

The Elder Justice Act: What it Means for Long-Term Care Facilities

I. Introduction

Stories of elder abuse often spark outrage in the community; yet because of the vulnerable nature of the elderly, they remain easy targets for abuse, neglect, and financial exploitation. The justice system is beginning to put its foot down on this abuse by revving up the penalties for institutions that provide negligent elder care, and revitalizing programs designed to investigate and intervene in the name of elder justice. For example, a jury in California recently awarded over twelve million dollars to a 94-year-old woman, Sophie Schwartz, who was sexually assaulted in her own bedroom at an Assisted and Independent Living facility. The corporation operating the facility falsified the employment records of the assailant—an illegal immigrant hired as a dietary aide who never received a background check or any training in dealing with elderly residents. Unfortunately, Sophie Schwartz's story is not an anomaly, and it is this alarming trend of negligent hiring, cost-cutting, and inadequate staffing that led in large part to the adoption of the Elder Justice Act in the recent overhaul of America's health care system.

The Elder Justice Act of 2009, "the EJA," part of the recently enacted

Patient Protection and Affordable Care Act, or "the Health Reform Act," takes aim at developing and implementing strategies to decrease the likelihood of elder abuse, neglect, and exploitation. The Act utilizes three significant approaches to accomplish its mission of promoting elder justice: the first is the creation of a Coordinating Council and an Advisory Board, both of which are charged with recommending multi-disciplinary tactics for reducing elder abuse at the local, state, and federal levels; the second is the allotment of grant money and monetary incentives to improve staffing, quality of care, and technology in long-term care facilities and boost the effectiveness of states' adult protective services departments.¹ The third, and perhaps most significant approach, is a provision of the EJA that requires facilities receiving federal funding to adhere to a strict reporting requirement.

II. Entities Created by the Elder Justice Act

Elder Justice Coordinating Council.

The Coordinating Council will be composed of employees or officers in various departments of the federal government that administer programs related to elder justice,

including the HHS Secretary and the Attorney General. It will meet biannually to discuss coordinating activities designed to reduce cases of elder abuse amongst state and federal government and various departments. By 2012 the Council must submit a report of its activities to the Senate Finance Committee and the House of Representatives Committee on Energy and Commerce that includes recommendations for legislation or model laws related to elder justice.

Advisory Board on Elder Abuse, Neglect, and Exploitation.

The Advisory Board will be composed of various members of the public with experience in preventing, detecting, treating, or prosecuting crimes against the elderly and will take a multi-disciplinary approach to improving the quality of long-term care and reducing the frequency of elder abuse, neglect, and exploitation. For example, the board is charged with developing a panel to address possible methods to manage resident-on-resident abuse in long-term care facilities. Members of the board will be appointed by the Secretary, who published a notice in the Federal Register soliciting nominations on July 14, 2010.² Within eighteen months of the enactment of the Health Reform Act, and annually

¹ For the purposes of the EJA, a long-term care facility is any residential care provider that arranges for, or directly provides supportive and health services for individuals who have lost the capacity for self-care due to illness, disability, or vulnerability. 42 U.S.C.S. § 1397(j) (2010).

² 75 Fed. Reg. 40838 (July 14, 2010) nominations will close August 15, 2010.

the Board must submit a report to the Elder Justice Coordinating Council and others, on the status of elder justice programs at the local, state, and federal level. The report should include recommendations regarding legislation, program development, and coordination of national data on elder abuse.

III. Monetary Incentives and Grant Programs

Elder Abuse, Neglect, and Exploitation Forensic Centers.

Eligible entities, such as institutes of higher learning, may apply to receive federal grant money to develop forensic centers which will research and develop forensic expertise regarding elder abuse in order to provide higher quality intervention, case management and advocacy programs to victims of elder abuse, neglect, and exploitation. For example, entities will use these grants to assist in developing methodology to determine whether abuse, neglect, or exploitation occurred, and whether a crime was committed. These centers are required to research and disseminate information regarding the forensic markers of elder abuse and appropriate methods of intervention. While the Act specifically sets aside a portion of this funding for institutions of higher education, the remainder of the money is available to other entities that have expertise in elder justice issues. Qualified entities must submit an application to the HHS Secretary to receive such funding.

Enhancement of Long-Term Care.

The Act also uses monetary incentives to encourage the training and retention of employees who work directly with residents of long-term care facilities by offering grant money to eligible entities to provide bonuses, increased compensation, and/or

benefits to employees who complete certification programs. Grants are also afforded to eligible entities to provide training and technical assistance to employees providing direct care to residents; for example, grant money may be used to increase the compensation of employees who receive positive job reviews, to establish a positive work environment, and to develop programs that promote high quality care through continuing education. Long-term care facilities, which stand to benefit significantly from better trained staff and lower workforce turnover, can be entities eligible to receive these grants. Facilities that wish to participate in this project must submit an application to the HHS Secretary, who will publish the applications.

Long-term care facilities may also apply for grant money designated to offset the costs of implementing electronic health record technology, "EHR." Asserting that these technologies improve patient safety, reduce adverse medical events and prevent errors in medication distribution, the Act envisions EHR grant money funding the purchase or lease of computer software and technology, any upgrades and improvements made to existing programs, and the training of staff in EHR usage. In order to participate in this grant program, long-term care facilities must participate in their states' health exchange program, where available.

While the use of more sophisticated technology could improve the care provided to those living in long-term care facilities, it is integral that facilities using this technology share information with other health care providers use standardized methods to record patients' health care data. In an effort to encourage such uniformity, the Secretary must develop standardized electronic methods for the exchange of clinical

data between long-term care facilities. Compliance with data collection and reporting standards will be a condition of a state's receipt of federal funding authorized by the EJA.

Adult Protective Services Functions and Grant Programs.

State and local adult protective services offices that investigate elder abuse, neglect, and exploitation will receive additional funding from the Department of HHS. They will also have access to an annual compilation of data relating to elder justice, and information regarding best practices and training techniques to improve the provision of adult protective services. The Department will give grant money to states to enhance state and local adult protective services departments based upon the percentage of elderly people that reside within that state. These funds may not be used for any other purpose, and are designed to supplement and not replace other forms of funding. States that participate in this program must submit a report to the Secretary detailing the number of elderly within that state that were served by the grant money. The HHS Secretary is required to provide further details regarding what states must include in these reports and the deadline for submission.

Surveyor Training. The Act also seeks to increase the quality and effectiveness of the surveillance of long-term care facilities by establishing a National Training Institute for Federal and State Surveyors. Surveyors will receive training in investigating reports of abuse and neglect in long-term care facilities receiving federal funds. The Institute will study the use of surveyors, their current competency levels, and their effectiveness in investigating abuse reports. Not only will the institute develop training programs,

but it will also regularly disseminate information on the best practices for investigating reports of abuse and neglect.

Grants to State Survey Agencies.

The Act does not forget state agencies that perform survey and certification functions on behalf of CMS. The Act will provide grants to state agencies to design “complaint investigation systems” to ensure rapid and effective responses and to optimize collaboration with other state agencies, including law enforcement, agencies on aging, and the long-term care ombudsman.

Grants to Support the Long-Term Care Ombudsman Program.

Entities with experience in abuse and neglect in long-term care facilities or ombudsman programs may be eligible to receive grant money to improve the ability of these programs to respond to and resolve complaints about elder abuse and neglect. Money is also set aside for ombudsman training.

Entities interested in applying for any of these grant programs need not wait long; the Health Reform Act set aside specific federal appropriations to fund these grant programs beginning in fiscal year 2011. While private long-term care facilities may not be eligible for all of the grants described in this section, it is important to be aware that they exist. As the groups and programs designed to investigate, regulate, and detect adult abuse, neglect, and exploitation begin to receive more federal funding and training, facilities should expect a higher level of scrutiny.

IV. Reporting Requirements

Reporting of Crimes Occurring in Federally Funded Long-Term Care Facilities. While the monetary incentives provided by

the EJA are overwhelmingly positive for long-term care facilities, facilities receiving this federal grant money must be willing to comply with a strict reporting requirement—effective immediately—as a condition of receipt. Each year, the owner or operator of a facility receiving federal funds must do an assessment to determine if the amount of funding it receives is greater than \$10,000. If so, the facility is bound by the EJA’s reporting provision, which requires that covered individuals report “any reasonable suspicion of a crime against any resident of, or individual receiving care from, the facility” to both the HHS Secretary *and* one or more law enforcement³ entities within the facility’s locale. The report must be made within a short two hours if the suspected crime resulted in serious bodily injury, and within twenty-four hours if it did not.

Individuals covered by this reporting requirement include: each individual who is an owner, operator, employee, manager, agent, or contractor of a long-term care facility receiving the requisite amount of funds. The owner or operator of the facility must also notify these individuals of their duty to report. These individuals face a hefty fine for non-compliance; failure to report a suspicion could result in a fine of up to \$200,000, or up to \$300,000 if the failure to report exacerbates the harm to the victim or another individual. This penalty may be reduced at the discretion of the Secretary if the facility is located within an underserved population—defined as an area with a shortage of elder justice programs.

A long-term care facility may not retaliate against an employee who makes a legitimate report of

suspected abuse in compliance with the Act, and if it does, it will be subject to a fine of up to \$200,000 and may be excluded from receiving federal funding in the future. To keep employees fully informed of their right to be free from retaliation for making reports, each facility must conspicuously post a notice of employee rights within the facility that includes a description of how employees can make complaints for retaliation.

Reporting Requirements Already in Place.

Virginia nursing facilities receiving federal reimbursement through Medicare or Medicaid are already bound by a set of reporting requirements, which differ from the EJA’s reporting requirements in a few distinct ways. These facilities are required to immediately self-report “incidences”—including abuse, neglect, or misappropriation of a resident’s property—of staff misconduct to the Office of Licensure and Certification and any other state officials required by law. The EJA’s reporting requirement is more expansive because: (1) it requires reporting of *any* crime, rather than just abuse, neglect, and misappropriation of property; (2) it specifically enumerates covered individuals who must file a report, rather than merely imposing the obligation on the facility; (3) it does not specify that the crime must be an act of staff misconduct, and thus contemplates the reporting of resident-on-resident abuse or abuse by a third party; and (4) it requires reporting within a strict two hour time frame.

Virginia state law also mandates reporting of adult abuse, neglect, and exploitation in certain situations. Individuals licensed or certified by health regulatory boards, employed with a facility and working with adults in a

³ For purposes of the EJA, law enforcement means “the full range of potential responders to elder abuse, neglect, and exploitation including: police, sheriffs, detectives, public safety officers and corrections personnel; prosecutors; medical examiners; investigators; and coroners.” 42 U.S.C.S. § 1397(j) (2010).

supportive, administrative, or direct care capacity, or providing full, intermittent or occasional care to an adult for compensation are required by Virginia law to report any reasonable suspicions of abuse, neglect, or exploitation encountered while performing their official job duties. Like the EJA, employers of mandated reporters are not permitted to restrict their employees from making reports, and must inform their employees of the duty to report suspicions of abuse. Additionally, mandated reporters must report their suspicions immediately to the local department of social services in the county or city wherein the adult resides, or where the adult abuse, neglect, or exploitation occurred, or to the adult protective services hotline. This is different from the EJA, which requires a covered reporter to report their suspicions to law enforcement within the political subdivision in which the facility is located and to the Secretary of HHS. Also unlike the EJA, the Virginia reporting requirement applies to all individuals working with adults—not just facilities receiving federal funding, and the fines for non-compliance under the state law reporting requirement are much lower than those under the EJA.

Nevertheless, existing reporting requirements provide a helpful framework for compliance with the Elder Justice Act. Facilities must be aware of crimes and advise a

much broader category of “covered individuals” of the reporting obligation which extends even to consultants or contractors, but should continue to report to the OLC, DSS and state ombudsman until the HHS Secretary publishes further guidance. Facilities should document reports made in order to best ensure proof of compliance with the law, until more definitive guidance is released by HHS.

V. Conclusion

Many of the details of the EJA await clarification as the HHS Secretary begins to promulgate regulations to enforce the Health Reform Act. What is still unclear from the EJA will begin to develop over the next few years; for example, the Act does not define the term “reasonable suspicion” of abuse, or what qualifies as a “conspicuous” way to post a notice of employee rights and obligations. Notwithstanding, the reporting provision of the EJA took effect on March 23, 2010, and facilities receiving federal funds should immediately conduct an assessment of whether they receive over \$10,000 in funding and must thus comply with the requirement. If so, the facility should inform all employees of this requirement, and post a notice of employee rights regarding retaliation within the facility. Facilities governed by multiple reporting requirements should follow the strictest provisions if there are areas in which the requirements differ.

As the national legislative landscape focuses more attention on elder justice, through increased funding to adult protective services, surveillance programs, forensic detection of crime, and governmental advisory boards, long-term care facilities would be wise to constantly focus on improving the quality of care provided to their residents. Long-term care facilities should consider applying for federal grant money available under the EJA to improve staff training programs and overall quality of care. Facilities who apply may be eligible to receive federal funding to train and retain employees, improve the workplace environment and culture, and update workplace technology. Successful long-term care facilities will be those who become leaders in the community with regards to providing high quality care and having zero tolerance for elder abuse.

If you have any questions, or for more information about the Elder Justice Act, assistance in applying for the grants established by the Act, or counsel regarding compliance with the reporting requirement, please contact Jeannie A. Adams at (866) 967-9604 or by email at: jadams@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C., is available on the firm’s website at: www.hdjn.com.

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