Texas and Washington in allowing residents or families of residents in long-term care facilities to install cameras or other electronic monitoring devices in resident rooms. The Authorized Electronic Monitoring in Long-Term Care Facilities Act (hereinafter the ''act'') that was signed by Gov. Bruce Rauner (R) on Aug. 21, 2015, is likely the most significant change to the long-term care industry in the state in the past 10 years.

This new law does not exist in a vacuum. Illinois has a long history of regulating long-term care and assisted living facilities. This article will look at Illinois experience regulating these facilities and will then look at the act specifically and what the act is intending to change and accomplish. Illinois is the fifth state that has adopted this approach and other states might well decide to follow. Although this article focuses on the challenges facing long-term care facilities in Illinois, facility operators in other states are well-advised to be cognizant of the trends in the industry with the possibility that their states might soon follow suit.

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Long-Term Care Facilities and Nursing Homes in Illinois—A Brief History

Long-term care facilities in Illinois are generally subject to the statutory framework found within the Nursing Home Care Act (NHCA).[1] The NHCA was passed in 1979 and was intended to improve care in certain facilities across the state. Those most familiar with the NHCA, and particularly those responsible for defending actions brought under the NHCA, are painfully aware of the fee-shifting provision found within the NHCA.[2] Under this provision, if resident-plaintiffs are successful at trial in establishing a violation of their rights under the NHCA, the facility becomes responsible for paying the actual damages and costs and attorneys' fees to the residents. The NHCA does not, however, provide guidance on how to calculate fees or have any requirement that awarded fees be proportionate to the verdict.[3] Importantly though, Illinois has made distinctions among the continuum of facilities to ensure that not all senior living communities fall within the purview of the NHCA. This distinction among facilities is of critical importance to the newly passed law, which applies only to senior communities and facilities governed by the NHCA.

Under the NHCA, a facility is defined as ''a private home, institution, building, residence or any other place, whether operated for profit or not, or a county home for the infirm and chronically ill operated pursuant to Division 5-21 or 5-22 of the Counties Code, or any similar institution operated by a political subdivision of the State of Illinois, which provides, through its ownership or management, personal care, sheltered care or nursing for 3 or more persons not related to the applicant or owner by blood or marriage. It includes skilled nursing facilities and intermediate care facilities. . . .''[4] Personal care under the NHCA has been defined as care

[1] 210 ILCS 45/1-101.
[2] 210 ILCS 45/3-602.
[3] *Rath v. Carbondale Nursing and Rehabilitation Center*, 374 Ill.App.3d 536 (2007), 2007 BL 29994.
[4] 210 ILCS 45/1-113.

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provided to an individual ''who is incapable of maintaining a private, independent residence or who is incapable of managing his or her person. . . .''[5] This latter clarification truly sets facilities falling under the purview of the NHCA apart from senior living facilities that do not. In this regard, the NHCA explicitly excludes from its coverage any ''supportive residence licensed under the Supportive Residences Licensing Act'' or ''any assisted living or shared housing establishment licensed under the Assisted Living and Shared Housing Act.'' In other words, facilities where the residents do not receive personal care and where the individual does not require such increased level of care are typically excluded from the NHCA.

The most poignant example can be found within assisted living facilities. In fact, to highlight the distinction between the regulations for long-term care facilities and assisted living facilities, Illinois has drafted an entirely separate statutory scheme found within the Assisted Living and Shared Housing Act (ALSHA).[6] Under the ALSHA, a person shall not be accepted for residency or remain in the residence if the establishment cannot provide or secure appropriate services, if the individual requires a level or type of service that the establishment does not provide or if the establishment does not have the appropriate number of staff with appropriate skills to provide such services.[7] An easy test offered by the ALSHA to determine whether a resident is not a suitable candidate for admission is whether the individual requires total assistance with at least two activities of daily living.[8] Because the mere labeling of an institution as an assisted living facility is not sufficient to evade the statutory scheme found within the NHCA, courts look to the services offered to determine whether the entity constitutes a ''facility'' for purposes of the NHCA. Therefore if a facility holding itself out as an assisted living facility is in fact providing services that should be regulated under the NHCA (i.e. admitting and treating residents who require total assistance with at least two activities of daily living), a court may deem the facility to fall under the NHCA.

The distinction in Illinois between facilities governed by the NHCA and facilities governed by the ALSHA has always been of the utmost importance, at least for litigation purposes, because of the NHCA's fee-shifting provision. Now, however, the Illinois Legislature has spoken again, and the importance of this statutory distinction has increased in significance because of the act.

Electronic Monitoring in Long-Term Care Facilities

Akin to the passage of the NHCA in 1979, the most recent passage of the act was, as indicated by its legislative history, spearheaded as an attempt to improve care in long-term care facilities.[9]

According to the definitions provided in the act, it covers intermediate care facilities for the developmentally disabled that are licensed under the ID/DD Community Care Act and have at least 30 beds, long-term care facilities for those younger than 22 that are licensed under the ID/DD Community Care Act and facilities licensed under the NHCA.[10] As the definition of the act makes clear, it is not intended to apply to facilities in Illinois that are subject to the ALSHA, but, within the senior living realm, is directed only towards facilities that fall under the purview of the NHCA.

What Does the Act Require?

Simply, any long-term care facility governed by the NHCA must now allow residents or their families to electronically monitor their rooms by way of video monitoring. Specifically, Section 10(a) of the act states, ''A resident shall be permitted to conduct authorized electronic monitoring of the resident's room through the use of electronic monitoring devices placed in the room pursuant to this Act.''[11] Critically, the act expressly does not allow for still photographs and nonconsensual monitoring.[12]

Who Can Request the Monitoring?

Under the act, the electronic video monitoring can be requested by either the resident or the legal guardian/representative of the resident.[13] More specifically, if the resident has not affirmatively objected to the electronic monitoring, and his or her physician determines that the resident lacks the ability to understand and appreciate the nature and consequences of the monitoring, individuals, in the following order, may also consent on behalf of the resident: (1) a health-care agent named under the Illinois Power of Attorney Act, (2) the resident's representative, (3) the resident's spouse, (4) the resident's parent, (5) the resident's adult child who has the written consent of the other adult children of the resident to act as the sole decision maker regarding authorized electronic monitoring, and (6) the resident's adult sibling who has the written consent of the other adult siblings to act as the sole decision maker regarding authorized electronic monitoring. The act adopts the same definition of resident representative as the NHCA, which is a person other than the owner not related to the resident, or an agent or employee of a facility not related to the resident, designated in writing by a resident to be his or her representative, or the resident's guardian.[14]

Given the obvious privacy concerns that arise with electronic video monitoring, the act goes to great lengths to provide that any resident with a roommate must also gain the permission of the roommate.[15] If the roommate does not consent, the facility must make reasonable accommodations. While ''reasonable accommodations'' is not defined, it likely will be interpreted to mean a room change, should such be available.

What Are the Installation Requirements?

First and foremost, with regard to installation, the monitoring device must be placed in a conspicuous location.[16] That is, no ''teddy bear cameras'' are permitted. Second, the resident, not the facility, is responsible for any costs associated with the installation and main-

[5] 210 ILCS 45/1-120.
[6] 210 ILCS 9/75.
[7] 210 ILCS 9/75.
[8] 210 ILCS 9/75.
[9] Authorized Electronic Monitoring in Long-Term Care Facilities Act, 2015 Ill. Legis. Serv., Pub. Act 99-430, § 5 (West).
[10] Pub. Act 99-430, § 5.
[11] Pub. Act 99-430, § 10(a).
[12] Pub. Act 99-430, § 10(b).
[13] Pub. Act 99-430, § 15(a).
[14] *See* 210 ILCS 45/1-123.
[15] Pub. Act 99-430, § 15(c).
[16] Pub. Act 99-430, § 25(d).

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tenance.[17] If the monitoring device requires the Internet, the resident must make arrangements for the Internet access and pay any associated charges.[18] The facility cannot charge for the monitoring.[19] That said, the law does envision some public funding for the monitoring by way of a scholarship program to be available to residents receiving medical assistance under Article V of the Illinois Public Aid Code. It specifically intends on distributing $50,000 on an annual basis.[20]

What Are the Duties of the Facility?

As expected, notwithstanding the financial responsibility falling upon the resident, the act nonetheless does provide for certain duties of the facility. Not only does the act require the facility to make ''a reasonable attempt'' to accommodate the request for monitoring and installation[21] but it also places the burden on the facility of proving that a requested accommodation is not reasonable.[22] In addition, the facility must also provide information to the Department of Public Health as to the number of ''authorized electronic monitoring notification and consent forms received annually.''[23] The facility also must document the request by the resident or representative and document such request on an approved form to be developed by the Department of Public Health.[24] This documentation must be kept in the resident's clinical file.

Further, along with the accommodations and documentation requirements, the act requires facilities to post signs at the entrances to the buildings as well as the entrance of the rooms being monitored advising of the electronic monitoring devices in use.[25]

Penalties

To ensure facility adherence, the act imposes stringent penalties on any individual or facility that ''knowingly hampers, obstructs, tampers with, or destroys an electronic monitoring device installed in a resident's room.''[26] What is more, the facility can be held liable for intentionally retaliating or discriminating against any resident for consenting to authorized electronic monitoring or preventing the installation or use of an electronic monitoring device.[27] Any intentional retaliation is a business offense punishable by a fine not to exceed $10,000.[28]

How Can the Footage Be Used?

Above all, the resident owns the footage. Moreover, the facility has no right to the footage whatsoever.[29] With regard to actual uses of the video, the act expressly provides that the information ''may only be disseminated for the purpose of addressing concerns relating to the health, safety, or welfare of a resident or residents.''[30] This does include litigation.[31] On the litigation front, the act goes one step further to state that the information obtained may be ''admitted into evidence in a civil, criminal, or administrative proceeding.''[32] However, the information cannot have been ''edited or artificially enhanced and the video recording must include the date and time the events occurred.''[33]

Going Forward

As noted, the passing of this legislation is one of the more significant changes impacting the long-term care communities within Illinois over the past several years. Given the specific facility responsibilities enumerated within the act as well as the critical language providing for the direct admissibility of the video footage obtained in any legal proceeding, facilities within Illinois must be armed to appropriately handle these requests for electronic monitoring come Jan. 1, 2016. Not only must facilities revise resident rules and regulations to allow for electronic monitoring, but admission guidelines and intake paperwork must also be amended. In addition, appropriate signs and documentation must be developed to alert any visitor to the facility of the monitoring in place. Importantly, facilities must also be prepared to provide logistical training for those working around the electronic monitoring as well as education for both clinical and non-clinical staff regarding the act and its requirements and implications. Of course, facilities outside of Illinois also should be aware generally of the requirements set forth in the act, as it appears that Illinois is among a growing number of states adopting similar legislation.

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[17] Pub. Act 99-430, § 25(a).
[18] Pub. Act 99-430, § 25(b).
[19] Pub. Act 99-430, § 25(e).
[20] Pub. Act 99-430, § 27(b).
[21] Pub. Act 99-430, § 25(c).
[22] Pub. Act 99-430, § 25(c).
[23] Pub. Act 99-430, § 55.
[24] Pub. Act 99-430, § 20(b).
[25] Pub. Act 99-430, § 30.
[26] Pub. Act 99-430, § 40(a), (c).
[27] Pub. Act 99-430, § 70.
[28] Pub. Act 99-430, § 70.
[29] Pub. Act 99-430, § 45.
[30] Pub. Act 99-430, § 45(b).
[31] Pub. Act 99-430, § 45(c).
[32] Pub. Act 99-430, § 50.
[33] Pub. Act 99-430, § 50.