



PHCA Webinar
November 27, 2018

Criminal Liability for Abuse and Neglect: New Law and New Risks

Paula G. Sanders, Esquire

Act 53 of 2018: Criminal Neglect and Abuse of Care-Dependent Persons

- Expands law governing criminal neglect of care-dependent persons (18 P.S. § 2713)
- Creates new crime of criminal abuse of care-dependent persons (18 P.S. § 2713.1)
- Passed unanimously as H.B. 1124, signed by Governor Wolf on June 28, 2018, and effective on August 28, 2018

Act 53: Expands Definition of Caretakers

- Caretaker is any person who is an owner, operator, manager or employee of any of the following:
 - Nursing home, personal care home, assisted living facility, private care residence or domiciliary home
 - Community residential facility or intermediate care facility for a person with mental disabilities.

Act 53: Expands Definition of Caretakers

- An adult daily living center
- A home health service provider whether licensed or unlicensed
- Any entity licensed under the Health Care Facilities Act (including hospitals)
- An adult who lives with the care-dependent person and has a legal duty to provide care or has voluntarily assumed an obligation to provide care because of a family relationship, contract or court order

Act 53: Criminal Neglect Easier to Prove

- Prosecutors need only show that a caregiver intentionally, knowingly or recklessly endangered the welfare of a care dependent person for whom he is responsible by failing to provide treatment, care, good or services necessary to preserve the health, safety or welfare of the person
 - No need to prove actual injury

Act 53: Criminal Neglect Easier to Prove

- “Recklessly” is the conscious disregard of a substantial and unjustifiable risk to the care-dependent person
 - *Note: a repeated failure to follow a plan of treatment could be “reckless”*
- Neglect also includes intentionally or knowingly using a physical or chemical restraint or medication or isolating a care-dependent person contrary to law and causing bodily injury, serious bodily injury or death

Act 53: Penalties for Criminal Neglect

- 1st degree misdemeanor for bodily injury
 - ≤ 5 years in jail and/or $\leq \$10,000$ in fines
- 1st degree felony for serious bodily injury or death
 - ≤ 20 years in prison and/or $\leq \$25,000$ in fines
- 2nd degree misdemeanor for endangerment
 - ≤ 2 years in jail and/or $\leq \$5,000$ in fines
- 3rd degree felony for course of conduct of endangerment
 - ≤ 7 years in jail and/or $\leq \$15,000$ in fines

Act 53: New Crime of Abuse of Care-Dependent Person

- Caretaker with *intent to harass, annoy or alarm* care-dependent person:
 - Strikes, shoves, kicks or subjects, attempts to subject or threatens a care-dependent person with physical contact
 - Engages in a course of conduct or repeatedly commits acts which serve no legitimate purposes

Act 53: New Crime of Abuse of Care-Dependent Person

- Communicates to a care-dependent person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures
- Communicates repeatedly with the care-dependent person at extremely inconvenient hours
- Commits a crime of stalking against care-dependent person

Act 53: Penalties for Criminal Abuse

- 1st degree misdemeanor
 - ≤ 5 years in jail and/or $\leq \$10,000$ in fines
- 3rd degree felony penalty for stalking a care-dependent person
 - ≤ 7 years in jail and/or $\leq \$15,000$ in fines

Act 53: Required Reporting

- Department of Aging, Department of Health (DOH) and Department of Human Services (DHS) *must report* to local law enforcement or to the Office of the Attorney General . . .
 - If in course of conducting a regulatory or investigative responsibility (i.e., a survey or inspection), it has a *reasonable cause to believe* that a caretaker has engaged in conduct that violates this law

Abuse and Neglect Under the New Requirements of Participation (ROPs) and the State Operations Manual (SOM), Appendix PP

To Whom Do the Abuse ROPs Apply?

- “Staff” includes employees, the medical director, consultants, contractors, volunteers, caregivers who provide care and services to residents on behalf of the facility, students in the facility’s nurse aide training program, and students from affiliated academic institutions, including therapy, social, and activity programs
 - F600, §483.12(a)(1)

Freedom From Abuse, Neglect and Exploitation

- F 600 – Right to be free from abuse, neglect and exploitation
- F602 – Exploitation and misappropriation
- F603 – Involuntary seclusion
- F604 – Physical restraints
- F605 – Chemical restraints
- F606 – Not employ/engage individual who was found guilty by a court or has finding on nurse aid registry; staff includes employees, medical director, consultants, contractors, volunteers, caregivers, students
- F607 – Policies and procedures re prohibiting abuse, neglect and exploitation, investigation, training
- F608 – Elder Justice Act
- F609 – Reporting of alleged violations involving abuse, neglect and exploitation
- F610 – Investigate, prevent and correct

Federal Definitions

- Abuse: the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the *deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.* **Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish.** It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology.

Determination of Findings and Potential to Foresee Abuse

“It has been reported that some facilities have identified that they are in compliance with F600 . . . because they could not foresee that abuse would occur and they have ‘done everything to prevent abuse,’ such as conducted screening of potential employees, assessed residents for behavioral symptoms, monitored visitors, provided training on abuse prevention, suspended or terminated employment of the perpetrator, developed and implemented policies and procedures to prohibit abuse, and met reporting requirements. However, this interpretation would not be consistent with the regulation, which states that ‘the resident has the right to be free from verbal, sexual, physical, and mental abuse...’”

Screening Volunteers

- Policies must address how pre-screening occurs for prospective consultants, contractors, volunteers
- Require same scrutiny prior to placement in facility, whether screened by facility itself, third-party agency, or academic institution
- Maintain documentation of the screening

Volunteer Abuse Training: F943

- Training must address:
 - Activities that constitute abuse, neglect, exploitation, and misappropriation of resident property
 - Procedures for reporting incidents of abuse, neglect, exploitation, or the misappropriation of resident property
 - Dementia management and resident abuse prevention

Elder Justice Reporting Requirements

- Penalties for covered individual's failure to notify
 - CMP up to \$200,000
 - Possible exclusion from participation
 - If failure exacerbates harm to victim or results in harm to another individual
 - ▶ CMP up to \$300,000
 - ▶ Possible exclusion from participation
- Penalties for retaliation

Elder Justice Act Reporting: Be Prepared For The Media

- Develop a media response for all “crisis” situations
- Identify and train staff about internal procedure for crisis management, including press statements and spokespersons

Prepare for Phase 3 of the RoPs

- 483.12 Freedom from abuse, neglect, and exploitation
 - (b)(4) Coordination with QAPI Plan
- 483.70 Administration
 - (d)(3) Governing body responsibility for QAPI program
 - ▶ Must have responsibility and accountability for QAPI
 - ▶ *Tip: Get this on Board agenda before November 28, 2019*

Phase 3 of the ROPs: Training

- 483.95 Training requirements Phase 3 topics:
 - Communication: effective communications for direct care personnel
 - Resident Rights and Facility Responsibilities
 - Abuse, Neglect, and Exploitation: exploitation
 - ▶ Taking advantage of a resident for personal gain through manipulation, intimidation, threats, or coercion

Abuse Reporting Guidelines

	F608 42 CFR 483.12(b)(5) and Section 1150B of the Act (ELDER JUSTICE ACT)	F609 42 CFR 483.12(c)
What?	Any reasonable suspicion of a crime against a resident	1) All alleged violations of abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property 2) The results of all investigations of alleged violations
Who is required to report?	Any covered individual, including the owner, operator, employee, manager, agent or contractor of the facility	The facility
To whom?	State Survey Agency (SA) and one or more law enforcement entities for the political subdivision in which the facility is located (i.e., police, sheriffs, detectives, public safety officers; corrections personnel; prosecutors; medical examiners; investigators; and coroners)	The facility administrator and to other officials in accordance with State law, including to the SA and the adult protective services where state law provides for jurisdiction in long-term care facilities
When?	Serious bodily injury- Immediately but not later than 2 hours* after forming the suspicion No serious bodily injury-not later than 24* hour	All alleged violations-Immediately but not later than 1) 2 hours- if the alleged violation involves abuse or results in serious bodily injury 2) 24 hours- if the alleged violation does not involve abuse and does not result in serious bodily injury.

ABUSE/NEGLECT COMPARISON CHART

<u>F600</u>	<u>ACT 53</u>
Corporal Punishment	2713.1(a)(1)(i)
Involuntary Seclusion	2713.1(a)(1)(ii)
Involuntary Restraint	2718 (Strangulation)
Staff Retaliation to Resident	2713.1
Unsympathetic Attitude	2713.1(a)(1)(ii)
Chronic Staffing Problems	2713(a)(1), 2713(a)(3)
Physical Abuse	2713.1(a)(1)(i)
Deprivation of Goods/Services	2713(a)(3)
Mental/Verbal Abuse	2713.1(a)(1)(iii), 2709 (Harassment)
Sexual Harassment	2713.1(a)(1)(i), 2713.1(a)(1)(iii)
<u>F578</u>	<u>ACT 53</u>
Neglect/Treatment in Conformance With Resident Wishes Exception	2713(e)

CMS Hand in Hand: A Training Series for Nursing Homes

- Focuses on caring for residents with dementia and preventing abuse
- Five modules
 - Four on dementia
 - One on preventing and responding to abuse

https://surveyortraining.cms.hhs.gov/pubs/ClassInformation.aspx?cid=0CMShandinHand_DL

https://surveyortraining.cms.hhs.gov/pubs/ClassInformation.aspx?cid=0CMShIH_ONL

Abuse and Neglect Strategies

- What is reportable abuse and neglect?
- How effective is on-line training?
- How are staff trained for media inquiries?
- What rights do you and your staff have when an investigator knocks?

To-Do List

- Review and update existing abuse and neglect policies, procedures and training
- Review QAPI for inclusion of abuse issues
- Retrain staff and document training
- Monitor for further guidance from DOH
- Consult with local law enforcement

Questions

Paula G. Sanders, Esquire

Principal & Co-Chair, Health Care Practice Group

Post & Schell, PC

psanders@postschell.com

717-612-6027