

Mandatory Reporting of Elder Abuse in PPACA Creates Additional Risk and Compliance Burdens for Long-Term Care Providers

by H. Carol Saul and Allen B. Roberts

Many of us who focus on the healthcare industry are familiar with the financial “carrot” dangled before whistleblowers who report alleged false claims by filing qui tam lawsuits. One portion of the Patient Protection and Affordable Care Act (PPACA) now will function not as a whistleblower carrot, but as a “stick,” imposing significant penalties against individuals who fail to report a reasonable suspicion of a crime against a long-term care resident or other individual receiving services from a long-term care facility. Long-term care facilities and those who arrange for long-term care, as well as their employees and contractors, should understand their new obligations, the additional risks and the compliance steps which are necessary to reduce that risk.

Subtitle H of PPACA, titled the “Elder Justice Act of 2009,” amends Title XX of the Social Security Act to establish a federal elder justice program.¹ It represents the culmination of a nearly decade-long effort for increased federal regulation of elder abuse. First introduced in 2003, an elder justice bill was passed by the Senate Finance Committee four times, and by the House of Representatives once. Despite strong efforts of the Elder Justice Coalition to get a bill through both houses of Congress, those efforts were unsuccessful until Senator Blanche Lincoln, D-Arkansas, led successful efforts to include it in the federal healthcare reform bill.²

The Elder Justice Act, which was signed into law on March 23, 2010, authorizes block grants to states for social services; provides funding for adult protective services; establishes an advisory board on elder abuse, neglect and exploitation; and provides for Ombudsman Program grants, as well as grants and incentives for long-term care staffing.³ From a compliance and employment law perspective, however, it is Section 6703(b)(3) of the Elder Justice Act, titled “Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities,” that should be carefully noted.⁴ This section mandates reporting of suspected crimes in federally funded long-term care facilities.⁵ Every “covered individual” with respect to any long-term care facility that receives at least \$10,000 in federal funds annually under the Social Security Act is subject to the reporting requirements in Section 6703(b)(3).⁶

What Entities Are Impacted?

A “long-term care facility” is defined as a “residential care provider that arranges for, or directly provides, long-term care.”⁷ “Long-term care” in turn is defined as “supportive and

health services specified by the Secretary [of the Department of Health and Human Services (Secretary)], for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability or vulnerability.”⁸ Drilling deeper, “loss of capacity for self-care” in turn is defined as “an inability to engage in 1 [one] or more activities of daily living, including eating, dressing, bathing, management of one’s financial affairs and other activities the Secretary determines appropriate.”⁹

The Notice and Reporting Obligations

Once a provider falls within the statute’s definition of a long-term care facility, its owner or operator is required to notify annually each “covered individual” of that individual’s obligation to comply with the abuse reporting requirements. “Covered individuals” are defined broadly as owners, operators, employees, managers, agents or contractors of a long-term care facility.¹⁰ Such covered individuals are required to report to the Secretary, and to one or more law enforcement entities in the political subdivision where the facility is located, “any reasonable suspicion of a crime...against any individual who is a resident of, or is receiving care from, the facility.”¹¹ Crimes are to be defined by the law of the applicable political subdivision.¹²

Short Timeframes for Reporting

The reporting obligations must be met within very short timeframes. If the event results in serious bodily injury, the covered individual is required to report the suspicion immediately, but not later than two hours after forming the suspicion.¹³ If the event does not cause serious bodily injury, the covered individual is required to report the suspicion within twenty-four hours after forming the suspicion.¹⁴

Penalties for Failures to Report

Penalties for non-compliance are severe. A covered individual who fails to meet the reporting requirements is subject to a civil money penalty of up to \$200,000, and the Secretary may exclude the covered individual from participation in federal healthcare programs.¹⁵ If the covered individual fails to meet the reporting obligation and such failure exacerbates the harm to the victim of the crime, or results in harm to another individual, the civil money penalty may be increased to as much as \$300,000, and the Secretary may exclude the covered individual from participation in the federal healthcare programs.¹⁶ Of major consequence to long-term care facilities, while any covered individual is classified as an “excluded individual,” a facility employing such covered individual is ineligible to receive federal funds.¹⁷

Importantly, the Elder Justice Act penalties are not aimed at the person committing the crime, but rather at each witness to the crime. Any person with first-hand or other information must fulfill the reporting obligations or be subject to sanctions, which ironically may be harsher than the consequences to the individual committing the underlying crime.

Governmental Discretion to Lessen or Waive Penalties

The Section 6703(b)(3) reporting requirements allow the Secretary to take into account the financial burden on providers with underserved populations in imposing the penalties,¹⁸ presumably permitting a lesser penalty, or waiver of penalties altogether, for providers with underserved populations. Areas or groups that are geographically isolated, that are comprised of racial and ethnic minority populations or that are underserved because of special needs, such as language barriers, disabilities, alien status or age, are specifically identified as potentially appropriate for a modification of the penalties.¹⁹

Non-Retaliation Mandate

As is common with other statutes encouraging whistleblower disclosures, the long-term care facility is prohibited from retaliating against those who step forward appropriately.²⁰ The facility is subject to a civil money penalty of up to \$200,000 and discretionary exclusion for two years for unlawful retaliation.²¹ Additionally, each facility that is subject to the reporting requirements is required to conspicuously post a sign detailing the rights of employees to be free from retaliation for reporting as required by the statute, and advising employees that they may file a complaint with the Secretary against the facility if they believe they have been subject to retaliation.²² The form for this non-retaliation notice is to be specified by the Secretary at some future date.²³ Facilities should move quickly to educate managers on the types of activities which can trigger a claim of retaliation so as to avoid whistleblower claims.

In material respects, the Elder Justice Act reporting provisions have unique features and reach. The express terms governing reporting and consequences for failure to report do not appear to confer meaningful discretion on the individual, the facility or the federal government. Each subsection states that an individual “shall” report and “shall” be subject to a fine. Subject to clarification by administrative rule or regulation, this could leave minimal room for error or mistake in reporting.

It is clear that internal reporting of the suspicion of a crime does not fulfill the individual’s duty under the Elder Justice Act, as it would under other statutes. For example, Section 307 of the Sarbanes-Oxley Act (SOX) imposes an “up the ladder” reporting obligation on attorneys appearing and practicing before the Securities and Exchange Commission (SEC) to make certain disclosures of a material violation of securities law, breach of fiduciary duty or similar violation.²⁴ Absent an appropriate response by the corporation through its executives and board members and committees, SOX allows – but does not mandate – certain reporting or disclosure to the SEC.²⁵ The Elder Justice Act makes no provision – or exception – for internal reporting; instead it mandates going outside the organization and imposes penalties for not doing so.

Questions Raised by the Statute

Several questions of interpretation are immediately apparent:

- Based on the definition of long-term care facility noted above, clearly skilled nursing facilities that receive federal funding must comply with the new abuse reporting requirements. What is less clear is whether the requirements extend to other residential facilities that receive federal funding, such as in-patient hospice or assisted living.
- The broad definition of “covered individual” requires that the annual notice of reporting responsibilities be provided to a wide range of associates, including vendors, agents, and other contracted parties that may never step foot on-site at the facility. This creates an additional burden to the long-term care facility and subjects facilities to potential penalties for failure to provide notice to a party that would have no reason to use these procedures.
- No guidance is provided regarding what constitutes a “reasonable suspicion.” Laypersons employed by a facility may not have sufficient knowledge or experience to interpret this standard to fulfill their own responsibilities and avert risk for themselves and their employers.
- A report must be made to at least one law enforcement entity within the political subdivision. This may cause confusion or mistake by the covered individual, which is particularly problematic given the short window of time to make the report.
- There is no safe harbor for events that did not appear to involve serious bodily injury but, in hindsight, did cause serious bodily injury and therefore, fall within the two-hour reporting deadline.
- There is no exception for previously reported suspicions or events. Under a literal meaning of the Elder Justice

Act, each person with some knowledge, no matter how obtained, must follow the reporting requirements outlined above, even if multiple reports to the government and law enforcement result.

- Will the discretion given to the Secretary to impose lesser penalties on long-term facilities that serve racial and ethnic minorities result in their residents not being afforded the same level of protection from abuse as residents in facilities with larger non-minority populations?

Action Steps

While no one will argue with the laudable goal of curtailing abuse of long-term residents and care recipients, the abuse reporting requirements in the Elder Justice Act may prove problematic to interpret and implement. While we await much needed clarification, implementing the required annual notice of abuse reporting obligations and posting the notice regarding non-retaliation are steps that require prompt attention. A full recommended list of steps for compliance should include:

- Establish procedures to notify promptly all covered individuals of the obligation to report a crime against a resident or other recipient of care; consider developing contractual provisions addressing a contractor's obligation to report suspected crimes.
- Post the required non-retaliation notice once it is available from HHS.
- Assure that employees and line and staff management know the employment and other consequences of an employee's "excluded individual" status resulting from a failure to report.
- Review application forms and employment due diligence procedures to include an express inquiry into whether the applicant has been listed as an "excluded individual" or is subject to an ongoing investigation; include terms in applications and contracts whereby employees or contractors certify that they are not excluded individuals.
- Identify the law enforcement agencies in the appropriate political subdivision(s) to which reports will need to be directed.
- Establish and publicize protocols for notice, orientation, training and monitoring to assure that covered individuals know and fulfill their reporting responsibilities.
- Establish controls to assure compliance and minimize liability of others by managing communications so information is shared appropriately to an incident and the need to know; insulate others not having a need to know from becoming covered individuals and having their own reporting responsibilities.

For additional information on this subject and cost-effective advice as to how these changes may impact your compliance program and employment policies and training, please contact: H. Carol Saul, Esq., Epstein Becker & Green, P.C., Suite 2700, 945 East Paces Ferry Road, Atlanta, Georgia 30326, (404) 923-9069, csaul@ebglaw.com; and Allen B. Roberts, Esq., Epstein Becker & Green, P.C., 250 Park Avenue, New York, New York 10177, (212) 351-3780, aroberts@ebglaw.com.

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¹ Patient Protection and Affordable Care Act (PPACA), Pub.L.No. 111-148, §6703(a)(1)(A), 124 Stat. 119 (2010).

² Press Release, *Lincoln: Senate Health Reform Law has Significant Benefits for Arkansas Seniors*, March 26, 2010, available at <http://lincoln.senate.gov/newsroom/2010-3-26-2.cfm> (last visited June 3, 2010).

³ PPACA §6703(b)(3).

⁴ *Id.* (amending Part A of Title XI of the Social Security Act (SSA) to include §1150B).

⁵ *Id.* n.3.

⁶ *Id.*

⁷ *Id.* at §6703(a)(1)(C) (implementing Elder Justice Act (EJA) §2011(15)).

⁸ *Id.* (implementing EJA §2011(14)(A)).

⁹ *Id.* (implementing EJA §2011(14)(B)).

¹⁰ *Id.* at §6703(b)(3) (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(a)(3)).

¹¹ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(b)(1)).

¹² *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(b)(1)).

¹³ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(b)(2)(A)).

¹⁴ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(b)(2)(B)).

¹⁵ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(c)(1)).

¹⁶ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(c)(2)).

¹⁷ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(c)(3)).

¹⁸ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(c)(4)(A)).

¹⁹ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(c)(4)(B)).

²⁰ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(d)(1)).

²¹ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(d)(2)).

²² *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(d)(3)).

²³ *Id.* (implementing EJA §2046(b)(3) and amending Part A of Title XI of the SSA by adding §1150B(d)(3)).

²⁴ 15 U.S.C. §7245 (2006).

²⁵ *Id.*