

**Pennsylvania Health Care Association's
Annual Conference**

**Wednesday, September 27, 2017
(1:45 p.m. – 3:00 p.m.)**



**Mandatory Reporting of Crimes: Current
Requirements and Implementation of “Phase II”
Regulations in the Final Rule of the Updated Federal
Nursing Home Regulations**

Presenters

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Overview

- To which facilities and individuals do the mandatory reporting requirements apply?
 - What types of facilities are subject to the mandatory reporting requirements?
 - Which individuals should report (“Covered Individuals”)?
- How does one fully comply with the mandatory reporting requirements?
 - What should be reported?
 - When should the reports be made?
 - To whom should reports be made?
 - Do any of the requirements apply to facilities rather than covered individuals?
- Are there any penalties for failing to comply?
 - Penalties for Covered Individuals
 - Penalties for Facilities
- What are the written policies and procedures facilities are required to develop by November 28, 2017 and what must be included in them?

Types of Facilities that are Subject to the Federal Mandatory Reporting Requirements

- Applicability:
 - Applies to crimes committed against residents of and individuals receiving care from “Long-term care facilities”
 - “Long term care facilities” are defined as residential care providers that arrange for, or directly provide, long-term care (i.e., supportive and health services for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability, or vulnerability)
 - “Loss of capacity for self-care” defined as an inability to engage in 1 or more activities of daily living, including eating, dressing, bathing, and management of one’s financial affairs.
 - In Pennsylvania, the following are “long-term care facilities”: nursing facilities (NFs), skilled nursing facilities (SNFs), hospice programs operating in SNF/NFs, and intermediate care facilities for the mentally retarded (ICFs/MR)

Types of Facilities that are Subject to the Federal Mandatory Reporting Requirements

- The federal reporting requirements only apply to long term care facilities that annually receive at least \$10,000 of federal funds.
 - NOTE: In Pennsylvania, the federal reporting requirements do not apply to assisted living facilities or personal care homes. That is because under Pennsylvania's Medicaid plan Medicaid does not pay for those services; therefore, those facilities do not receive at least \$10,000 per year in Federal funds
 - Even if the federal reporting requirements do not apply, state reporting requirements may still apply

HYPO #1

A skilled nursing facility accepts only private pay and does not participate in the Medicare or Medicaid programs.

- Do the federal mandatory reporting requirements apply?

HYPO #2

The business office manager of a Pennsylvania assisted living facility becomes aware that a resident's son/POA is receiving the resident's pension in the community and refusing to forward the pension to the resident or the facility, despite the resident's wishes.

- Do the federal mandatory reporting requirements apply?
- May Pennsylvania's reporting requirements still apply?

Who should report?

- "Covered Individuals" are required to report.
- "Covered Individuals" include anyone who is an owner, operator, employee, manager, agent or contractor of a long term care facility which annually receives at least \$10,000 in federal funds.
- "Covered Individuals" are required to report any reasonable suspicion of crimes committed against residents of the facility and crimes committed against individuals who receive care from the facility.
 - Not just residents; also individuals who received care from the facility (i.e. outpatients).

Who should report?

- “Agent” defined as any person who has been delegated the authority to obligate or act on behalf of a provider
- “Contractor” a person or business which performs services for another person or entity under a contract between them, with the terms spelled out such as duties, pay, the amount and type of work and other matters

HYPO #3

The owner/operator of company, which has contracted with an SNF to refill its vending machines, visits the SNF. The SNF is subject to the reporting requirements. He observes a man stealthily remove the wallet, out of the purse of a woman who is receiving outpatient rehabilitation services at the facility, and slip it into his pocket.

- Do the federal mandatory reporting requirements apply to the owner/operator of the vending machine company?

Who should report?

- All “Covered Individuals” with knowledge of the incident must report
 - Individuals, not the facility, have the duty to report
 - First-hand knowledge not required

HYPO #4

The person in charge of a company that manages an SNF visits the nursing home for a meeting with the administrator. The federal mandatory reporting requirements apply to the SNF. The management company representative witnesses a resident’s son charge toward the resident, raise his fist above him, and scream “I’m goin’ to pound you!”

- Do the mandatory reporting requirements apply to the management company representative?
- Do they apply if the management company representative does not personally witness this event, but merely learns of this event from the administrator?

Definition of the crime of Simple Assault

§ 2701. Simple assault.

(a) **Offense defined.**--Except as provided under section 2702 (relating to aggravated assault), a person is guilty of assault if he:

- (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;
- (2) negligently causes bodily injury to another with a deadly weapon;
- (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or
- (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.

HYPOTHESIS #5

An SNF contracts with a third-party entity to provide barber/beauty services to its residents. The SNF receives more than \$10,000 in Federal funds each year.

- Do the federal mandatory reporting requirements apply to the employees of the entity providing barber/beauty services to the SNF's residents or only to the barber/beauty company?

HYPOTHESIS #6

A Social Worker at an SNF subject to the reporting requirements develops a reasonable suspicion that a crime has been committed against one of the SNF's residents. The Social Worker immediately reports the incident to the SNF's Administrator.

- Has the Social Worker fulfilled his/her mandatory reporting obligations?
- Does the Administrator have a mandatory reporting obligation?

HYPOTHESIS #7

An SNF subject to the reporting requirements hired an attorney to petition for guardianship for one its residents and to assist in proving the resident's Medicaid eligibility. In the process of her work, the attorney discovers that the resident's son has used his authority as POA agent to write many checks to himself from the resident's bank account. The resident states he did not authorize the son to write those checks.

- Is the attorney responsible to report the possible crime?
- Is the nursing home required to give annual notices to the attorney or her firm?

What should be reported?

- Any “reasonable suspicion” of a crime committed against a resident or person receiving care at the facility
- “Reasonable suspicion” not defined by the federal mandatory reporting statute or regulations
- “Crime” defined by the laws of the applicable city, county, township, or village where an LTC facility is located

What should be reported?

- LTC facilities can coordinate with local law enforcement and their attorneys to determine those actions which are considered crimes
- LTC facilities can attempt to develop a reporting procedure with local law enforcement

HYPOTHESIS #8

An employee of an SNF subject to the reporting requirements witnesses a visitor of a resident striking the resident forcefully with his fist.

- Does this constitute a “reasonable suspicion?”

HYPOTHESIS #9

An employee in the business office of an SNF receiving over \$10,000 in federal funds per year is assisting with a resident’s Medicaid application and notices a number of unexplained ATM withdrawals. The resident states she does not know who made those withdrawals and did not authorize them.

- Does this constitute a “reasonable suspicion?”

When should the report be made?

- If the events that cause the reasonable suspicion of a crime result in **serious bodily injury**, a report must be made **immediately and no later than two hours** after forming the suspicion

When should the report be made?

- If the events that cause the reasonable suspicion of crime **do not result in serious bodily injury**, a report must be made **no later than 24-hours** after forming the suspicion

HYPO #10

When must the employee who witnessed a visitor striking a resident report the incident?

HYPO #11

An employee of an SNF subject to the reporting requirements obtains bank records showing large withdrawals being made from a female resident's bank account by her son for his personal use while the resident has dementia and is clearly incapable of handling her own affairs.

- Is this incident subject to the federal mandatory reporting requirements?
- When must the employee report the incident?

To whom should the reports be made?

- The reports should be made to **both** the local police department and the the state survey agency: in Pennsylvania, that is the Department of Health.
 - Police department – call the police department which has jurisdiction over the facility and verbally make the report. Also advisable to fax the report to the police so you have proof the report was delivered.
 - Department of Health-Nursing Home Survey Office – submit the report to your facility’s assigned Survey Field Office. Submit the reports by way of filing a PB22 form through the Department of Health’s Electronic Event Reporting System (ERS). If the covered individual who reports does not have access to the ERS, submit a report to the applicable field office by fax. In addition to timely submitting the PB22 through the ERS and/or faxing the notice to the field office, call and verbally report within the required time frame. Keep records of the date, time, subject matter, and recipient’s names for all verbal reports.

Pennsylvania Dept. of Health’s Division of Nursing Care Facilities’ (DNCF) Field Offices

Harrisburg DNCF Field Office
132 Kline Plaza, Ste. B
Harrisburg, PA 17104
Phone: 717-783-3790
Fax: 717-772-3641

Jackson Center DNCF Field Office
19 McQuiston Drive
Jackson Center, PA 16133
Phone: 724-662-6050
Fax: 724-662-6067

Johnstown DNCF Field Office
184 Donald Lane, Ste. 3
Johnstown, PA 15904
Phone: 814-248-3125
Fax: 814-248-3058

Lehigh Valley DNCF Field Office
4520 Bath Pike
Bethlehem, PA 18107
Phone: 610-861-2117
Fax: 610-861-2123

Lionville DNCF Field Office
110 Pickering Way P.O. Box 500 Exton, PA
19341
Phone: 610-594-8041
Fax: 610-594-9267

Norristown DNCF Field Office
1937 New Hope Street
Norristown, PA 19401
Phone: 610-270-3475
Fax: 610-270-1152

Pittsburgh DNCF Field Office
11 Stanwix Street Room 410 Pittsburgh, PA
15222
Phone: 412-565-2836
Fax: 412-565-2893

Scranton DNCF Field Office
100 Lackawanna Avenue
Scranton St. Office Bldg, Room 111
Scranton, PA 18503
Phone: 570-963-4331
Fax: 570-963-3415

Williamsport DNCF Field Office
1000 Commerce Park Drive, Ste. 112
Williamsport, PA 17701
Phone: 570-651-1040
Fax: 570-651-1043

Should each covered individual submit a separate report?

- Multiple individuals join in a single report but all reporting “Covered Individuals” must be identified
- Even if a multiple-person report is filed, facility should permit “Covered Individuals” to file their own, separate reports
- If additional information regarding the incident is discovered later, it is advisable to file supplemental reports

HYPOTHESIS #12

A nurse employed by an SNF forms a reasonable suspicion that a crime occurred against one of the SNF’s residents. The SNF is subject to the federal reporting requirements. The nurse reports the matter to the Director of Nursing who, in turn, reports the matter to the Administrator.

- Who should submit a report to the police and the Department of Health?
 - How can these individuals file reports?

HYPOTHESIS #13

- Assume the nurse from the previous hypothesis discovers after the initial report was made that there was another individual involved in the suspected crime against the resident.
 - Does this trigger additional reporting requirements under the federal mandatory reporting requirements?

Penalties for Covered Individuals' Failures to Report

“Covered Individuals” failing to comply with the reporting requirements could be subject to:

- A civil monetary penalty of up to \$200,000;
and
- Exclusion from participation in any Federal health care program.

Facility Requirements

1) Posting of Notice

- Facility must conspicuously post a notice for employees specifying covered individuals' reporting requirements and the prohibitions against facility retaliation against covered individuals who make reports

Facility Requirements

2) Notification of "Covered Individuals"

- Each individual must annually be provided notice of their reporting obligations
- Distribution of the written policy/training
- Revisions to vendor contracts
- Facilities should document the annual notifications to all "Covered Individuals" of their reporting obligations
 - Examples include:
 - Copy of notice or letter sent to each "Covered Individual"
 - Completed training/orientation attendance sheet specifying reporting obligations

Facility Requirements

3) Refrain from Retaliation

- A “Covered Individual” may not be retaliated against for reporting the reasonable suspicion of a crime under the Act
- Retaliation includes discharge, demotion, suspension, threats, harassment, denial of a promotion or other employment-related benefit, or any other manner of discrimination in the terms and conditions of employment

Facility Requirements

4) Establish Internal Policies and Procedures

- Who, within the facility, should be notified if a report is made under the Act?
- Remember that each covered individual is still required to individually report or join in a multiple-person report

Facility Requirements

- 5) Refrain from employing “Excluded Individuals”
 - “Excluded Individuals” are people who have been determined by the Secretary to be excluded from participation in any Federal health care program
 - Database of “Excluded Individuals”—can be searched at <https://exclusions.oig.hhs.gov/>

Penalties for Facilities

- If a facility is found to have retaliated against a “Covered Individual” it can be subject to:
 - A civil monetary penalty of up to \$200,000; and/or
 - Classification as an excluded entity for two years
- Whether a facility is liable in a civil or criminal case if a “Covered Individual” fails to report is a question for the courts
- Penalty for facilities hiring “Excluded Individuals:” the facility could potentially be found ineligible to receive Federal funds

HYPOTHESIS #14

A business office employee who properly reported a reasonable suspicion that a resident of the facility was a victim of a crime is the only employee of the SNF who does not receive an annual cost of living raise the following year.

- Could the SNF have committed a violation?
- If the SNF was found to have retaliated against the business office employee, what penalties could be levied against the SNF?

HYPOTHESIS #15

A covered SNF conspicuously posts a notice that states in large, bold print, only: “All employees are required to report suspected crimes against residents.”

- Does this posted notice meet the regulatory requirements?

HYPOTHESIS #16

An SNF adds to its new vendor contracts a provision stating, “All agents and contractors of SNF shall report suspected crimes against residents.”

- Does this satisfy the SNF’s annual notification requirements for agents and contractors?

Written policies and procedures to develop and implement by November 28, 2017

By November 28, 2017, the federal regulations require facilities to develop and implement written policies and procedures about the mandatory reporting requirements.

Written policies and procedures to develop and implement by November 28, 2017

The policies and procedures should include:

- Statement that facility will annually notify covered individuals of their obligations to:
 - Report to the State Survey Agency and one or more law enforcement entities any reasonable suspicion of a crime against any residents and individuals who receive care from the facility;
 - Report, within 2 hours, their reasonable suspicions of crimes that result in serious bodily injury; and
 - Report, within 24 hours, their reasonable suspicions of crimes that do not result in serious bodily injury.

Written policies and procedures to develop and implement by November 28, 2017

The policies and procedures should include:

- Statement that the facility will post a conspicuous notice of employee rights, as defined at section 1150B(d)(3) of the Act (42 USCS § 1320b-25(d)(3)).
 - The sign should include a statement that an employee may file a complaint with the Secretary of Health and Human Services against a long-term care facility that violates the regulations which prohibit a facility from retaliating against an employee who lawfully reports a crime.

Written policies and procedures to develop and implement by November 28, 2017

The policies and procedures should include:

- A statement that the facility will refrain from retaliation, as defined at 1150B(d)(1) and (2) of the Act (42 USCS § 1320b-25(d)(1) and (2)), against any employee who lawfully reports a crime.
- The statement should specifically describe the following examples of prohibited retaliation:
 - Discharge, demotion, suspension, threats, harassment, or denial of promotion or other employment-related benefit to an employee, or in any other manner of discrimination against an employee in the terms and conditions of employment because of lawful acts done by the employee, for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to 42 USCS § 1320b-25(b)(1) ; and
 - Filing of a complaint or a report against a nurse or other employee with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or employee for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to 42 USCS § 1320b-25(b)(1)

Ideas for efficiently providing annual notice to covered individuals

- Annually send notices to all covered individuals, which contain a signature line for each covered individual to confirm he or she received and read the notice. Collect the signed and dated confirmations from all of the covered individuals.
- Annually conduct a group meeting attended by as many covered individuals as possible. During the meeting, verbally provide the notices. Collect signatures from attendees. Follow up with non-attendees.

What about annually notifying contractors and agents?

- Send annual notices to the person in charge of each contractor and agent, along with a confirmation form.
- Request that the person in charge sign a form confirming his or her receipt of the annual notice. Possibly, also request that the person in charge arrange for all employees of the contractor or agent—who could possibly discover crimes against residents of your facility or others who receive care from your facility—to sign forms confirming their receipt of the annual notices. Collect the signed and dated forms.

Some ideas to help obtain buy-in from employees, contractors, and agents to the reporting requirements.

- The Hedges Company’s Dial-In™ model of structuring buy-in:
 - Describe the problem and summarize your proposed solution to those from whom you seek buy-in (stakeholders)
 - Provide concrete illustrations to describe the problem and your proposed solution
 - State your concerns. What are the risks and challenges of implementing your proposed solution?
 - Invite evaluation and critiques of your proposed solution from the stakeholders and acknowledge those comments and concerns.
 - By inviting comments, even criticism, of your proposed solution you encourage active involvement from your stakeholders
 - The Hedges Company proposes you ask your stakeholders the following questions: “What am I missing?” and “How can this idea be stronger?”
 - Acknowledge comments and critiques and incorporate them to improve your proposed solution.
 - Provide status updates to your stakeholders of the improvements to your proposed solution. Refine and continue to improve the solution.
 - Come to a consensus with the stakeholders for the final terms of the solution.

“Get the Buy-In You Need,” The Hedges Company’s website. <http://bit.ly/2gSMDE1>

Summary and Conclusion

- To which facilities and individuals do the federal mandatory reporting requirements apply?
 - Facilities—Long term care providers which annually receive at least \$10,000 in federal funds.
 - "Covered Individuals," not facilities, are required to report. Includes not only owners, operators, and employees of facilities, but also others such as contractors, agents, and managers of facilities.
- How does one fully comply with the federal mandatory reporting requirements?
 - Subject of report—Reasonable suspicion of crimes against residents and people who receive care from the facility.
 - Timing of Report—Serious bodily harm (immediately/within 2 hours) and Other than serious bodily harm (within 24 hours)
 - Report to the local police and the Dept. of Health field office.
 - Facilities are obligated to annually notify covered individuals of the reporting requirements and are prohibited from retaliating against Covered Individuals who report.
- Penalties for Non-compliance
 - Penalties for Covered Individuals
 - Penalties for Facilities
- Written policies and procedures facilities are required to develop by November 28, 2017 and what must be included in them

