

## Long-Term Care Survey Alert

### Patient Privacy: Hidden Cameras: Protect Residents' Privacy -- And Your Reputation -- In The YouTube Era

#### Electronic monitoring could spell trouble at survey time.

Headlines these days are laden with words and phrases like "surveillance" and "data mining" and nursing homes should take note. The National Security Agency may not be watching you, but residents, family members, and state officials may be engaging in a few covert operations of their own and the push to allow electronic monitoring in our increasingly watched world only stands to increase.

In November, Oklahoma became the third state in the nation to spell out explicitly nursing-home residents' right to place and maintain hidden surveillance video cameras in their rooms. Nursing homes in that state along with facilities in Texas and New Mexico can no longer prohibit the use of such video monitoring devices.

Video monitoring is also familiar to facilities operating in Ohio and New York, where state justice officials have employed hidden cameras to investigate alleged cases of abuse in Medicaid-certified facilities.

**Bad apple:** Last year, officials in Ohio virtually shut down a nursing home in Zanesville, based in large part on evidence from hidden-camera monitoring. In turn, the Centers for Medicare and Medicaid Services opted to terminate the facility's ability to receive funding from Medicare and Medicaid, and the 100-bed facility finished the year with a handful of private-pay residents.

**Warning:** Survey strikes are likely to make your facility more prone to surreptitious video monitoring should your state decide to employ such tactics. The facility in Zanesville, for example, had been declared a "special focus" facility by CMS, a label it held for more than four years.

But even a clean survey record may not protect you from a video monitoring mandate. A bill proposed last year in Rhode Island (House Bill 5251) would have forced all facilities to provide video monitoring throughout the facility, including public areas as well as private rooms. Only residents who opted out of the program upon admission would be surveillance-free in their rooms. In addition to the video monitoring, the bill called for audio recording devices to operate in all bathrooms and bathing areas. The state also called for the admission of the recordings as evidence in civil or criminal court.

Other states introducing legislation related to surveillance camera use in 2013 include Ohio (House Bill 298) and South Carolina (Senate Bill 662). Both of these bills make explicit the right of residents or their designated guardians/family member to place covertly a video camera. In Ohio, the bill also codifies the right of state officials to use video cameras when investigating abuse.

#### Federal Law Fact That Could Trip You Up

While no federal law prohibits or permits the use of video monitoring in nursing homes, federal wiretapping law governs the use of surveillance audio without consent or legal cause.

Facilities faced with families who want to install monitors must also keep survey concerns in mind. If a facility allows, or is forced to allow, surveillance video cameras, does that run afoul of residents' rights to privacy as protected by federal long-term care regulations?

While a definitive answer remains elusive, many leaders in long-term care advise facilities to take a strong stand against the use of video monitoring, especially hidden cameras in private rooms.

Facilities in states that are still free to do so should consider crafting a facility-wide policy against the use of surveillance cameras and should ensure that residents and guardians agree to those rules upon admission, suggests Carol Rolf, an attorney with the Ohio Health Care Association.

"A picture doesn't always tell the whole story," says Joseph Bianculli, a health care attorney who represents providers in survey disputes. For every "extremely rare" case in which video footage shows actual abuse, there are many more cases in which a video short could be misconstrued or ambiguous, he contends, damaging the facility's reputation or even leading to criminal charges.

Case in point: In one instance, an agitated resident housed in a facility's behavioral unit barricaded himself in a bathing area along with a caregiver. Video footage from a nearby hallway-mounted camera showed frantic caregivers responding to the event and the chaotic footage resulted in a costly state case against the facility, even though there was no video footage of the resident in the barricaded area.

#### Heed This Advice

Bianculli and others suggest that facilities abandon the idea of cameras in public spaces for "security" or to aid in the prevention of "wandering" residents. In addition to the problem of ambiguity in film images, which are often taken out of context, he cites the high cost or impracticality of monitoring vast amounts of video.

If you already have cameras in place in public areas, be sure that you spell out clearly who owns the resulting footage including restrictions and procedures relevant to a resident or family member's request to view video content.

You should also be sure that staff is well-versed in any state-level administrative guidance regarding the use of monitoring devices in nursing homes. Maryland, for example, has issued a specific guidance regarding electronic monitoring in nursing homes.

Facilities should also be reminded that the cameras are really just a clarion call to poor-performing facilities to improve care. In New York, for example, state officials have effectively used the monitoring to document vital omissions of care, such as failure to turn and reposition a resident as required or assist with meals.

Planning, procedures, and proper training that lead to solid survey results should help you fare well should hidden cameras find their way into your residents' rooms.

As Bianculli points out, "If the goal is to improve care, there really are better ways to do it."