

Long-Term Care Survey Alert

Compliance: Get the Inside Scoop on the Duty to Report 'Reasonable Suspicion of a Crime'

Consider these compliance tactics.

As reported in the last LTC Survey & Compliance Alert, a recent survey & cert memo says "covered individuals" in nursing facilities have to let the survey agency and local law enforcement know any time they develop a "reasonable suspicion of crimes committed against a resident of that facility."

Who is a covered individual? "An owner, operator, employee, manager, agent, or contractor" of a federally funded long-term care facility, according to an excerpt in the survey memo from the Elder Justice Act (Section 6703) of the Affordable Care Act, which requires the crimereporting duty (see the excerpt on page 63 of this issue).

Below industry experts share their views on the reporting requirement, including what they see as some problems with it and potential solutions. And they offer pointers to help facilities and covered individuals comply.

Definitions of Crime, 'Reasonable Suspicion' May Vary Based on Location

"While CMS' definitions [in the survey memo] come directly from the law, a key concern is that the definition of crime, and what must therefore be reported, varies across states," says **Evvie Munley**, senior health policy analyst for LeadingAge (formerly the American Association of Homes & Services for the Aging). The definition may "even differ between local municipalities."

Also: "In some jurisdictions," says attorney **Fred Miles**, with Miles & Peters in Denver, "'reasonable suspicion' is going to be equivalent to probable cause," which is usually defined as having "reasonable grounds to suspect that a person has committed a crime," he says. In other jurisdictions, it's probably defined "as something less than that."

Miles notes that Black's Law Dictionary defines "reasonable suspicion" as having a "particularized and objective basis, supported by specific and articulable facts."

Key: "Everyone has to get clear on what to report or someone is going to get fined" for failing to report something they didn't know they were supposed to -- "or law enforcement is going to be inundated with reports," says **Jennifer Hilliard**, public policy attorney for LeadingAge.

"At this point, there are many more questions than answers," she adds.

Legal Expert Recommends 3 Actions

Miles thinks "state associations representing long-term care facilities need to sit down with their state Attorney General's Office or whoever has jurisdiction over these matters and do three things:

- (1) Define what crimes are reportable in accordance with that state's law as covered by the EJA;
- (2) Define what constitutes 'reasonable suspicion' of a crime using a definition that is consistent with that state's law; and
- (3) Set up some sort of statewide reporting system or designate on a geographical basis what law enforcement agency in the facility's particular area is going to be responsible for receiving these reports. Otherwise, there's not going to be a way to track the reports," says Miles.

Reasoning: "Given the significant penalties that may be imposed on both the 'covered individuals' and for nursing facilities under the Medicare and Medicaid requirements for participation, just leaving it up to state surveyors to make these determinations without specific instructions and examples is going to be very, very risky in the context of due process for those accused," Miles continues. And it's going to be "exceedingly difficult for agencies that want to prove covered individuals' and facilities' non-compliance," he adds.

Colorado's state health department, for example, "has a very detailed occurrence reporting manual that attempts to define a crime," adds Miles. "When push comes to shove, they don't leave it up to surveyors to say something was a sexual assault under state law or that something constitutes exploitation under state law. The manual does have examples for that very reason. I doubt seriously that most states have gone to the extent that Colorado has, but it is something that needs to be done."

Miles notes that if the state survey agency or the state doesn't set up a reporting system, "what could happen is that surveyors could say the facility has an incident of abuse that constitutes a crime, and three people working in the facility had a reasonable suspicion of a crime. You talk to the employees and one says they didn't know who to report it to so they called the local police department. Most local police aren't going to [intervene] when you have resident-to-resident abuse involving residents with dementia. Another employee may say they reported it to the Adult Protective Services, which in some states has enforcement authority. Another may say they reported it to the district attorney or attorney general."

Bottom line: "Without systematic designation of which agencies will accept these reports and maintain records concerning the report," says Miles, "there's no way it's going to work properly."

Lyn Bentley, MSW, director of regulatory services for the American Health Care Association, says she doesn't know how "reporting 'crimes' committed by people with dementia to law enforcement is going to work. This issue will require conversations in advance among providers, state survey agencies, and law enforcement. We are encouraging our members to meet with their local law enforcement agency and state survey agency to help improve understanding of this type of situation," adds Bentley.

Consider These Compliance Tactics

LeadingAge is advising its members "to review their existing policies and procedures for reporting incidents" under federal and state law, and "amend or expand" them, as required, to "comport" with the Affordable Care Act requirements, says Munley.

Tip: AHCA's Bentley notes that "one thing that's important to distinguish is that the EJA requires individuals to report a suspicion of a crime whereas the federal incident reporting requires facilities to report suspected abuse, neglect, misappropriation of funds, or injuries of unknown source."

Under the EJA, "employees must be informed about their rights to report suspicion of a crime as individuals," Munley says. "And retaliation for reporting a suspected crime should be explicitly prohibited. Facilities must be sure that the information about employee rights and responsibilities is posted in a conspicuous place" where staff can readily see it. Employees must also "be notified and remain aware of their rights and responsibilities under the law."

Keep in mind: The "EJA places the onus on the nursing facility to make sure individuals understand their reporting requirements," says Miles.

Also: "CMS is allowing for multiple individuals to file a single report," Munley observes. "But facilities must be sure that policies and procedures for group reporting do not preclude or prevent an individual employee from filing a report separately," she stresses.

Bentley thinks "it's going to be important for there to be some record of having made the report." She notes that "a faxed report is acceptable for the state survey agency. And when you fax something, you can get confirmation that it was received. This is usually dated and time stamped."

