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Cutting Through the Confusion—The Illinois Authorized Electronic Monitoring in Long-Term Care Facilities Act Revisited



BY DAVID ALFINI AND ADAM GUETZOW

Numerous new laws took effect in the Land of Lincoln at 12:01 a.m. on Jan. 1. Pumpkin Pie is now the official pie of Illinois. Illinois also now provides for an on-line application process for notary publics. That is also the day that the Illinois Authorized Electronic Monitoring in Long-Term Care Facilities Act took effect. In short, the act allows for certain types of authorized electronic monitoring in the resident rooms of long-term care facilities.

Since then, residents of long-term care facilities, and, more often, family members of residents of long-term care facilities, have begun to take steps to use electronic monitoring in the resident rooms. Unfortunately, Illinois facilities have seen an increase in the number of devices installed without facility knowledge, devices that do not comply with the act's technical requirements, or devices installed prior to full compliance with the act's mandates regarding consent. These "unauthorized" electronic monitoring devices are troubling

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not only for the facility due to lack of knowledge but also as a result of the obvious privacy concerns that may arise if each and every regulation in the act is not complied with prior to an installation of an electronic monitoring device.

For long-term care facility operators in other states, where similar statutes—if not already in effect—may be enacted, it is important to understand the way at least one state has opted to regulate this type of electronic monitoring and the challenges facility operators in Illinois are facing from residents and, more often, their family members.

What the Act Says vs. How It Is Interpreted

On its face, the language of the act is simple. It 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 the act. § 10(a).

The most critical language of this "purpose" section of the act is the use of the term "authorized." That is, the act does not permit any monitoring deemed acceptable by the resident or their consenting representative to be installed. Rather, the act goes to great lengths to define what is truly "authorized electronic monitoring." This simple yet important term has, to date, caused the most significant amount of confusion surrounding the act and its requirements. While residents and resident representatives are often quick to cite to the act in support of any electronic monitoring device they deem acceptable to install, both with and without facility knowledge, the act in actuality places considerable limitations on both the devices that can be installed and the process leading to installation. Knowledge of these limitations is essential for facility owners and operators not only to ensure that the consent and privacy issues contemplated by the drafters of the legislation are fully addressed and complied with, but also to provide an opportunity to educate residents and their representatives on what rights the act actually provides.

Technical and Installation Specifications

First and foremost, since the passing of the effective date of the act there has been a growing number of resident or resident representatives inquiring as to the actual type of electronic monitoring device that can be in-

stalled as well as a growing number of devices being found by facility staff that do not comport with the act's technical specifications. Aside from the act's strict restraints on electronic monitoring devices capable of capturing still images (only audio, video, or a combination of both are permitted under the act), the act also requires that any electronic monitoring device installed have a fixed position. § 5. Further, the act makes clear that the camera must be placed in a conspicuously visible location in the room. § 25(d). These two latter requirements so far have seemed to be overlooked by many of the residents or family members who wished to install a camera. The intent of the act, aside from providing greater protection for long-term care residents, was also to do away with the secret "nanny" or "teddy bear" cameras that did not take into account privacy issues or the importance of providing notice to the facility and its employees of the existence of the camera. Adherence to these technical requirements set forth in the act is crucial for any analysis determining whether the electronic monitoring device is truly "authorized" under the act.

IDPH Authorization and Consent Form

Second, the most misinterpreted and overlooked language of the act pertains to its various regulations regarding privacy and consent. As noted, many family members of long-term care residents have deemed the passing of this legislation as a ticket to install an electronic monitoring device in their loved ones' room on their own terms, their own schedule, and even at times over the objection of the resident. This is not the case. The act goes to great lengths to protect the privacy of the resident by providing the resident the ultimate right of refusal concerning the monitoring as well as a detailed step by step process if the request for installation comes from anyone but the resident. These specific regulations must not be overlooked.

Shortly after the Jan. 1, 2016, effective date, in an effort to ensure full compliance with the act's requirements on consent and privacy, the Illinois Department of Public Health (IDPH) issued a Notification and Consent Form that must be completed by the resident or resident representative prior to any electronic monitoring device being installed. The content of the IDPH Notification and Consent Form is mandated by Section 20 of the act and is to be kept in the resident's clinical file.

The IDPH Notification and Consent Form very clearly lays out and emphasizes the precautions that must be taken if a resident representative (and not the resident) is requesting to install an electronic monitoring device. More specifically, it highlights the fact that not only must a physician determine (and document by way of the physician's signature on the IDPH form) that the resident lacks the ability to understand electronic monitoring but also that the consenting individual falls within the categories of permissible individuals who may request monitoring on a resident's behalf: (1) health-care agent named under the Illinois Power of Attorney Act; (2) resident representative as defined in the act; (3) resident's spouse; (4) resident's parent; (5) resident's adult child who has written consent from other adult children; and (6) resident's adult sibling who has written consent from other adult siblings.

Further, the IDPH Notification and Consent Form also reinforces that the resident representative must document, in the presence of a facility employee, that

the resident was advised as to: (1) the type of electronic monitoring device to be used; (2) the standard conditions that may be placed on the electronic monitoring device; (3) with whom the recording may be shared; and (4) the resident's ability to decline all recording. Inherent in the multi-step process reiterated in the IDPH Notification and Consent Form is that a family member requesting to install electronic monitoring on behalf of a family member does not have an absolute right to do so and the procedural safeguards put in to protect residents who may not want the monitoring must be followed.

As an aside, the IDPH Notification and Consent Form does include significant detail regarding standard conditions that may be placed on any electronic monitoring device installed. Standard conditions, which are those situations where the resident or approved resident representative elects to have the camera turned off, may include the examples provided in the IDPH form (i.e. turn off or block visual recording component of electronic monitoring device while dressing or bathing is performed) or may include any other conditions or restrictions the resident elects to have on the monitoring. As the IDPH Notification and Consent Form is part of the resident's clinical file, the standard conditions too are part of the clinical file and require an affirmative step on behalf of clinical staff to turn off and on the electronic monitoring devices.

Ultimately, proper completion of the IDPH Notification and Consent Form not only ensures a proper party is requesting the monitoring but also safeguards the facility from privacy issues by detailing the multi-step process that must be followed when the resident is not the individual requesting the monitoring.

Moving Forward

"The greatest enemy of knowledge is not ignorance, it is the illusion of knowledge."

—Stephen Hawking

A fair amount of confusion has been caused by the "illusion of knowledge" with respect to what the act allows. As an increasing number of family members have equated the passing of the act as an automatic right to conduct video surveillance of their loved ones' rooms within a long-term care facility, owners and operators must be vigilant in training both their clinical and administrative staff on the actual requirements of the act. Not only does proper training relative to the restrictions of the act assist in the ability to effectively respond to family inquiries but it also permits facilities the ability to explain with conviction why a family member who has initiated "unauthorized" electronic monitoring cannot continue to do so until the requirements as set forth in the act (and reinforced in the IDPH Notification and Consent Form) are fully complied with.

The next question becomes what type of education on the act should the facilities provide for the residents and family members. Some facilities have elected to take a proactive approach and advise the resident and resident families of the act. This has allowed them to educate the residents and family members as to the requirements of the act. Specifically that the monitoring must be *authorized* and what authorized means under the act.

Finally, for those outside of Illinois, it is critical to note that in addition to Illinois being the fifth state to pass electronic monitoring in long-term care facilities legislation, Utah has now proposed similar legislation titled "Monitoring Equipment in a Care Facility." The permissive use of authorized electronic monitoring in

long-term care facilities is certainly a growing trend, likely due in large part to both the growing older adult population as well as the technological capabilities of their caretakers. Long-term care facilities in states that do not yet have such legislation should pay careful attention for similar proposed bills in the near future.