

Long Term Care Facilities' and Employees' Responsibilities Under the Elder Justice Act

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On March 28, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA).¹ A part of that legislation, the Elder Justice Act (EJA), can be found in PPACA at Title VI, Subtitle H, Sections 6701-6703. EJA is designed to “detect, prevent and prosecute elder abuse, neglect, and exploitation.”² One requirement of EJA, effective immediately, is a responsibility for individual employees to report suspected crimes against residents of long term care facilities and others who receive care from the facility. The Act creates serious penalties for individuals and, potentially, for long term care facilities that employ individuals who fail to report.³ This article summarizes EJA provisions that have the greatest immediate impact on long term care facilities, including the new reporting requirements, and suggests actions facilities should take to ensure compliance.

Long Term Care Facilities Defined

Section 6703(b)(3) of PPACA, entitled “Reporting of Crimes in Federally Funded Long-Term Care Facilities,” amends Part A of Title XI of the Social Security Act (42 U.S.C. 1301 *et. seq.*) by adding section 1150B. The new section applies to long term care facilities that received at least \$10,000 in federal funds during the preceding year.⁴ EJA defines a long term care facility as “a residential care provider that arranges for, or directly provides, long-term care.”⁵ In turn, EJA defines long term care as:

- (A) IN GENERAL- The term ‘long-term care’ means supportive and health services specified by the Secretary for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability, or vulnerability.
- (B) LOSS OF CAPACITY FOR SELF-CARE- For purposes of subparagraph (A), the term ‘loss of capacity for self-care’ means an inability to engage in 1 or more activities of daily living, including eating, dressing, bathing, management of one’s financial affairs, and other activities the Secretary determines appropriate.⁶

EJA places two requirements on facilities that received the threshold amount of federal funds during the previous year: a notification requirement and an individual reporting requirement. Further, the Act provides stiff penalties for failure to comply with the reporting requirement. Under the EJA definition, almost all existing long term care facilities must comply.



Annual Notification Requirement

Owners and operators of long term care facilities that received at least \$10,000 in federal funds the previous year are obligated under EJA to “annually notify each covered individual (as defined in paragraph (3)) of that individual’s obligation to comply” with the Act’s reporting requirements.⁷ The “covered individuals” that must be notified every year are “each individual who is an owner, operator, employee, manager, agent, or contractor” of the facility.⁸

Reporting Requirements

The EJA mandates that each “covered individual”—owners, operators, employees, managers, agents, or contractors—report “any reasonable suspicion of a crime” against any person “who is a resident of, or is receiving care from, the facility.”⁹ The Act relies on local and state laws to define a reportable crime.¹⁰ The suspicion must be reported to both the Secretary of the U.S. Department of Health and Human Services (Secretary) *and* to one or more local law enforcement agencies.¹¹ The Act, however, does not designate any particular form by which the report must be made.

Crucial to this mandatory reporting requirement is the time in which the report must be made. Where the suspected crime “results in serious bodily injury, the individual shall report the suspicion *immediately, but not later than 2 hours* after forming the suspicion.”¹² Where serious bodily injury does not result from the suspected crime, the suspicion must be reported “not later than 24 hours after forming the suspicion.”¹³ EJA defines “serious bodily injury” as “an injury—(i) involving extreme physical pain; (ii) involving substantial risk of death; (iii) involving protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or (iv) requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”¹⁴ Also

included in the Act's definition of "serious bodily injury" is criminal sexual abuse, prohibited by federal statutes 18 U.S.C. §§ 2241 or 2242, "or any similar offense under State law."¹⁵

Penalties for Failing to Report

Under EJA, any covered individual—be it the owner, an employee, or even a facility contractor—who does not comply with the reporting requirements is subject to a civil penalty up to \$200,000.¹⁶ If the individual fails to report his or her reasonable suspicion of a crime and the failure to report "exacerbates the harm to the victim of the crime or results in harm to another individual" the maximum civil penalty is increased to \$300,000.¹⁷ In addition, any failure to report exposes the individual to the possibility of being excluded "from participation in any Federal health care program."¹⁸ While these civil monetary and exclusion penalties fall upon the individual, any facility that subsequently employs an excluded individual becomes "ineligible to receive Federal Funds under this Act."¹⁹

At a minimum, the civil monetary penalty is mandatory, however the Act provides the Secretary with the discretion to "take into account the financial burden on providers with underserved populations in determining any penalty" he or she imposes under the Act.²⁰ Finally, there are additional penalties to a long term care facility for any retaliation against a nurse or other employee for making a report of a suspected crime.²¹ These include maximum civil monetary penalties of \$200,000 and the possibility of exclusion from participation in federal healthcare programs "for a period of 2 years."²² EJA requires long term care facilities to conspicuously post notice of the rights of its employees under the Act.²³ The form of the required notice is to be, but has not yet been specified by the Secretary.²⁴

Other EJA Provisions

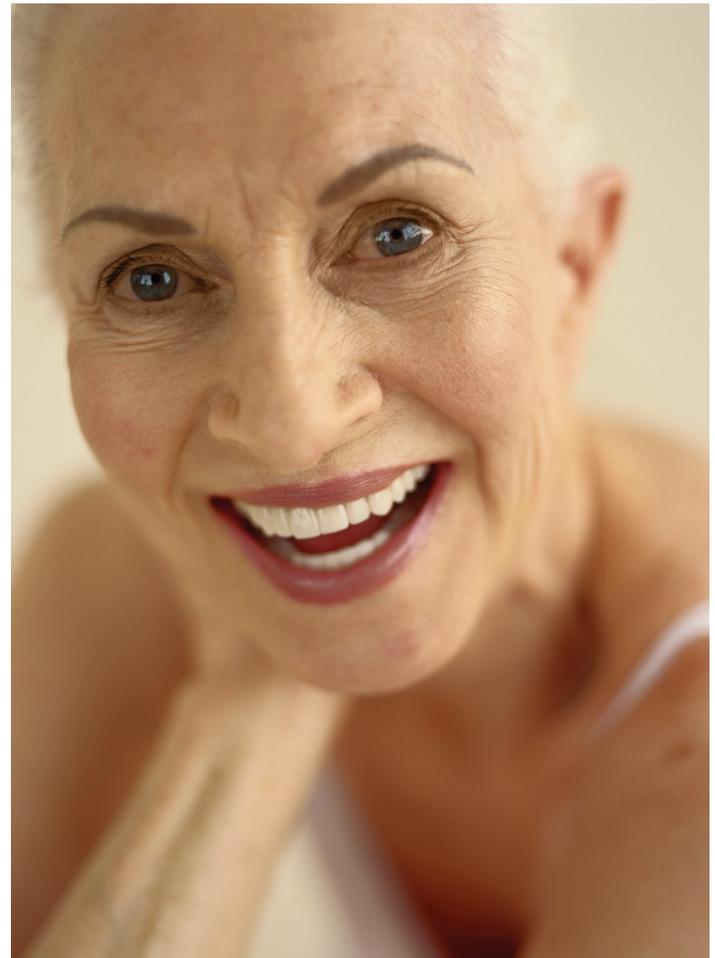
EJA does much more than set out these new mandatory notice and reporting requirements. Among other things, the Act establishes an Elder Justice Coordinating Council and an Advisory Board on Elder Abuse, Neglect, and Exploitation.²⁵ The Council is to make recommendations to the Secretary for coordinating the activities of various federal, state, local, and private agencies in their efforts "relating to elder abuse, neglect, and exploitation."²⁶ The Board is to develop collaborative, multidisciplinary approaches to improve the quality of long term care and to prevent abuse, neglect, and exploitation.²⁷ EJA also provides for grants to establish forensic centers to develop expertise and provide services relating to elder abuse, neglect, and exploitation; provide training and incentives to improve long term care staffing and management practices, including wage or benefit increases; to enhance adult protective services; to support long term care ombudsman programs; and design and institute complaint investigation systems for state surveyors of nursing facilities.²⁸ Additionally, EJA authorizes the Secretary to study the establishment of a National Nurse Aide Registry that could provide information "regarding violations of Federal and State law."²⁹

Although the grants, especially to help finance training and benefits for long term care staff and management, would be a

great help to long term care facilities in implementing the Act's annual notification requirement and in assisting with training to ensure all "covered individuals" understand their rights and responsibilities, EJA only authorizes funds for the grant. The \$20 million authorized for training has not been appropriated by Congress, leaving the grant unobtainable and ineffective in helping alleviate the immediate burden the Act places on long term care facilities to comply with its requirements.³⁰ Likewise, at some future date when a National Nurse Aide Registry is in place, the registry could help long term care facilities avoid the inadvertent hiring of an excluded individual, placing the facilities' own ability to participate in federally funded healthcare programs at risk. However, while the registry is only in the study phase, facilities are still required to comply with the Act's requirements and are subject to its penalties.

Recommendations for Immediate Action

Notwithstanding that other portions of the EJA, although authorized, will not be implemented until the requisite funding is appropriated, long term care facilities are immediately obligated to meet the notification and reporting requirements. The penalties for failure to report are mandatory, not discretionary, although the amount of the civil penalties and whether to exclude



a “covered individual” from participation are at the discretion of the Secretary.

A first step to compliance with EJA requirements is for long term care facilities to create a method by which to notify all “covered individuals” working with and for the facility of their individual reporting responsibility. If it has not already, a facility’s management team should work with its local law enforcement agency to establish what constitutes a reportable crime against a resident or care recipient. Then, the facility should create the policies and procedures to educate and notify all “covered individuals” of their responsibility under EJA. The two primary distinctions in EJA requirements from existing state and federal reporting requirements are most likely the short, two-hour timeframe for reporting suspected crimes resulting in serious bodily injury and the fact that individuals, rather than facilities are now responsible to do the reporting.³¹ All “covered individuals” must know that these new requirements and the penalties for noncompliance are their own personal responsibility.

EJA requires all “covered individuals” to report any “reasonable suspicion” of a crime but does not define “reasonable suspicion.” Therefore, a long term care facility should develop reporting guidelines to encourage and assist its personnel in complying with the Act while at the same time reducing the number of potential “covered individuals” who must report. Because the Act does not specify a form in which the report must be made, facilities should develop a uniform reporting protocol. Additionally, clearly defined communication channels can protect both resident privacy and employee reporting liability by keeping information within well-set “need to know” boundaries.

“Covered individuals” includes not only the facility’s on-the-premises employees, but contractors as well. Therefore, a facility should consider modifications to its contractor agreements that include provisions relating to the contractor’s own responsibility under EJA and provide release for the facility if the contractor should ever be excluded by the Secretary for failing to report.

Because a facility will be ineligible to receive federal funds if it employs “excluded individuals,” a long term care facility will need to adjust its hiring practices for both employees and contractors to enable it to determine whether the potential hire is considered “excluded” for past failure to comply with EJA reporting requirements. A facility will also need to revise its employee retention policy based on the potential of an employee’s failure to report resulting in the employee becoming an excluded individual—and notify its staff of the revisions. Furthermore, the facility will need to post the employees’ rights notice as soon as it is available from the Secretary or consider developing its own notice for use until the Secretary’s is available.

Conclusion

The bulk of the newly enacted EJA creates, among other things, a Council, an Advisory Board, and monetary grants for addressing the problem of elder abuse, neglect, and exploitation. These entities and programs, however, are on hold until Congress actually

appropriates the authorized funds. In the meantime, the notice and reporting requirements placed on long term care facilities and “covered individuals” went into effect with the passage of PPACA. Long term care facilities must act now to notify the “covered individuals” they employ of their individual duty to report suspected crimes and to implement procedures to facilitate that reporting. It is imperative for facilities to track the status of their agents, employees, and contractors to ensure that they are not dealing with excluded individuals that would put the facility’s own eligibility to receive federal funds at risk. Until federal regulations are promulgated to further clarify individual and facility rights and responsibilities under EJA, each facility must create its own procedures to ensure good-faith compliance with the Act.

1 See Priscilla Shoemaker, *AHCA Policy Memorandum on Section 6703(b)(3) of the Elder Justice Act in PPACA*, June 18, 2010, available at www.careproviders.org/members/2010/EJA_ReportingofCrimesMemo_Final.pdf.

2 *Id.*

3 *Id.*

4 Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, § 6703(b)(3) (amending Part A of Title XI of the Social Security Act (SSA) to include § 1150B(a)(1)).

5 PPACA § 6703(a)(1)(C) (amending Title XX of the SSA to include § 2011(15)).

6 *Id.* (amending Title XX of the SSA to include § 2011(14)).

7 PPACA § 6703(b)(3) (amending Part A of Title XI of the SSA to include § 1150B(a)(2)).

8 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(a)(3)).

9 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(b)(1)).

10 *Id.*

11 *Id.*

12 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(b)(2)(A)).

13 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(b)(2)(B)).

14 PPACA § 6703(a)(1)(C) (amending Title XX of the SSA to include § 2011(19)(A)).

15 PPACA § 6703(a)(1)(C) (amending Title XX of the SSA to include § 2011(19)(B)).

16 PPACA § 6703(b)(3) (amending Part A of Title XI of the SSA to include § 1150B(c)(1)(A)).

17 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(c)(2)(A)).

18 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(c)(1)(B) & (2)(B)).

19 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(c)(3)).

20 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(c)(4)).

21 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(d)(1)).

22 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(d)(2)).

23 *Id.* (amending Part A of Title XI of the SSA to include § 1150B(d)(3)).

24 *Id.*

25 PPACA § 6703(a)(1)(C) (amending Title XX of the SSA to include §§ 2021 & 2022).

26 *Id.*

27 *Id.*

28 PPACA § 6703(a)(1)(C) (amending Title XX of the SSA to include §§ 2031, 2041-43); PPACA § 6703(b)(2)).

29 PPACA § 6703 (c).

30 See Lori A. Stiegel, *Elder Justice Act Becomes Law, But Victory Is Only Partial, Bifocal* (vol.31, no.4, Mar.-Apr. 2010), available at http://new.abanet.org/aging/PublicDocuments/eja_act_art_prtl.pdf.

31 See Shoemaker, *AHCA Policy Memorandum on Section 6703(b)(3) of the Elder Justice Act in PPACA*, June 18, 2010.