

## AHCA Policy Memorandum on Section 6703(b)(3) of the Elder Justice Act in PPACA

### Reporting of Crimes in Federally-Funded Long Term Care Facilities

Title VI, Subtitle H, Sections 6701-6703 of the Patient Protection and Affordable Care Act (PPACA) signed into law by President Obama on March 23, 2010, contains the “Elder Justice Act of 2009” (EJA). The overall purpose of the EJA is to detect, prevent and prosecute elder abuse, neglect, and exploitation. The EJA is designed to address crimes committed against older persons using a multidisciplinary approach, raise national awareness of elder justice issues, and apply resources to the efforts of individuals, organizations and government entities confronting elder abuse and neglect on the front lines in healthcare settings. The EJA adds numerous new “elder justice” provisions and specific long term care provider requirements by amending various sections in several titles of the Social Security Act (SSA). The EJA at Section 6703(b)(3) amends title XI of the SSA at section 1150 and became effective on March, 23, 2010, upon enactment of PPACA.

Section 6703(b)(3) of the PPACA requires that any reasonable suspicion of a “crime” (as defined by the law of the applicable political subdivision) that results in “serious bodily injury” to any individual who is a resident of, or who receives care from, a federally-funded residential care provider that arranges for or directly provides that care be reported within two (2) hours to the Secretary and to one or more local law enforcement entities (SSA Sec. 1105B by PPACA Sec. 6703(b)(3)).

#### **Sec. 6703(b)(3) Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities**

**Coverage:** For the purposes of this provision, “reporting” is required by any individual who is an owner, operator, employee, manager, agent or contractor of a long term care facility (defined as a residential care provider that arranges for or directly provides long term care) that receives at least \$10,000 in annual Federal funding during any given preceding year.

#### **Key Provisions**

- The facility owner or operator must determine on an annual basis whether the facility received \$10,000 or more in federal funds the previous year and then notify each “covered” individual of his/her obligation to comply with the new “crime” reporting requirements.
- “Covered” individuals required to report are owners, operators, employees, managers, agents and contractors of facilities that received at least \$10,000 in federal funds the prior year as determined by the owner or operator.
- Effective immediately, each covered individual is required to report any “reasonable suspicion” of a crime (as defined by the law of the applicable political subdivision) against any individual who is a resident of or receiving care from a long-term care facility.
- Reports must be made to the “Secretary” and at least one local law enforcement entity within two (2) hours of “forming a suspicion” if there is “serious bodily injury” and within twenty-four (24) hours of “forming a suspicion” if no serious bodily injury has occurred.
- Covered individuals will be subject to a civil money penalty (CMP) of up to \$200,000, and may be excluded from participation in any Federal health care program for failure to report a suspected crime.
- If a covered individual’s failure to report a crime results in further injury to the “victim of the crime” or “results in harm to another individual,” the potential CMP penalty increases to \$300,000.

- If a facility employs a covered individual who has been excluded by the Secretary from participation in any Federal health care program for violating the reporting requirements of this section, the facility itself becomes ineligible to receive Federal funds under the SSA.
- The Secretary does have the authority to take into account the financial burden on providers with “underserved populations” in determining penalties. For the purposes of this section, “underserved population” means an area or a population group with a shortage of elder justice programs, as designated by the Secretary.
- A facility may not retaliate, discriminate, or file a complaint or a report against an employee who makes a report, causes a report to be made or takes steps in furtherance of making a report according to the requirements of this section.
- The facility could face up to a \$200,000 CMP and up to a 2-year exclusion from any Federal health care program for violation of the anti-retaliation provisions in this section.
- Additionally, the facility is required to post conspicuously in an appropriate location a sign (in a form specified by the Secretary) that notifies employees of their right to file a complaint with the Secretary against the facility for violating the anti-retaliation provisions of this section, and information on how to file such a complaint.

#### **Facility Actions to Consider in the Absence of Agency (HHS) Implementing Regulation and/or Guidance**

- It is likely that most nursing facilities and many assisted living and ICFs/MR members are responsible for the crime reporting requirements in this section. Since this particular provision of the EJA is effective immediately, facilities (owners and operators) should determine whether they received the requisite federal dollars last year and if so, notify employees and other covered individuals of their obligations to report and the process for reporting. Employees also should be notified of their rights against retaliation for reporting.

*HHS is responsible for designating the specific format for the posted signage required to notify employees of their rights under the reporting requirement.*

- Under Federal law (42 CFR 483.13) nursing facilities and ICFs/MR (42 CFR 483.420) already must report alleged violations involving resident mistreatment, neglect, abuse, injuries of unknown origin and misappropriation of property. Under the new law, reporting may be expanded with the broader requirement to report any “reasonable suspicion” of a “crime” (as defined by state/local law). Many states already require reporting crimes, so members should discuss with local and state law enforcement any differences between the federal and state requirements. (The two-hour timeframe for reporting where “serious bodily injury” has occurred may be the most likely difference and if so, the Federal timeframe takes precedent over longer state timeframes for reporting).

*HHS may provide further guidance on what “reasonable suspicion” means, but in the interim state law likely is controlling and in the absence of state law, the “reasonable person” standard may apply.*

- Under Federal law and most state laws, the obligation to report falls on the facility. New requirements under the EJA expand the reporting obligation to covered individuals (owners, operators, employees, managers, contractors and agents). Facilities, if they have not already done so, should review current policies and procedures to ensure that employees and other required reporters have a clear understanding of their obligation to report any “reasonable suspicion” of a crime against a resident and are educated about the timeframe and process for reporting. Members may need to meet with their state

health agencies and local and state law enforcement to discuss new reporting obligations before developing training and education programs for employees and other required reporters.

*Under the new law “covered individuals” must make a report to both the HHS Secretary and one or more state and/or local law enforcement entities. It is expected that the Secretary will designate another entity to which reports must be filed.*

- Given the expanded list of individuals who are now required to report crimes under the new law, the frequency and volume of reports being filed most likely will go up significantly. This could place an enormous burden on state agencies and local law enforcement, as well as on the facilities. Members may want to have that discussion with their agencies and enforcement entities who are designated recipients of the reports.

*Comments and recommendations filed with the Centers for Medicare and Medicaid Services (CMS) have asked for consideration of consolidating the reporting requirement (group report) to avoid multiple reports of single “suspected crime” events.*

- In addition to CMPs and program exclusion penalties that may be imposed on “covered individuals” who fail to report “reasonable suspicion of a crime” against a resident, the facility who employs or contracts with an individual who has been excluded from a Federal health care program for failure to report will also be assessed a CMP of up to \$200,000 and could face expulsion from the program as well. Facilities will need to continue diligently checking the program exclusion list on a regular basis.

AHCA recognizes that new requirements in the Elder Justice Act of PPACA at Sec. 6703(b)(3), Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities, leave many questions unanswered regarding the new obligations that nursing, assisted living and MR/DD facilities are under. While AHCA continues to work with HHS and other government agencies to provide further clarification and direction regarding the new reporting law, we encourage our state affiliates to work with state agencies and local law enforcement as facility members begin to comply with the requirements that are effective now.

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