

Electronic Monitoring Workgroup

ISSUE AREAS FOR DISCUSSION FALL 2018

Updated 9/21/18 with notes from 9/19/18 meeting

Updated 10/9/18 with notes from 10/4/18 meeting

This document is simply a starting point for this working group. It's designed help facilitate conversation about electronic monitoring issues where there is widespread agreement and where there are areas of disagreement. The document will refer to two bills from last session [SF 3437 \(PDF\)](#) and SF 3656. Note that [SF 3656 \(PDF\)](#) was the Omnibus bill – so the relevant lines for this workgroup are 611.1 to 666.27. The issues highlighted below are raised in the order they appear in the text of SF 3437.

I) What is definition of a legal representative?

(i.e. a person allowed to place a camera that is not the resident)

A. Compare SF 3437 lines 3.12 to 3.14 with SF 3656 lines 612.25 to 612.2

(e) "Legal representative" means a court-appointed guardian or other person with authority to make decisions about health care services for the resident, including an individual who is an interested person, as defined in section 626.5572, subdivision 12a.

(g) "Legal representative" means a court-appointed guardian or other representative with legal authority to make decisions about health care services for the resident, including a health care agent or an attorney-in-fact authorized through a health care directive or power of attorney.

B. Issues to consider:

- a. Aside from powers of attorney and health care agents, who else should be considered a legal representative? Consider the approach proposed on page 11 of the monitoring report that summarizes a variety of possible individuals who should be considered. Also consider the definition of interested person, lines 67.5 to 67.17 of [SF 3437](#).

Discussion from Meeting 1 (9/19/18)

- Consensus that a resident themselves can choose to install a camera
- Issues arise as to who – if a person lacks capacity – can install a camera on that person's behalf
 - General agreement that the definition from Omnibus bill is too narrow, but the definition of interested person from SF 3437 is too broad. Conversation focused on how to properly balance/narrow the definition of SF 3437.
 - We looked to the definition of resident representative, which is in federal regulation at 42 CFR § 483.5:
Resident representative. For purposes of this subpart, the term resident representative means any of the following:

- (1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
 - (2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
 - (3) Legal representative, as used in section 712 of the Older Americans Act; or.
 - (4) The court-appointed guardian or conservator of a resident.
 - (5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.
- We discussed issues related to how someone can know whether a “person chosen” by the resident was actually chosen. There was conversation about having documents on file with provider that the person chosen was identified because they are on an admission form or other form in the provider files. The point was made that providers already have several documents that name people chosen by the resident, and there are several instances when the resident could demonstrate this choice – including upon admission, during periodic well-being updates, emergency contact forms, etc. This requirement could, however, prevent an otherwise qualified and chosen person who was never actually identified, from being a legal representative.
 - The issue of priority (i.e. what to do when multiple people come forward to install or dispute installation) will be left for discussion in next meeting(s).

II) What types of devices are allowed in rooms

A. Compare SF 3437 line 3.5 to 3.8 with SF 3656 lines 612.13 to 612.15

(c) “Electronic monitoring device” means a camera, including one that captures, records, or broadcasts audio, video, or both, or other technological device used to monitor or communicate with a resident or others that is installed in a resident’s room or private living space.

(e) “Electronic monitoring device” means a surveillance instrument with a fixed position video camera or an audio recording device, or both, that is installed in a resident’s room or private living space and broadcasts or records activity or sounds occurring in the room or private living space.

B. Issues to consider: what is the purpose of the technology – both to monitor and also communicate?

Discussion from Meeting 1 (9/19/18)

- We had a fairly lengthy discussion about how to best define the technology. There was some general agreement that the definition should try to be broad enough to consider future tech changes. However – there is also caution not to define the device so broadly that it would include/capture devices never intended under this statute (i.e. like an amazon Alexa or a gaming device that is always on)

- Discussion about having a dual purpose noted in the statute – that is the device is defined as one both for monitoring and/or for communication. If someone wants one only for communication, should that fall under the purview of the statute (i.e. a webcam to talk to grandson)?
- Some brief discussion on the concept of a fixed device and general agreement that this may not be the best language. Issues related to what the device is actually capturing (part of a room, etc.) can perhaps be better covered in other parts of the statute where the resident/legal rep/roommate can dictate/modify the areas of coverage of the device.
- One way to consider this definition is that there are three basic issues to consider as other state statutes generally have three parts:
 - The type of device
 - Broadcast ability (constant streaming? Recording? Broadcasting so that someone can watch in real time)
 - The Intent/purpose
- Consider whether the language of 3437 is close to something your organization could support and if not what changes might you consider? How can we get at the intent/purpose part of the statute.

III) What facilities should be subject to rules around cameras

- A. Compare SF 3437 line 3.11 with SF 3656 line 612.24 where housing with services under 144.D but not under 144.G are subject to the rules on cameras

(d) "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, or registered as a housing with services establishment under chapter 144D.

(f) "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, or registered as a housing with services establishment under chapter 144D that is also subject to chapter 144G.

- B. Issues to consider: what housing with services facilities, if any, should be excluded from these rules and why (consider privacy concerns of younger adults worried about over-zealous guardians or other interested persons).

Discussion from Meeting 1 (9/19/18)

- We had a discussion of what facilities should/should not be covered by these provisions
 - The reason for the difference in the SF 3437 and Omnibus definitions is to try and exclude a certain subset of HWS settings where either the population is one that is not subject of primary concerns and/or the setting itself is not really an assisted-living or similar type of setting
 - Specific reasons to exclude such settings is because HWS facilities have so few services that the independent living is really like an apartment and thus those

- residents should be able to follow the same laws as any other person with a lease-agreement
- Another consideration is persons with disabilities and other populations who may be concerned about over-zealous guardians. Whether in their current settings or if they end up moving to a setting where these regulations are in place. Is the guardianship rules/laws the better place to deal with this overreach, rather than a type of exemption from these rules.
 - Questions about whether the language in the Omnibus bill most accurately gets at this subset of settings and if not – is there a different/better way to do so.
 - We discussed the possibility of adding swing beds to the list of facilities covered by these rules...no clear objections from those in attendance, but not sure about the full considerations on this point
 - Another point of discussion was to consider if there is a different way to get at the point of the point of all these complex camera rules by looking more at the scope of the residents right to privacy and the possible corresponding duties of a provider to uphold that right – could there be a much more simple approach that would not require all this new regulation/statutory language.

IV) How must a resident consent to monitoring and what type of process must a legal representative go through in order to gain/prove consent?

A. Consider SF 3437 lines 3.23 to 4.13

Subd. 3. Consent to electronic monitoring. (a) Except as otherwise provided in this subdivision, a resident must consent in writing on a notification and consent form prescribed by the commissioner to electronic monitoring in the resident's room or private living space. 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 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. The resident's response must be document on the notification and consent form.

(b) 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 to be conducted. The resident's legal representative must explain to the resident:

1. the type of electronic monitoring device to be used;
2. the standard conditions that may be placed on the electronic monitoring device's use, including those listed in subdivision 5;
3. with whom the recording may be shared under this section; and
4. the resident's ability to decline all recording.

(c) A resident or roommate may consent to electronic monitoring with any conditions of the resident's or roommate's choosing, including the list of standard conditions provided in subdivision 5. A resident or roommate 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.

Discussion from 9/19/18

- Language from Subdivision 3(a) Getting Consent
 - Some concerns were raised about requiring resident to affirmatively decline the monitoring
 - Discussion about how/why the need for a physician to make the capacity determination
- Language from Subdivision 3(b) How to get consent
 - There seems to be basic consensus around the language in 3437 that describes the four things a representative must explain to the representative before getting consent. However – there was a question raised on whether or not there needs to be an additional requirement (i.e. a fifth item of explanation) that ensures the resident representative explains to the resident the reason for the camera placement
- This issue was raised but not thoroughly discussed and there could be further discussion about possible pro's/con's of this requirement

B. Issues to consider:

- a. Who must be present? Consider SF 3656 lines 613.22 to 613.25

(b) Prior to a resident's legal representative consenting on behalf of a resident, the resident must be asked by the resident's legal guardian in the presence of a facility employee if the resident wants electronic monitoring to be conducted. The resident's legal representative must explain to the resident:

Discussion from 9/19/2018

- There appears to be consensus that there should not be a requirement that the provider or agent/employee of the provider be in the presence of the resident and representative when the representative is getting consent. The discussion noted concerns about intimidation and also the feasibility/desirability of a provider fulfilling this requirement.
- There was discussion, and no agreement or consensus, about whether there should be a third party witness to the consent. Discussion included:
 - Comparing this consent for electronic monitoring to similar requirements in areas of estate planning – such as Power of Attorney, Healthcare directives, and Wills
 - Pros: May provide assurances against forgery
 - Cons: adds another barrier for resident representative to install a camera

V) Roommate consent and withdrawal of consent

A. Consider SF 3437 lines 4.9 to 4.27

(c) A resident or roommate may consent to electronic monitoring with any conditions of the resident's or roommate's choosing, including the list of standard conditions provided in subdivision 5. A resident or roommate 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.

(d) Prior to implementing electronic monitoring, a resident must obtain the written consent of any other resident residing in the room or private living space on the notification and sent form prescribed by the commissioner. Except as otherwise provided in this subdivision, a roommate must consent in writing to electronic monitoring in the resident's room or private living space. 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 legal representative may consent on behalf of the roommate.

(e) Any resident conducting electronic monitoring must obtain consent from any new roommate before the resident may resume any authorized 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.

Discussion from 10/4/18

- There is some concern with the language starting on line 4.18 that (1) it's a bit cumbersome to read through and (2) practically speaking it may be difficult for a person or their representative to actually find the roommate's representative (let alone their physician) in order to get roommate consent.
 - As for the clarity of the language – there was some consensus on looking at re-writing this section. The underlying policy is to have the “affirmative objection” and the physician sign-off as a safeguard to protect the roommate and ensure that to the best extent possible, we know they are not objecting to the camera placement.
 - As for the practicality of getting consent, we discussed having the provider act as a “pass-through” whereby they could alert the roommate's family that the resident or their representative is wanting to place a camera in the room and provide the roommate with the contact information for the resident/representative.
 - Point was made that if section (e) is to stay, then the facility needs to have notice of the presence of the camera.
 - We briefly re-visited a conversation about the language in section (c) that begs the question of “who” should be responsible for ensuring the specific instructions about the camera (i.e. when to turn off, etc.) are followed.

- We can also look at what DHS has already developed with regard to how one goes about asking a roommate for permission to install electronic monitoring devices
- We re-visited the conversation about the scope of monitoring devices at issue (including bed sensors, door alarms, etc.) , raising again the need to be very contentious when defining monitoring devices for purposes of this section

VI) What notice, if any, should be given to the facility that a camera has been installed?

A. Consider SF 3437 lines 5.17 to 5.20

Subd. 5. Notice; form requirements. (a) Electronic monitoring may begin only after the resident who intends to install an electronic monitoring device completes a notification and consent form prescribed by the commissioner and submits the form to the facility and the ombudsperson for long-term care.

B. Issues to consider:

- a. Notice provided to just Ombudsman for long-term care or also to the provider facility?

Discussion from 10/4/18

- Significant discussion about why providers want/need to know about a camera in the room.
 - Because of their obligation to protect privacy, they need to know if there is a camera placed in the room on behalf of the resident and that the resident or their representative agreed to it/did not oppose it.
 - If a camera is found, they need to know who it belongs to and ensure it was not put there by a stranger or ill-intentioned person (including staff)
- There are essentially three positions regarding notice that arose during the conversation:
 - Notice could just be given to the Ombudsman. As for provider obligation to protect privacy, that issue could be dealt with by modifying the bill of rights to state that a provider fulfills the obligation to protect privacy by alerting ombudsman when camera is found. There was discussion about the practicality of changing the bill of rights and issues regarding the practicalities of removing a camera (see line 4.23-27 above) and/or modifying the camera's use (i.e. during private cares or clergy visit) if the provider has no notice of the camera. There are also issues about capacity of Ombudsman office to take this sole responsibility. Not really strong support for this position from anyone during this conversation.
 - Notice could just be given to the provider
 - If given to provider – who within the facility would have access to the information? There was a long discussion about the practical effects of limiting access to camera notice to just an administrator. Some participants noted that providers would likely inform care teams and even maintenance staff so that everyone is both “on notice” and they know how to treat the camera to conform with the resident wishes (i.e. turn off during private cares or clergy visits)

- Notice could be given to provider and ombudsman
 - The notice to Ombudsman as a back-up would provide another “set of eyes” and alert Ombudsman that potentially there is a conflict/issue where resident might want/need intervention/advocacy. Would need to check on capacity issues at Ombudsman office.

VII) Issues regarding the data/footage of cameras

A. Consider SF 3437 lines 7.31 – 8.12

Subd. 9. Dissemination of recordings. (a) A facility may not access any video or audio recording created through electronic monitoring without the written consent of the resident or the resident’s legal representative. If a resident consents to access to a recording by the facility, the resident is deemed to have consented to access to an employee under paragraph (c).

(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) An employee of a facility who is the subject of proposed corrective or disciplinary action based upon evidence obtained by electronic monitoring must be given access to that evidence for purposes of defending against the proposed action. The recording or a copy of the recording must be treated confidentially by the employee and must not be further disseminated to any other person except as required under other law. Any copy of the recording must be returned to the facility or resident who provided the copy when it is no longer needed for the purposes of defending against a proposed action.

B. Other Issues to consider

- a. What should the statute say, if anything, about use of data in court proceedings?
- b. Should legal representatives also be mandatory reporters?

VIII) Consent Form: What form (if any) should be used, who is in charge of its creation, what should be included on the consent form, and how should form be disseminated?

A. Consider SF 3437 lines 5.21 to 7.6

(b) 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 legal 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 legal representative, if applicable. If a roommate's legal 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) (ii) who was present when the roommate was asked; and
 - (iii) (iii) an acknowledgement 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) (ii) prohibiting video recording;
 - (iii) (iii) prohibiting broadcasting of audio or video;
 - (iv) (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) (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) (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;
- (8) any other condition or restriction elected by the resident or roommate on the use of an electronic monitoring device;
- (9) a signature box for documenting that the resident or roommate has withdrawn consent; and
- (10) a statement of the circumstances under which a recording may be disseminated under subdivision 9.

(c) 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 as described in subdivision 3, paragraph (f).

(d) The commissioner shall prescribe the notification and consent form required in this section no later than January 1, 2019, and shall make the form available on the department's Web site.

(e) Beginning January 1, 2019, facilities must make the notification and consent form available to the residents and inform residents of their option to conduct electronic monitoring of their rooms or private living spaces.

(f) Any resident, legal representative of a resident, or other person conducting electronic monitoring of a resident's room prior to enactment of this section must comply with the requirements of this section by January 1, 2019.

B. Other Issues:

- a. Who maintains the completed consent form (Consider SF 3437 4.28 to 4.30)?

Discussion from 10/4/18:

See notes about in section about notice to the provider as this language seemed connected to the concept of limiting the knowledge of camera presence to certain provider staff only...not a lot of support to keep this particular language. Some question as to what it was trying to accomplish (HIPPA reasons? Etc.) and if there is desire to try and limit knowledge of camera to certain staff, is there a better/different way to do that.

(f) Copies of all completed notification and consent forms must be submitted to the facility, and the facility must keep the notification and consent forms on file in a location separate from the resident's clinical record.

IX) What enforcement/penalty should exist for facilities that violate resident and legal representatives' right/ability to place a camera?

- A. Should it be incorporated into homecare and healthcare bills of rights? See SF 3437 lines 15.20 to 15.22?

Subd. 35. **Electronic monitoring.** A patient, resident, or interested person has the right to install and use electronic monitoring, provided the requirements of section 144.6502 are met.