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The Elder Justice Act as Part Of Health Care Reform 2010

Eradication of elder abuse, neglect and exploitation is in place

By William P. Isele

What is elder justice? Former U.S. Sen. John Breaux of Louisiana defined it thusly: "Elder justice means assuring that adequate public-private infrastructure and resources exist to prevent, detect, treat, understand, intervene in and, where appropriate, prosecute elder abuse, neglect and exploitation. From an individual perspective, elder justice is the right of every older American to be free of abuse, neglect and exploitation." (Executive Summary of *S. 333* [108th Congress]).

History

Since the mid-1970s, Congress had conducted hearings on the national problem of elder abuse. In 2001, Breaux became the Chair of the Senate Special Committee on Aging, and made it a priority of the committee to fight elder abuse. On February 10, 2003, Breaux first introduced the Elder Justice Act in the Senate. Breaux retired from the Senate in 2005, and others championed the cause thereafter, including Rep. Rahm Emmanuel of Illinois. Since its initial introduction in 2003, the Elder Justice Act had passed the Senate Finance Committee four times and the House of Representatives once, before finally being enacted as part of the massive health reform legislation this year. With major health reform legislation impending after the election of President Obama, Senators Blanche Lincoln of Arkansas and Orrin Hatch of Utah led the effort to add the Elder Justice Act to the health care reform bill as Subtitle H (Sections 6701-6703).

Provisions

The Elder Justice Act (a) provides victim assistance, improved long-term care, and support for at-risk elders. The act also (b) provides resources to states for abuse prevention and improved prosecution for the mistreatment of older Americans. Specifically, the Elder Justice Act promotes both aspects of elder justice with the following provisions:

- Provides a first-time direct funding stream separate from the Social Services Block Grant for Adult Protective Services (APS) funding. The bill authorizes $100 million a year for each of the next four years, and awards additional grants of $25 million per year for demonstration projects.
- Establishes an Elder Justice Coordinating Council in the Department of Health and Human Services to work with the Department of Justice and other relevant agencies on issues of elder abuse, neglect and exploitation and "other crimes against elders."
- Creates an Advisory Board on Elder Abuse, Neglect and Exploitation to create strategic plans for the developing elder justice activities, and to recommend regulatory changes.
- Provides grants to establish six mobile and four stationary forensic centers, to develop forensic expertise and services relating to elder abuse, neglect and exploitation. The stationary centers will be established at institutions of higher education; the mobile centers are not more clearly defined in the law. $4 million is authorized for FY 2011, $6 million for FY 2012 and $8 million for each of FYs 2013 and 2014.
- Authorizes $20 million in grants for FY 2011, $17.5 million for FY 2012 and $15 million for each of FYs 2013 and 2014, to enhance long-term care staffing through training and recruitment, establish employee incentives and develop programs to improve management practices.
- Authorizes $10 million for programs to provide and improve training for long-term care ombudsmen, to improve ombudsman effectiveness in addressing abuse and neglect in nursing homes and assisted living facilities.
- Authorizes $12 million over a four-year period for the secretary to con-

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tract with an entity to establish and operate a National Training Institute for federal and state nursing home surveyors with respect to investigating abuse, neglect and misappropriation of property.

- Authorizes $500,000 to determine the efficacy of establishing and maintaining a national nurse aide registry.

One provision that requires immediate attention by long-term care facilities and their counsel is Section 6703(b)(3) of the PPACA, which requires prompt reporting of crimes occurring in long-term care facilities.

1. Who Must Report? An owner or operator of a long-term care facility must first determine whether the facility received at least $10,000 in federal funds in the previous year. If so, any individual owner, operator, employee, manager, agent or contractor of that facility is considered a "covered person" under the law. This means that the reporting obligation, and the fines resulting from failure to report, rest on the individual, not the facility. New Jersey facilities should be familiar with this concept, because the provisions of the Mandatory Adult Abuse Reporting Law (N.J.S.A. 52:27G-7.1), in effect since 1983, also apply to individuals, not facilities.

2. What Must Be Reported? Each covered individual must report any reasonable suspicion of a crime, as defined by local law, against any individual who is a resident of, or is receiving care from, the facility. It is impossible in this article to list all crimes that may be perpetrated against residents and those receiving care from long-term care facilities, but following are some examples: Simple assault of a resident by an employee is a crime of the fourth degree (N.J.S.A. 2C:12-1(d)). Abandonment of an elderly or disabled adult is a crime of the third degree (N.J.S.A. 2C:24-8). Theft is a crime; the degree of criminality of theft depends on the amount taken and other circumstances (N.J.S.A. 2C:20-2(b)). Various forms of Medicare and Medicaid fraud are, of course, crimes. Most actions, in order to be considered crimes, require intent or reckless disregard of the consequences.

The Elder Justice Act does not define "reasonable suspicion." In a criminal context, reasonable suspicion is based on the totality of the circumstances as understood by those versed in the field of law enforcement. It is commonly described as something more than a hunch but less than probable cause. "Totality of circumstances" generally refers to an assessment based on objective observations, information from reports and consideration of the modus operandi of certain kinds of lawbreakers. In the long-term care context, an individual's observation, experience, and the information provided in reports by family or staff, would be key to developing a "reasonable suspicion." If a family member reports an assault, and the resident is unduly agitated or fearful, that is probably enough to form a reasonable suspicion that an assault may have occurred.

3. To Whom Must a Report Be Made? The law requires reporting to the Secretary of Health and Human Services. Realistically, this will mean someone the secretary designates, and this could mean the N.J. Department of Health and Senior Services, the State Long-Term Care Ombudsman, or some other agent. We will need to await regulations to be certain. The law also requires reporting to one or more law enforcement entities for the political subdivision in which the facility is located. Clearly, this includes the local police.

4. When Must a Report be Made? This is the really unique feature of this law. If there is serious bodily injury, the report must be made not later than two hours after forming the suspicion. If the event did not cause serious bodily injury, the report must be made not later than 24 hours after forming the suspicion. Again, there are ambiguities here. "Serious bodily injury" is not defined. A fracture would certainly qualify, but would a small skin tear? Until there are regulations, facilities should at least develop their own definition of what is "serious." Another ambiguity relates to forming the "reasonable suspicion" that a crime has occurred. As discussed above, this is a process that results in more than a hunch. The law would seem to contemplate a process that takes moments, not days, however.

5. Penalties. Penalties for failure to report are severe. The individual who fails to report is subject to a civil money penalty up to $200,000 plus potential exclusion from participation in any federal health care program. If the failure to report exacerbates the harm to the resident, the individual is subject to a civil money penalty up to $300,000 plus mandatory exclusion.

6. When Does This Law Become Effective? It became effective immediately on passage, March 23.

7. Retaliation. A long-term care facility may not discharge, demote, suspend, threaten or deny any benefit to an employee who makes a report, or takes steps in furtherance of making a report under this law. Penalties for retaliation are equally severe: up to $200,000 in fines, exclusion for two years, or both. These penalties are borne by the facility.

Recommendations:

a. Long-term care facilities need to notify employees and other "covered individuals" of their reporting obligation, and prepare to post a sign to be developed by the ssecretary, specifying the rights and obligations of employees under this law.

b. Long-term care facility owners or administrators should meet with local police, to discuss the requirements of this law, and the potential of increased reporting that may result.

c. Long-term care facilities, in cooperation with competent legal counsel, should develop or revise policies and procedures regarding reporting. Until federal regulations are promulgated, the facility should develop clearly-understood definitions of "crime," "reasonable suspicion," "serious bodily injury" and other terms that may be unclear, ambiguous, or subject to interpretation.

d. Facilities should develop and offer in-service programs to employees regarding their rights and responsibilities under this law.

As a result of health care reform, Senator Breaux' dream of a national Elder Justice Act is finally reality. Hopefully, it will empower and further strong programs at the state and local level, committed to the eradication of elder abuse, neglect, and exploitation. ■