

2018 Minnesota Department of Health Electronic Monitoring Workgroup Report

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I. Summary of the Process

The Minnesota Elder Justice Center facilitated the electronic monitoring workgroup, which held over nine meetings since the middle of September 2018.¹ The workgroup built off the Residential Care and Services Electronic Monitoring Workgroup Report submitted to legislature January 16, 2017; different language introduced in the 2018 legislative session; and examples from other states.²

We looked at over 15 specific topics related to electronic monitoring. For each topic, we had at least two in-depth conversations and looked at past legislative language when applicable. We did not “vote” on topics or sample language related to topics, but tried hard to note all areas of general consensus and areas of disagreement throughout the process. For purposes of this report, “general consensus” does not necessarily mean there was unanimous agreement, but indicates strong support for the issue.

II. Structure of this Report

This report presents all of the topics discussed by the workgroup, and presents them in order that they might appear in a statute. There is general consensus that Minnesota should have a comprehensive law that allows for electronic monitoring in long term care facilities, and we believe this report goes a long way in providing the rational and sample language for such a law.

We do not anticipate to cover every issue or questions that may be raised during the legislative process, but we intend this report to serve as reference for lawmakers when reviewing issues that have been thoroughly discussed and thought about in this process. For each topic, this report includes:

- A detailed summary about the workgroup’s discussions regarding the topic. This includes areas of agreement and disagreement and reasons for the differences in opinion.
- Sample statutory language. For some topics, there is more than one version of sample language so as to reflect the areas of disagreement on the issues.
- Comments, when applicable, as to why certain words or language was included or omitted from the sample language.

¹ The following entities participated in a majority of the workgroup meetings: ARC Minnesota, Care Providers of Minnesota, Elder Voice Family Advocates, Leading Age Minnesota, Minnesota Elder Justice Center, Minnesota Department of Health, Minnesota Department of Human Services, and staff from partisan and non-partisan offices of the Minnesota House and Senate.

² View the 2017 report, which includes examples from other states, at: <http://www.health.state.mn.us/divs/fpc/rcworkgroup/index.html>. The language examined from 2018 came from SF 3437 found here: <https://elderjusticemn.org/wp-content/uploads/2018/12/3437-1.pdf> and CCRSF 3656 found here: <https://elderjusticemn.org/wp-content/uploads/2018/12/3656.pdf>.

III. Issue Areas

1. Definition of Electronic Monitoring Device

The definition of a device sets the parameters of what this law is regulating. Because an electronic monitoring law will place responsibilities upon those consenting and placing devices in rooms, and upon other parties, it is important that the parameters of what devices we are actually talking about are clear. For example, the working group imagined that anything from bed sensors, to artificial intelligence (i.e. Amazon Alexa), to handheld devices may at one point capture information a private room. When should, then, a device actually trigger the rights and responsibilities encompassed in the law?

The working group agreed that the definition of a monitoring device is a crucial part of any electronic monitoring law. The definition should consider three key questions: (1) what device is used, (2) what is the broadcast and recording/archiving ability of the device, and (3) what is the purpose of the device.

The sample language reflects general consensus that the Minnesota definition should be broad enough to encompass changing technology, but also narrowly apply only to devices that are placed to monitor the resident.

This definition tries to find that balance by excluding devices that capture audio/video (such as computer camera used for skype) but are not used for monitoring and devices that monitor (bed sensors) that do not capture audio or video.

Sample Language

"Electronic monitoring device" means a camera or other device that captures, records, or broadcasts audio, video, or both, that is placed in a resident's room or private living space and is used to monitor the resident or activities in the room or private living space.

Comment

The term “placed” is used instead of other verbs that were considered (including “installed”) in order to account for devices that may not be technically mounted or otherwise installed in the room. The term “placed” should be used consistently throughout whenever language is referring to the placement or intended placement of the camera.

The workgroup considered various ideas for the phrase “monitor the resident or activities.” This is different language than what was included in SF 3437 and CCRSF 3656, as the phrase “monitor the resident or activities” captures the more expansive purpose of what these monitoring devices may be set up for. In addition to allowing someone to see and hear the resident, devices may be placed in rooms to monitor the care being provided to a resident and to ensure the safety of the resident or resident’s belongings, and the word activities helps capture that more expansive goal.

2. Definition of Resident Representative

There was little controversy among workgroup participants in recognizing that a resident with capacity to consent, should be able to place a monitoring device in his or her own room. The issue becomes more difficult when another person is consenting on behalf of the resident. Workgroup participants anticipate that many situations implicated by this law will involve a resident lacking capacity and so it is critical to allow another person to consent on behalf of a resident lacking capacity. The key is to find the right balance in defining who can consent on behalf of such a resident.

If the definition is too narrow, it may prevent a resident's advocate, working in good faith, from protecting the resident through the placement of an electronic monitoring device. If the definition is too broad, it may allow for an individual, or individuals with a more tenuous connection to the resident to be making critical decisions regarding their privacy and safety, and create confusion for licensed facilities and regulators obligated to protect the privacy rights of the resident.

The workgroup generally came to general consensus that the language of resident representative, as defined in federal regulation, accurately captures the universe of persons that should be allowed to consent on behalf of a resident for purposes of a camera.³ That includes a court appointed guardian, a health care agent, or a person chosen by the resident (generally upon admission – but not limited to that timeframe).

The workgroup had lengthy discussions about the scope of this third category (person chosen by the resident). The federal regulation does not indicate *how* someone is designated and/or how the how anyone might actually know someone is designated as this type of resident representative. Some members of the workgroup noted this ambiguity could be intentional, as a person may want to change who the resident representative is or may not have had the opportunity to designate someone upon admission. Others noted, however, that if the resident lacks the ability to communicate, it would be impossible to verify if a person was truly chosen by the resident if it is not noted somewhere in the file.

Sample Language

"Resident representative" means a court-appointed guardian, health care agent under section 145C.01, subdivision 2; or a person chosen by the resident and identified in the resident's records on file with the facility.

Comment

The first two categories are already recognized in law. The specific statutory reference to health care agent is to help clarify any ambiguity about who this person might be, because in practice

³ See 42 § CFR 483.5.

there is often confusion and conflation between health care agents, someone acting as attorney in fact under a power of attorney document, and other legally-designated decision makers.

The language regarding “identified in the resident’s file” is designed to add more clarity about how a resident representative is designated. It intentionally does not prohibit a person from changing the resident represented any time through the duration of their residency in the facility. Workgroup members noted that there is not necessarily law on point that requires a provider to ask a resident to identify a resident representative, and thus they may never be given the chance to designate someone in the file. There was not agreement on whether or not such a requirement is needed, advisable, or what exactly it would entail.

3. Definition of Facility

The workgroup spent considerable time discussing the range of facilities where this law may be applicable. While the workgroup briefly discussed simply aligning the scope of this law with the forthcoming assisted living licensure framework, it was decided that the timeframe for that framework would be too slow to accommodate this law. The workgroup did agree that the scope of this law should apply to whatever final framework is developed for assisted living license (and may need updating if they do not align right away).

While there was general consensus that this law should apply to nursing homes, there was not consensus on how broad to draw the line within the umbrella “housing with services” designation. All members agree that the final scope should be aligned with the assisted living licensing framework that is to be developed in other legislation. However, as described above, the timeframe for the finalization of such a framework is unknown, so the workgroup agreed that proposed legislation should specify what facilities this new law should apply to.

Some workgroup members believe that the rule should apply to all housing with services. Under this reasoning, the requirement and protections afforded under this law should be extended to all settings where housing and services are delivered. Others believe that that the rules should only apply to those housing and services operating under the MN. Stat. § 144G assisted living title protection statute. Under this version, several hundred settings that have not chosen such a designation would be left out of this law. It was pointed out that those other settings provide an array of services to a diverse array of individuals and their representatives have not been significantly involved with this workgroup. The assisted living designated settings generally cater to older adults seeking assisted living services and represent the bulk of the facilities where stakeholders see the need for clarity around electronic monitoring laws.

Finally, the workgroup also considered whether the law should cover two other settings (swing beds and home care services in someone’s own home), but reached general consensus that they should not be included. Swing beds (beds in hospital settings that are designated and utilized as skilled nursing beds) would likely require outreach to hospital stakeholders and may raise various concerns that would be outside the scope of the residential services settings contemplated in this law. Extending the law to cover all home care services would include people living in their own homes receiving licensed home care services that are not registered housing with services. Because the breadth of this change would be sweeping (consider that perhaps personal care attendant services would also implicate the law under this reasoning), and stakeholders from

those industries were not present, the workgroup reached general consensus that the law should only apply to homecare services when provided in a setting covered by 144D or 144G.

Sample Language – Version 1

"Facility" means a facility that is licensed as a nursing home under chapter 144A or as a boarding care home under sections 144.50 to 144.56, a registered as a housing with services establishment under chapter 144D, or the licensed homecare agency providing services to a resident of an establishment registered under chapter 144D.

Sample Language – Version 2

"Facility" means a facility that is licensed as a nursing home under chapter 144A or as a boarding care home under sections 144.50 to 144.56, a registered as a housing with services establishment under chapter 144D that is also subject to chapter 144G, or the licensed homecare agency providing services to a resident of an establishment registered under chapter 144D that is also subject to chapter 144G.

Comment

The intent of this definition is to cover both the housing with services establishment that registers under 144D and/or 144G and the home care agency providing services. Because housing and services are regulated separately under current law, this type of specificity is necessary until there is a single license for Assisted Living.

4. Electronic Monitoring Authorized

There is general consensus that the statute should explicitly allow for residents to be able to use electronic monitoring in their rooms. Currently, because of confusion regarding the current state of the law, there is an open question as to whether a resident or someone acting on their behalf can place a monitoring device, or if a facility can simply ban the use of any recording devices in the facility. The electronic monitoring law should include language to expressly clarify this current ambiguity in the law.

Sample Language

Subd. (). Electronic Monitoring Authorized. (a) A resident of a facility or the resident's representative may conduct electronic monitoring of the resident's room or private

living space through the use of an electronic monitoring device or devices placed in the room or private living space as provided in this section.

(b) Provisions in this section do not apply to monitoring technology authorized in HCBS services under sections 256B.0913, 256B.0915, 256B.092, and 256B.049.

(c) Monitoring technology identified in this section may not be reimbursed using HCBS services identified in sections 256B.0913, 256B.0915, 256B.092, and 256B.049.

Comment

Both SF 3437 and CCRSF 3656 included authorizing language, but approached it differently. SF 3437 stated that a facility must authorize monitoring. Paragraph (a) reflects language from CCRSF 3656 that authorizes the resident or resident representative to conduct monitoring in accordance with the section. As an authorizing section, most in the workgroup felt it was clearer to give the authority to monitor directly to the resident or resident representative, rather than indirectly giving them authority by requiring the provider to allow the monitoring.

Paragraphs (b) and (c) were suggested by the Department of Human Services (DHS) and are intended to clarify the interaction of this law the other monitoring requirements within the Home and Community Based Services (HCBS) program funded and regulated by DHS.⁴

5. Resident Consent to Electronic Monitoring

The workgroup agreed that the statute should address three types of consent for purposes of placing an electronic monitoring device: consent by the resident, consent on behalf of the resident by a resident representative, and consent by a roommate (if applicable).

Consent by a resident who has capacity to consent is the easiest situation to address in the law. The workgroup reached general consensus that if a person has capacity and wants to place an electronic monitoring device in their own room or private living space, they can do so. The main question for the law to resolve, is whether the resident must confirm this consent in a written consent form (even if they then do not have to give that form to anyone). Issues concerning consent documentation and notification (including sample language) are addressed in part 10.

6. Resident Representative Consent to Electronic Monitoring

One of the most important concepts for an electronic monitoring law to consider is under what circumstances can someone consent *on behalf of* the resident. While the definition of resident

⁴ DHS CBSM on monitoring technology can be found here: http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_180346&RevisionSelectionMethod=LatestReleased.

representative helps clarify the universe of persons who can fulfil this role, the law should also spell out the steps necessary for that person to provide such consent.

There is general consensus that a starting principal for consent by the resident representative is that the resident him or herself still have an opportunity to know about and disallow monitoring if they choose. There is not full agreement about how that is to be done. The most obvious solution is that the resident representative must go directly to the resident and explain why monitoring is being considered, what will be placed in the room, and what conditions or limitations the resident may want on the monitoring.⁵

During this process, the law should allow the resident to stop any proposed monitoring by expressing their affirmative objection in a variety of possible ways. These added protections come from a recognition that monitoring a resident's private space represents a unique responsibility not necessarily contemplated when a resident representative was appointed (via guardianship) or designated (via healthcare directive or resident representative).

The workgroup noted practical issues if a resident chooses to place conditions or restrictions on the monitoring (such as turning off during private cares). Who is responsible for doing this and what happens if the instructions are not followed. The sample language remains silent on this issue, though it was suggested the consent form could clarify that it is the resident and/or their representative's responsibility to make sure the conditions are followed. The workgroup speculated that in some circumstances the resident representative could work with the provider (though there was not agreement about requiring a provider to do so) or that some technology might allow for customized/remote controls to help with these issues.

Another difficult area was determining exactly when a resident was incapacitated so that the resident representative could consent on his or her behalf. There were concerns that the use of a physician as contemplated by the sample language (see below) is not always the most reliable or efficient way to determine capacity. While work group members agree that determining capacity is a moving target, there are no other legal alternatives short of sending someone through a guardianship process or having a physician assess capacity. There is general consensus that this law should not encourage guardianship and it would not make much sense to have a law that does not indicate when a resident representative would be allowed to consent on behalf of the resident. Without the sample language regarding capacity, there would be too much confusion/potential conflict if a resident representative is adamant that a person is incapacitated, but others (including possibly the resident) say otherwise.

Finally, the workgroup had general consensus that the law should account for the possibility that two or more resident representative's may have competing ideas about consent and the placement of the electronic monitoring device. The law could account for this by creating a hierarchy, such that the legal guardian overrules either of the other two representatives and the

⁵ The primary concern about this requirement relates to section 9 in this report (who receives notice of monitoring). If a resident representative is required to both have the conversation with a resident and submit a notice form to the facility regarding that discussion, there is concern that the process would be overly scrutinized and/or be a target for retaliation.

healthcare agent overrules the resident representative indicated in the resident's file. The workgroup did not develop sample language relating to this hierarchy of authority but had general consensus that it will be important to develop it during the legislative process (see paragraph (f) in sample language below). It was also widely agreed that a competent resident overrules any resident representative, though it is not clear that any further language is needed to clarify this point as a competent resident can simply object as outlined in the sample language below.

Sample Language

Subd. (). Consent on behalf of a resident. (a) If the resident has not affirmatively objected to electronic monitoring and the resident's physician determines that the resident lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the resident representative may consent on behalf of the resident. For purposes of this subdivision, a resident affirmatively objects when the resident orally, visually, or through the use of auxiliary aids or services declines electronic monitoring.

(b) Prior to a resident representative consenting on behalf of a resident, the resident must be asked by the resident representative if the resident wants electronic monitoring to be conducted. The resident representative must explain to the resident:

- (1) the reasons for placing an electronic monitoring device;
- (2) the type of electronic monitoring device to be used;
- (3) the resident may place conditions or restrictions on the use of the electronic monitoring device, including those listed in [];
- (4) with whom the recording may be shared under this section; and
- (5) the resident's ability to decline all recording.

The resident's response must be documented on the notification and consent form.

(c) A resident may set conditions or restrictions for use of the electronic monitoring device, including the list of standard conditions provided in [insert subdivision].

(d) A resident may request that the electronic monitoring device be turned off or the visual or audio recording component of the electronic monitoring device be blocked at any time.

(e) A resident may withdraw the consent made on the resident's behalf at any time by affirmatively objecting to the monitoring.

(f) [Hierarchy of resident representatives]

Comment

The workgroup added paragraph (b)(1) that had not been in any previous language to ensure that the conversation with the resident includes at least some basic information about why the resident representative is planning to place a monitoring device in the resident's room or private living space.

7. Roommate Consent

While many residents in long-term care settings have private living spaces, there is consensus that roommate issues must be addressed by the law.

There is general consensus that the roommate consent process should largely, though not entirely, mirror the consent process used by a resident representative. That is – the roommate must be consulted (even if the roommate's resident representative will be consenting on his/her behalf). The workgroup considered situations where a resident or resident representative may not know whether the roommate has capacity and/or has a representative (or who that person might be). There was not agreement, however, on whether (or how) the law should address these situations.

Sample Language

Subd. (.). Roommate Consent. (a) Prior to implementing electronic monitoring, a resident or a resident's representative must obtain the written consent of any other resident residing in the room or private living space on the notification and consent form.

(b) If the roommate has not affirmatively objected to the electronic monitoring in accordance with this subdivision and the roommate's physician determines that the roommate lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the roommate's resident representative may consent on behalf of the roommate. The roommate and a person consenting on behalf of the roommate must be told:

- (1) the type of electronic monitoring device to be used;
- (2) that they can place conditions on the electronic monitoring device's use, including those listed in [insert subdivision];
- (4) with whom the recording may be shared under this section; and
- (5) their ability to decline all recording.

(c) A roommate or roommate's representative may consent to electronic monitoring with any conditions of the roommate's choosing, including the list of standard conditions provided in subdivision [add from subd. re: contents of notice]. A roommate may request that the visual or audio recording component of the electronic monitoring device be disabled or blocked at any time.

(d) Consent may be withdrawn by the roommate or roommate's resident representative at any time by submitting written notice to [Depends on what type of notice requirement is adopted].

(e) Any resident currently conducting electronic monitoring must obtain consent from any new roommate before the resident resumes electronic monitoring. If a new roommate does not consent to electronic monitoring and the resident conducting the electronic monitoring does not remove the electronic monitoring device, the facility must remove the electronic monitoring device.

Comment

In Subd. (1)(b), the statute lays out largely the same requirements regarding the process of determining capacity and the safeguards related to this process. The statute gives the roommate the same opportunity to place conditions on the camera's use. The statute does not require the roommate be told the reasons for the placing of an electronic device, though nothing prohibits the resident or the resident representative from offering that information.

The statute clarifies that the roommate must be told of the itemized list whether they are consenting themselves or a resident representative is consenting on their behalf.

The language in (c) mirrors the conditions language in the resident section. The subdivision numbering is blank to account for changes in drafting, but refers specifically to the subdivision that lays out the contents of the consent/notice form. Paragraph (d) is similar to the withdrawal language for a resident who wants to withdraw consent. The person to whom the withdrawal is left open here because it will depend on what the law requires in terms of who the law requires the consent form to be given. Paragraph (e) contemplates a situation in which a new roommate moves into a room where monitoring is already being conducted.

8. Roommate Refusal to Consent, Reasonable Accommodations

The workgroup talked about circumstances where a resident's roommate does not consent to monitoring, and the resident or their representative look to the facility to help accommodate the resident's desire for monitoring by offering an alternative (such as changing rooms). Language in SF 3437 described what such an accommodation might look like.

The workgroup also noted that the term reasonable accommodation could be confusing, as it has a different meaning outside this context. The group did not, however, come up with clearly suitable alternative wording. One possible idea is to just call the subdivision "alternative accommodations."

In sum there are three general options to choose from: general reasonable accommodation, specific definition of what reasonable/alternative accommodation might be, and no reference at all to this concept in the statute.

There was not a lot of push for option 1, and paragraph b of option 2 raised many questions of feasibility. There is general agreement that providers should try and find a creative solution when possible, but no clear agreement about if that should be mandated in statute. There was wide agreement that the roommate should not be the one who has to move or asked to move as part of any accommodation.

Sample Language – Option 1

Subd. (). Reasonable Accommodation. The facility shall make a reasonable attempt to accommodate the resident or resident representative who wants to conduct electronic monitoring.

Sample Language – Option 2

Subd. (). [Reasonable/Alternative] Accommodation. (a) If a resident of a facility who is residing in a shared room wants to conduct electronic monitoring and another resident living in or moving into the same shared room refuses to consent to the use of an electronic monitoring

device, the facility shall make a reasonable attempt to [accommodate/provide alternatives] to the resident who wants to conduct electronic monitoring. A facility has met the requirement to make a reasonable attempt to accommodate [provide alternatives to] a resident who wants to conduct electronic monitoring when upon notification that a roommate has not consented to the use of an electronic monitoring device in the resident's room, the facility offers to move the resident to another shared room that is available at the time of the request.

(b) If a resident chooses to reside in a private room in a facility in order to accommodate the use of an electronic monitoring device, the resident must pay the private room rate. If a facility is unable to accommodate a resident due to lack of space, the facility must reevaluate the request every two weeks until the request is fulfilled. A facility is not required to provide a private room or a single-bed room to a resident who is not a private-pay resident.

Sample Language – Version 3 – No language needed, the statute should stay silent as to reasonable accommodation.

9. Notice of Consent

Once a resident or a resident representative consents to monitoring, it triggers an important question: should the resident and/or the resident’s representative be required to notify the facility by giving the facility a copy of the consent form?

The workgroup generally agreed that if notice is required, a resident or resident representative would not have to fill out or sign the consent form in the presence of a facility employee/representative. On most other notice issues, however, there was no agreement.

Resident Consent Only

There is not agreement on this issue. Some believe that once a resident consents, there is no reason they would need to give notice to the facility. If that resident fears possible retaliation, which is the primary argument for not requiring notice to the facility, it may temper their desire to place the electronic monitoring device. Language should be included in the law to prohibit facilities from retaliating, which may allay some resident fears.

Other workgroup members believe that notice to the facility should be required for every electronic monitoring device placement, as such a policy promotes consistency and provides the clearest avenue for provider facilities to know who put a camera in the room if it is found. A primary reason for requiring notice is so the facility can protect the resident’s right to privacy. In

this scenario, however, that may be less of a concern as the resident could be seen as waiving privacy rights related to the data captured by the device. That resident should not expect the facility to protect their right to privacy as it pertains to the electronic monitoring device.⁶ The workgroup discussed, but did not develop, language that clarifies a resident waving their right to privacy, though it could be added to the consent form.

Provider participants in the workgroup also expressed that notification provides an opportunity to protect the privacy of others who may enter the room being monitored (such as residents with cognitive impairment). It also provides an opportunity for communication about concerns the resident/family may have about the provider's services and treatments, including fears that maltreatment is or may be occurring, which would serve the purpose of preventing maltreatment from occurring. Consumer representatives noted that resident's wanting to place an electronic monitoring device may have already tried and failed to raise issues with the facility.

The issue was never fully settled one way or another, and the sample language below allows for this issue to be resolved either way.

Resident Representative Consent on Behalf of the Resident

One of the more deliberated topics was whether a resident representative, upon consenting on behalf of the resident, must notify the facility by giving them a copy of the consent form.

For those wary of a notice provision, the requirement acts as a barrier to placing an electronic monitoring device. In many situations, the underlying reasons for the placement relate to a mistrust or breakdown of communication and a resident or resident representative may be worried about retaliation for placing a device. The workgroup noted that while retaliation has been discussed in other workgroups related to these issues, this particular issue of electronic monitoring device placement will need to be flagged as a particular inflection point.

Additionally, unless electronic monitoring is happening in all rooms, someone seeking to maltreat a resident (i.e. theft or drug diversion) may simply do so in a room they know is not being monitored.

On the other side, proponents of notification note that it is important for the facility to perform their duty of protecting privacy. If they do not know who put in the camera, and one is found, how are they supposed to ensure resident privacy?⁷ Additionally, without notification, how can a provider and/or regulator be certain that a resident representative met the requirements of the consent provisions in the law? Some providers also noted that a care team may be more apt to provide responsive and quality care if they know a camera is in a resident's room. In addition,

⁶ The workgroup noted further discussion on this issue is needed because federal regulations regarding nursing homes may not allow someone to "waive" rights and the privacy protections in those regulations may present conflicts for providers if no-notice is required in the state electronic monitoring law.

⁷ The workgroup considered, but did not conclude on way or another, that the issue of waving one's right to privacy is more difficult if the resident representative is consenting and also waving privacy on behalf of the resident (as opposed to when a competent resident is waving that right).

notification could, depending on the circumstances, trigger the provider to initiate an external investigation regarding maltreatment. In sum, there are strong opinions on both sides of the issue.⁸

There was significant discussion, therefore, on finding some level of compromise. One area of compromise considered was limiting the notice to a designated person in the facility (such as the facility administrator only). Many observers, including multiple providers, noted that it is simply not realistic to expect that once a monitoring device is found (or even if notice given) that it will remain only known by one person in the facility. Language limiting the notice to a certain person or part of a resident's file, therefore, is not included in this report.

Another area of compromise, reflected in sample language version 2, is notice to a third party. This effort, would require logistical and cost considerations for the third party entity to act as such repository. One idea that was contemplated was that the Ombudsman for Long-Term Care might be able to be the repository. After further reflection however, that office reported that it is not prepared to play that role nor is it really within the scope of that organization's work. It was suggested in the alternative that MDH could be such repository. A provider, seeking to discharge their duty to privacy, would contact MDH upon finding of a camera to ensure that the proper consent form was filed.⁹

A third area of compromise that was explored was a general rule that requires notice be given to the facility, but to allow for certain exceptions where notice is not required for short periods of time. This sample language reflects a time-limited approach under certain conditions. It also reflects the workgroup's general agreement that the law should not incentivize a person from holding onto video/audio evidence of maltreatment without alerting authorities.

There is general agreement that when a roommate is involved, the concern for privacy may be heightened and perhaps should outweigh fear of retaliation. In this instance, the workgroup discussed but did not develop language about ensuring notice to facility when roommate is involved with no exceptions.

Sample Language – Version 1

Subd. (). Notice of monitoring to the facility. (a) Electronic monitoring may begin only after the [resident and/or resident representative] who intends to place an electronic

⁸ The workgroup also noted that further input from other stakeholders (including employees) who were not part of these discussions may add more perspective on the notice issues.

⁹ It was discussed that this concept may need additional language in statute, even beyond what is provided in paragraph (b) of the facility liability subsection described below, but the group did not develop further language on this point.

monitoring device completes a notification and consent form prescribed by the commissioner and submits the form to the facility.

Comment – Version 1

The workgroup considered designating a person within the facility to receive the form. This was in part to consider the issue of “limited” notice as discussed above, but because there was broad consensus that limited notice was impractical and would be ineffective to serve the purpose of limiting possible retaliation (or fears of retaliation), it was not included in the language. It was also decided that designating a specific person in the facility to receive the form would create unnecessary confusion.

Sample Language – Version 2

Subd. () Notice of monitoring to Minnesota Department of Health. (a) Electronic monitoring may begin only after the [resident and/or resident representative] who intends to place an electronic monitoring device completes a notification and consent form prescribed by the commissioner and submits the form to the Minnesota Department of Health as instructed on the consent form.

Sample Language – Version 3

Subd. (). Notice of monitoring to the facility, exceptions to required notice.

(a) Electronic monitoring may begin only after the [resident and/or resident representative] who intends to place an electronic monitoring device completes a notification and consent form prescribed by the commissioner and submits the form to the facility.

(b) Notwithstanding this section, the [resident and/or resident representative] who intends to install an electronic monitoring may do so [by submitting a notification form to MDH] without submitting a notification and consent form to the facility:

(1) for up to 30 days if the [resident or the resident’s representative] reasonably fears retaliation of the resident by the facility and timely submits a MAARC report and/or police

report upon evidence from such electronic monitoring device that suspected maltreatment has occurred;

(2) for up to 30 days if the resident or resident’s representative has already communicated in writing to the facility his or her concerns prompting the desire for placement without a written response from the facility; or

(3) for up to 30 days if the resident or resident’s representative has already submitted a MAARC report and/or police report regarding his or her concerns prompting the desire for placement.

Comment – Version 3

There is not agreement about the scope of this language. Some workgroup members believe this type of exception process presents a suitable alternative between notice to facility and no notice to facilities. In paragraph (b), there is an option to require notice to MDH (as per version 2) while not alerting the facility for a time-limited period. If adopted, the form would likely have to indicate clear instructions about the 30 day rules and the reporting requirements contemplated by this language. The workgroup noted there may be some additional practical considerations with this version, but did not have enough time to fully discuss all the possible iterations or changes to this sample language.

Sample Language – Version 4 – No language suggested, as no notice of any kind would be required.

10. Notification/Consent Form

There is general consensus that in order to ensure that consent has been obtained, a template form should be available to the public. Mandating the Commissioner to develop a form would promote standardization of what is included in the form.

Sample Language

Subd. (.). Notification and consent form requirements. (a) The notification and consent form must include, at a minimum, the following information:

(1) the resident's signed consent to electronic monitoring or the signature of the resident's representative, if applicable. If a person other than the resident signs the consent form, the form must document the following:

(i) the date the resident was asked if the resident wants electronic monitoring to be conducted;

(ii) who was present when the resident was asked; and

(iii) an acknowledgment that the resident did not affirmatively object;

(2) the resident's roommate's signed consent or the signature of the roommate's resident representative, if applicable. If a roommate's resident representative signs the consent form, the form must document the following:

(i) the date the roommate was asked if the roommate consents to electronic monitoring;

(ii) who was present when the roommate was asked; and

(iii) an acknowledgment that the roommate did not affirmatively object;

(3) the type of electronic monitoring device to be used;

(4) any installation needs, such as mounting of a device to a wall or ceiling;

(5) the proposed date of installation for scheduling purposes;

(6) a list of standard conditions or restrictions that the resident or a roommate may elect to place on the use of the electronic monitoring device, including, but not limited to:

(i) prohibiting audio recording;

(ii) prohibiting video recording;

(iii) prohibiting broadcasting of audio or video;

(iv) turning off the electronic monitoring device or blocking the visual recording component of the electronic monitoring device for the duration of an exam or procedure by a health care professional;

(v) turning off the electronic monitoring device or blocking the visual recording component of the electronic monitoring device while dressing or bathing is performed; and

(vi) turning off the electronic monitoring device for the duration of a visit with a spiritual advisor, ombudsman, attorney, financial planner, intimate partner, or other visitor;

(7) any other condition or restriction elected by the resident or roommate on the use of an electronic monitoring device;

(8) a signature box for documenting that the resident or roommate has withdrawn consent; and

(9) a statement of the circumstances under which a recording may be disseminated under subdivision [].

(b) A copy of the completed notification and consent form must be provided to the resident and the resident's roommate, if applicable. [The facility must retain the form after receiving it in accordance with subsection [].]

(c) The commissioner shall prescribe the notification and consent form required in this section no later than [], and shall make the form available on the department's web site.

Comment

Paragraph (a)(9) could include a more itemized list of the acceptable reasons/outlets for dissemination, such as “I authorize dissemination to legal or investigatory authorities only, media outlets, or any purpose to protect my or other residents health, safety, or welfare.” Paragraph (b) will depend on what notice provisions would be adopted into statute.

The language in paragraph (b) will depend on what type of notice is required by the statute.

11. Costs and Installation

The workgroup discussed the practicalities of using internet for electronic monitoring. It was noted that in many assisted living or housing with services residencies, residents already contract directly with a cable company and routinely install their own Wi-Fi network using their own internet plan. Other facilities may provide a public Wi-Fi system available to residents and guests. It was noted that too much monitoring on the public network may slow down speeds and that there is not agreement as to what providers must do, if anything, to accommodate monitoring in these situations.

The workgroup agreed that the language should not be too prescriptive and that the resident should bear the costs related to the device (although not necessarily for the use of public Wi-Fi).

It was noted that without broadband or other tools, access may be in an issue for some residents, but it was outside the scope of this work to discuss solutions related to access.

Sample Language

Subd. (). Costs and installation. (a) A resident [or resident representative] choosing to conduct electronic monitoring must do so at the resident's own expense, including purchase, installation, maintenance, and removal costs.

(b) If a resident chooses to install an electronic monitoring device that uses Internet technology for visual or audio monitoring, that resident may be responsible for contracting with an Internet service provider.

(c) The facility shall make a reasonable attempt to accommodate the resident's installation needs, including allowing access to the facility's public-use internet or Wi-Fi systems, when available for other public purposes.

(d) All electronic monitoring devices shall be UL-listed.

Comment

In paragraph (c), there is an open question as to what is reasonable (and who has the burden of showing an accommodation is reasonable) if the public Wi-Fi system cannot accommodate the speeds necessary for monitoring. More language may be necessary if the law is to address these scenarios.

12. Notice to Visitors

Most electronic monitoring laws contemplate public signage that would alert visitors, staff, and the public that electronic monitoring is or may be occurring. Some states require the posting of such signage on a resident's door if/when monitoring is authorized in their room.

There was general consensus (though not total agreement) that signage in the public area of the facility (ideally near the front entrance or the most conspicuous public space) indicating electronic monitoring "may be happening" is a good idea. There is general consensus that the law should not require residents or resident representatives to post about any monitoring that may be occurring in the resident's private space – but that such a sign would not be prohibited.

Sample Language

Subd. () Notice to visitors. (a) A facility shall post a sign at each facility entrance accessible to visitors that states "Electronic monitoring devices may be present to record persons and activities."

(b) The facility is responsible for installing and maintaining the signage required in this subdivision.

13. Dissemination

It is important that an electronic monitoring law lay out requirements for how a person in possession or control of the video and or audio captured by a device is allowed to share and disseminate that data.

While the workgroup noted that this topic involves, at some level, the question of “who owns the data,” it was decided that this particular law should not (or does not need to) speak directly to that question. It was widely thought, though not verified with specific research, that the resident and/or resident representative own the device and the data emanating from that device.

The more pressing question, however, that the workgroup generally agreed the law should address is under what circumstances the data, when controlled by a resident representative, must be or could be shared with others. It was generally agreed that the law should, at the very least, provide an “outer boundary” for when data should be shared. This outer boundary is delineated by the language “health, safety, or welfare”. The reason for the boundary is to respect resident privacy when their safety is not a concern and prohibit sharing of data for distasteful purposes. For example, this outer boundary would prohibit the posting of a video to social media because someone thought it was funny. This outer-boundary approach would leave it to the resident and resident representative to determine what purposes may fall under these guidelines, such as sharing a concerning interaction between a resident and care provider with a media outlet to draw broader attention to the care.

As an alternative, some in the workgroup think a more narrow approach could be taken, because “health, safety, or welfare” is so broad that it could encompass many things that could be on the borderline between inappropriate to share and yet still in furtherance of the person’s welfare to share. To address this, the workgroup considered that a resident could narrow the reasons for dissemination, as laid out in the contents of the consent form section.

The workgroup also discussed enforcement of improper dissemination. The workgroup considered that criminal and/or civil laws may be implicated by breaching this subdivision, but felt it unwise to create new civil or criminal penalties for specifically violating this subdivision. Instead, the sample language simply indicates that criminal or civil laws may apply to the improper dissemination of this data.

Another issue that the workgroup discussed, but did not come to any conclusion nor decide to provide sample language for, is the ability for an employee to access/view data. This scenario arises if a provider employer takes negative action against an employee, and the employee believes the data could exonerate, explain, or otherwise aid in their defense against the negative action. The workgroup agreed that more stakeholders, including those representing employees within facilities, should weigh in on any future discussions of this issue.

Sample Language

Subd. (). Dissemination of data. (a) No person may access any video or audio recording created through electronic monitoring without the written consent of the resident or the resident's representative.

(b) Except as required under other law, a recording or copy of a recording made as provided in this section may only be disseminated for the purpose of addressing health, safety, or welfare concerns of a resident or residents.

(c) A person disseminating a recording or copy of a recording made as provided in this section in violation of this subsection may be civilly or criminally liable.

Comment

The workgroup noted that the terms “recording” or “copy of recording” (especially in paragraphs (b) and (c)) may not be broad enough to cover live broadcasting or perhaps other data related to the electronic monitoring that may be important to cover with this section. However, other terms such as “data” were not discussed enough to consider all potential implications of using that word.

14. Facility Liability

There is general consensus that the law should relieve the facility from liability in certain circumstances. Because the facility has no control over what the resident or the resident representative choose to do with data from the device, the facility should not be held liable for any such action. The same is true for liability related to the right to privacy.

Sample Language

Subd. (). Facility Liability. (a) A facility is not civilly or criminally liable for the inadvertent or intentional disclosure of a recording by a resident or a resident's representative for any purpose not authorized by this section.

(b) A facility is not civilly or criminally liable for a violation of a resident's right to privacy based solely on the use of electronic monitoring conducted as provided in this section.

Comment

As with sample language regarding dissemination of data, it is not clear if the term “recording” accurately captures everything that should be covered, including live-broadcasting or copies of recordings. The workgroup did not have enough time to fully contemplate additional language addressing those issues.

15. Obstruction of Electronic Monitoring

The workgroup did not fully discuss all of the issues related to intentional obstruction. The sample language was in both SF 3437 and CCRSF 3656.

Sample Language

Subd. (). Obstruction of electronic monitoring. (a) A person must not knowingly hamper, obstruct, tamper with, or destroy an electronic monitoring device installed in a resident's room or private living space without the permission of the resident or the resident's representative.

(b) It is not a violation of this subdivision if a person turns off the electronic monitoring device or blocks the visual recording component of the electronic monitoring device at the direction of the resident or the resident's representative, or if consent has been withdrawn.

Comment

An additional sentence to paragraph (b) may be added to clarify that facilities are not *required* to turn off a device or help effectuate any conditions placed on the use of a device. That could read “[T]his language shall not be construed to require a facility to turn devices on or off at the request of a resident or resident representative or otherwise to assist the resident in fulfilling specific conditions that the resident wishes to place on the use of the monitoring device.”

16. Resident Rights and Protections | Penalties

There is general consensus that resident's ability to place an electronic monitoring device according to the provisions of this chapter should be protected. These sections outline two ways to do that.

First, there was general consensus that there should be language preventing facilities from refusing to admit, retaliating, and preventing electronic monitoring. There was some discussion about whether the concept of retaliation should be further developed here. It was noted that in the context of resident rights in long term care facilities, there are four other applicable areas of law where retaliation is regulated. There is broad array of approaches in these provisions whereby sometimes retaliation is defined in detail (along with who has the burden to prove retaliation). Other times the statute is vague.¹⁰ There is no consensus as to how to approach retaliation in this particular scenario.

There was no consensus on whether the department of health should be required to issue a correction order and/or if the authority to fine for violations of such an order should be included. The sample language is included below, adapted from SF 3437.

Sample Language

Subd. (. Resident rights and protection. (a) A facility must not:

(1) refuse to admit a potential resident or remove a resident because the facility disagrees with the potential resident's or the resident representative's decisions regarding electronic monitoring;

(2) retaliate against any resident for consenting or refusing to consent to electronic monitoring under this section; or

(3) prevent the placement or use of an electronic monitoring device by a resident who has provided the facility with notice and consent as required under this section.

Subd. (. Penalties. The commissioner of health [may/must] issue a correction order upon a finding that the facility has failed to comply with this subdivision. The commissioner of

¹⁰ The four other Minnesota statutes include: retaliation related to advocacy by the Ombudsman for Long Term Care (section 256.9742 subdivision 6), retaliation in eviction actions (section 504B.285 subdivision 2), retaliation against a person reporting suspected maltreatment of a vulnerable adult (section 626.557 subdivision 17), and retaliation against someone asserting a right under the Home Care Bill of Rights (section 144A subdivision 1 (22)).

health may impose a fine up to \$500 upon a finding of noncompliance with a correction order issued according to this paragraph.

Comment

Language introduced in both SF 3437 and CCRSF 3656 included the phrase “retaliate or discriminate.” The workgroup generally agreed that the action needing prevention is retaliation and did not include the word discriminate.