



MINNESOTA GERONTOLOGICAL SOCIETY

FREE WEBINAR
July 15, 2020
12:00 - 1:00 pm

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Electronic Monitoring in LTC in Minnesota and Allowable Compassionate Care Visits

By: Cheryl Hennen, State Long-Term Care Ombudsman,
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MN Office of Ombudsman for Long-Term Care

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Electronic Monitoring in LTC in Minnesota and Allowable Compassionate Care Visits MGS Webinar

CHERYL HENNEN, STATE LONG-TERM CARE OMBUDSMAN

AISHA ELMQUIST, DEPUTY OMBUDSMAN

WHAT IS THE LONG-TERM CARE OMBUDSMAN PROGRAM

Under the federal Older Americans Act (OAA), every state is required to have an Ombudsman Program that addresses complaints and advocates for improvements in the long-term care system.

Each state has an Office of the State Long-Term Care Ombudsman headed by a full-time State Long-Term Care Ombudsman who directs the program statewide.



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WHAT DOES THE OMBUDSMAN PROGRAM DO

Advocates for residents of nursing homes, board and care homes, assisted living facilities, and other similar adult care facilities

Educates residents, their family, and facility staff about residents' rights, good care practices, and similar long-term services and supports resources

Ensures residents have regular and timely access to ombudsman services

Provides technical support for the development of resident and family councils

Represents resident interests before governmental agencies; and

Seek legal, administrative, and other remedies to protect residents



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Compassionate Care

- Compassionate care:

 - How care is given through relationships based on empathy, respect and dignity
 - Helps people feel more comfort when in pain, feeling ill, or suffering from mental and emotional stress
 - Includes care for people with terminal diseases and hospice care
 - Focus on person-driven-centered care. Person-centered care honors residents rights to be allowed to have visitors for compassionate care reasons



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Not Dying Alone

Our country and our state is in the midst of one of the greatest public health crisis in modern times .

Many elders in hospitals, ICUs, and long-term care settings have died alone and scared with no access to family members and/or loved ones. Many more are isolated in their homes afraid to leave .

The fear of dying alone is nearly universal.

COVID-19 pandemic has been particularly difficult is separating family at critical times.



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Regulation

Centers for Medicare and Medicaid Services (CMS) issued guidance on 3/13/20 regarding compassionate care visits in Skilled Nursing Homes :

- *Facilities should restrict visitation of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation. In those cases, visitors will be limited to a specific room only.*

Ombudsman advocate for balance between safety and mitigating the spread of COVID-19 and acknowledging the significant importance of physical and emotional support people receive from family and loved ones.

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Regulation

Centers for Medicare and Medicaid Services (CMS) issued new FAQs on “compassionate care”:

- <https://www.cms.gov/files/document/covid-visitation-nursing-home-residents.pdf>
- This guidance clarifies that “compassionate care situations” do not only refer to end-of-life situations.
- Examples:
 - A resident who was living with their family before recently being admitted to a nursing home; the change in their environment and sudden lack of family can be a traumatic experience.
 - Allowing someone to visit a resident whose friend or family member recently passed away

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Electronic Monitoring (EM)

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Electronic Monitoring?

What is electronic monitoring?

The placement and use of an electronic monitoring device by a resident (or resident representative) in the resident's room or private living unit in accordance with the electronic monitoring law.

What is an electronic monitoring device?

"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 unit and is used to monitor the resident or activities in the room or private living unit."

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Background

- 2018: Commissioner of Health, Jan Malcolm, assembled workgroups regarding various elder protection issues including electronic monitoring
- Workgroup develops consensus electronic monitoring language.
- The consensus language was included in the 2019 Elder Care and Vulnerable Adult Protection Act
- The bill passed in the 2019 legislative session
- The bill was signed into law by the Governor

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Timeline

- Effective January 1, 2020
- Affected providers were required to have policies and procedures in place prior to January 1, 2020

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Applicability

Electronic monitoring applies to the following “facilities”:

- Licensed nursing homes
 - Licensed boarding care homes
 - Housing with services (HWS) that is subject to 144G (assisted living) or has a disclosed special unit under 325F.72 (dementia care)
 - Assisted living facilities starting 8/1/2021
- NOTE: The Home Care Bill of Rights includes the right to electronic monitoring—this general right is applicable to all home care. (i.e. the right to “place an electronic monitoring device in the client's or resident's space in compliance with state requirements”)

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Resident Protections

A facility must not:

- 1) Refuse to admit or remove a resident because of electronic monitoring
- 2) Retaliate against a resident for electronic monitoring
- 3) Prevent the placement or use of an electronic monitoring device by a resident who has provided the facility or OOLTC with notice and consent
- 4) Change rights under this section pursuant to contract

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Consent

- A key component to the law is the concept that a resident must consent to the use of electronic monitoring
- Resident must consent to electronic monitoring in writing on a specific form (a “notification and consent form”)
- Form must be provided to the facility – **but there is an exception**
 - Facility must place it in the resident’s file or with the HWS contract

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Consent Form

The consent form has many required elements:

- Date
- Who was present
- Acknowledgement the resident did not affirmatively object
- Source of resident representative’s authority
- Roommate consent, if applicable
- Type of electronic monitoring to be utilized
- Signature box
- A list of possible conditions or exceptions for consideration regarding the use of electronic monitoring device, e.g.:
 - Prohibited audio recording
 - Prohibited video recording
 - When to turn off or block the recording device

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Resident Choice

“A resident, or resident representative when consenting on behalf of the 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.”

- Electronic monitoring may not occur if the resident has affirmatively objected...even if the resident has a guardian

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Exception to Consent

- Resident representative* may consent on behalf of resident if:
 - Resident has not affirmatively objected to electronic monitoring and
 - Resident’s medical professional determines that resident currently lacks the ability to understand and appreciate the nature and consequences of electronic monitoring
- Prior to any monitoring, the resident must be asked if they want electronic monitoring conducted and certain things must be explained to resident including the type of electronic monitoring to be used, any conditions or limits the resident may desire, with whom the recordings may be shared, and the resident’s right to decline all recordings.
- Conditions may be placed on use of device

* *Defined on next slide*

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Definition of “Resident Representative”

"Resident representative" means one of the following, in the order of priority listed, to the extent the person may reasonably be identified and located:

1. A court-appointed guardian;
2. A health care agent as defined in section 145C.01, subdivision 2; or
3. A person who is not an agent of a facility or of a home care provider designated in writing by the resident and maintained in the resident's records on file with the facility

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Roommate Consent

Prior to implementing electronic monitoring, a resident must obtain written consent on the notification consent form from:

- The resident's roommate, or a resident roommate's representative

New Roommate

- If a new roommate moves in, the electronic monitoring device must be disabled until the new roommate (or resident rep) signs form

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Roommate Refusal to Consent?

Facility must make reasonable attempt to accommodate the resident who wants electronic monitoring, which includes:

- Offering to move the resident to another shared room/living unit that is available.
 -but the resident must pay the applicable rent/rate

If the facility cannot move the resident due to lack of space, the facility must reevaluate the request to move every 2 weeks until the request is fulfilled

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Withdrawal of Consent

- Consent for EM may be withdrawn at any time
- Withdrawal of consent must be documented in the original consent and notification form

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Notification

The signed consent, on the approved form, must be provided to the licensed facility prior to implementing electronic monitoring – **with an exception**

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Exception – No Notice to Facility

Exception to notice to facility if the resident or resident representative:

- Reasonably fears retaliation against the resident, or
- Submits a written concern to the facility regarding a concern prompting a desire for placement of electronic monitoring, and does not receive a timely response, or
- Has already submitted a MAARC report, OHFC complaint, or police report regarding the resident's concern prompting desire for placement of electronic monitoring

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Exception Notification

Then the resident or resident representative may submit the signed consent and notice form to the Office of Ombudsman for Long-Term Care (OOLTC)

- This notice is only valid for a 14 day period
- After 14 days, notification must be provided to the facility
- During the 14-day period, if a facility discovers an electronic monitoring device, and the facility has not been provided a signed consent and notice form, the facility may contact OOLTC to confirm that the OOLTC was provided the consent and notice form

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Notification and Consent Form Requirements

Notice includes acknowledgment that OOLTC and reps may disclose information is on form

Disclosure by OOLTC is limited to:

- The fact that the form was received from the resident or resident representative
- If signed by a resident representative, the name of the rep and the source of authority allowing the resident rep to sign
- The type of EM device placed

A facility that contacts the Office of Ombudsman for Long-Term Care regarding an electronic monitoring device must provide the office with:

- the type, make, and model number of the electronic monitoring device discovered by the facility

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Electronic Monitoring Devices

- The cost of an electronic monitoring device is the responsibility of the resident or resident representative
- However, the facility shall also make reasonable attempt to accommodate installation needs, including allowing access to facility's public-use internet/WiFi
 - Facility has burden to prove not reasonable
- All electronic monitoring devices must be UL-Listed
 - This is for fire safety

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Obstruction of EM Devices

- A person must not knowingly tamper, obstruct, tamper with, or destroy an electronic monitoring device placed in a resident's room or private living unit without the permission of the resident or resident representative.
- Facility staff checking for the make and model number does not constitute tampering under this subdivision.
- It is not a violation to turn off at direction of resident or resident representative.

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Disseminate of Recordings

- No person may access recordings without written consent of resident or resident representative
- A recording under this section may only be disseminated for the purpose of addressing “health safety, or welfare concerns of one or more residents.”
 - Person distributing in violation of the above may be held criminally or civilly liable
- Recording may be entered into evidence during a trial (*rules of evidence/procedure apply*)

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Employee Discipline

- If employee is subject to proposed disciplinary action based on evidence from electronic monitoring, the employee must be given access to the evidence
- Employee must not disseminate the recordings and must return the recording

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Q & A

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Questions or Comments:

contact info@mngero.org

Next Webinar: August 13, Noon - 1:00 pm

Geriatric Depression Disorders

**Ben Braus, Psychiatrist, MD,
Minneapolis VA Health Care System**

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