Electronic Monitoring Workgroup

DRAFT Recommendations

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The Electronic Monitoring Workgroup is in the process to determine and draft sample legislation that could be used as language during the 2019 legislative session. The workgroup still has two additional meetings to complete this work, and while recommendations in a few areas remain unclear, we do believe there is a path forward that will include consensus language. Below we have highlighted the outcomes or status of some of the issue areas pertaining to electronic monitoring. To view the full working documents we are using to discuss the issue, please see the MDH Workgroup website.

What is the definition of a monitoring device?

- **Why is this important?** Technology is rapidly changing and the definition of a monitoring device will set the parameters for what types of devices fall under the purview of the law.
- **Issues we have considered with general agreement:** There are three key issues that the definition should address: (1) the type of device (2) its broadcast ability and (3) the purpose of the device. Many people want to install devices for the purpose of communication, which is agreed as a good thing. The rules being established via electronic monitoring laws, however, are about the surveillance/monitoring aspect of the technology and so there is agreement that the definition should focus on that. Devices placed with only the intent and use of communication should not be covered. However, if those communication devices are being used for the purpose of monitoring, then rules would apply at that time.
- **Working Language:**
  "Electronic Monitoring device" means an audio or video capturing device, that records or broadcasts or does both, and that is installed/placed in a resident's room or private living space, and is intended to monitor the resident.

If the resident cannot provide consent, who can install a monitoring device on that persons behalf?

- **Why is this important?** There are many considerations when thinking about how broad the category of a resident representative should be. While it appears widely agreed that a formal alternative decision maker (such as guardian or healthcare agent) may already have or should have the ability to place a device, what about a person who does not have a formal decision maker in place?
- **Issues to consider -** For residents without formal decision makers, how broad should the category be? There is general agreement to borrow concepts from the federal definition of resident representative, which suggests that the key concept in identifying a non-formal representative is that person was *chosen* by the individual.
- **Working concepts to develop language**

        - The definition of legal representative should include a court appointed guardian, a healthcare agent, and a resident representative chosen by the individual and documented in the resident's file.
        - Establish a hierarchy of legal representatives to resolve a conflict when two potential legal representatives disagree about the placement of a camera.

How does the person acting on behalf of the resident prove they have "consent" to install a device?

- **Why is this important?** Either one of two things has to happen - the resident consents, or the legal representative consents on their behalf. When a resident lacks capacity and a legal representative wants to place a camera on the resident's behalf, the process that they go through and document is important to ensure the resident's privacy rights are/were protected when consenting on their behalf.
- **Issues to consider-** For the benefit of the resident, there is general agreement that the legal representative must consult with the resident as much as possible. There is also general agreement that the legal representative must document what they did during this process.
- **Working Concepts/Language:**
    - A resident must consent in writing to monitoring.
    - 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's legal representative may consent on behalf of the resident. For purpose of this subdivision, a resident affirmatively objects when the resident orally, visually, or through the use of auxiliary aids or services declines electronic monitoring.
    - Prior to a resident's legal representative consenting on behalf of a resident, the resident must be asked by the resident's legal representative if the resident wants electronic monitoring conducted. The resident's legal representative must explain to the resident:
        - The type of electronic monitoring device to be used;
        - Why electronic monitoring is being used;
        - The conditions that may be placed on the device (such as times it can be shut off)
        - With whom the recording may be shared;
        - The resident's ability to decline all recording.

Other issues with lots of discussion where we are still discussing and trying to evaluate what level of consensus we have:

- Should the facility or other entity be notified that electronic monitoring is occurring? If so – what should the parameters around notice look like?
- What should the consent form include and should MDH be directed to create it?
- What facilities/settings should these rules apply to?
- What penalties should be in place if the right to install the device is infringed?