

DRAFT ELECTRONIC MONITORING REPORT FOR REVIEW ON 12/10/18

[Note to work group: While anything is up for consideration in terms of edits, changes, disagreement, language/wording suggesting, etc. (don't worry about typos as we will clean those up!), I noted a number of areas I thought we still need some help, discussion, thought, etc.

Yellow: Please consider whether your organization supports these areas and/or has other thoughts to add/change/etc. These are mainly policy issues we still need to review. Also – anytime I thought there was either consensus or not, I highlighted it in the report to draw your attention and ensure that your organization agrees with the statement. Many of these areas should not be controversial in terms of where we had broad consensus or not. But - I will be reviewing these areas of yellow during our meeting on 12/10/18 to ensure this report accurately reflects the thoughts and work of the group.

Purple: Areas to develop alternative/new language

Thanks! – Sean]

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[Forthcoming]

Summary of the Process

[Forthcoming]

Structure of this Report

[Forthcoming]

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 ability of the device, and (3) what is the purpose of the device.

The proposed definition 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.

Suggested 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 intention is to use this term consistently throughout whenever language is referring to the placement or intended placement of the camera.

2. Definition of Resident Representative

While there was little controversy about allowing for residents with capacity to consent and place their own devices within their own rooms, the issue becomes more difficult when another person is to consent on behalf of the resident. Because stakeholders anticipate that many situations implicated by this law will involve a resident lacking capacity, 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 resident advocates, working in good faith, from protecting the resident through the placement of a camera. If the definition is too broad, it may allow for individuals with a more tenuous connection to the resident to be making critical decisions regarding their privacy and safety.

The work group generally came to consensus that the federal language of resident representative accurately captures the universe of persons that should be allowed to consent on behalf of a resident for purposes of a camera.¹ That includes a court appointed guardian, a health care agent, and a person chosen by the resident (generally upon admission – but not limited to that timeframe).

¹ See 2 CFR 483.5

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 resident representative or anyone else would know someone is the 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.

Suggested Language

"Resident representative" means a court-appointed guardian, health care agent under MN Stat. 145C.01 Subd. 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 there is often confusion and conflation between health care agents, powers of attorney 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 during the duration of their residency in the facility.

[Note to workgroup: should there be more language ensuring a resident is given the option of naming a representative upon admission and/or other times?]

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 agreed 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).

As a starting principal, it was widely acknowledged that current law allows for someone to place a camera in his or her own home to monitor activities without needing to provide consent to anyone.² Therefore, the gathering of consent and possibly giving notice to the facility represent

² Workgroup members noted that there may be more ambiguity to this general principal if a person's legal decision maker is placing the device on behalf of the resident.

both an extra series of requirements³ and some protections⁴ that this law would place on certain individuals in certain settings.

While there was **wide 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.⁵ Others believe that that the rules should only apply to those housing and services operating under the 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, as opposed to AL designated settings that generally cater to older adults seeking traditional assisted living.

Finally, the workgroup also considered adding swing beds (beds in hospital settings that are designated and utilized as skilled nursing beds). This addition 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.

Suggested 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, or registered as a housing with services establishment under chapter 144D.

³ The law requires a resident or resident representative to go through all the steps laid out in the consent process and consent form and possibly provide notice to the facility or a third party.

⁴ The law prevents a facility from removing a camera if it is placed according to these guidelines and therefore prohibits facility-wide bans on these types of devices.

⁵ It was also discussed whether or not, under this principal, maybe the law should extend anytime licensed homecare is being provide. This would include people living in their own homes receiving licensed home care services that are not registered housing with services. Otherwise, it may not be clear under what principal the law is distinguishing between services in a HWS that are subject to the law and services in someone’s own home that are not. Because the breadth of this change would be sweeping (consider that perhaps PCA services would also implicate the law under this reasoning), and stakeholders from those industries were not present, **the workgroup is suggesting the law only apply to HWS under 144D or 144G.**

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

4. Electronic Monitoring Authorized

There **is broad 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 facility can simply ban the use of any recording devices in the facility. The electronic monitoring statute should include language to expressly clarify this current ambiguity in the law.

Suggested Language

Subd. (). Electronic Monitoring Authorized. (a) A facility must allow a resident or a resident representative to conduct electronic monitoring of the resident's room or private living space as provided in this section.

(b) Nothing in this section precludes the use of electronic monitoring of health care allowed under other law.

Comment

Paragraph (b) contemplates possible interaction with the provisions of this statute and other monitoring requirements, such as Home and Community Based monitoring provisions outlined in the DHS Community Based Services Manual.⁶ **The workgroup agreed** that these provisions are not intended to preclude and should not prevent monitoring under the other statutes from taking place.

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. It was agreed with strong consensus that if a person has capacity and wants to place a camera in their own room, they can do so. **The main question for the law to resolve, is whether the resident**

⁶ See DHS CBSM on monitoring technology [DHS CBSM on monitoring technology \(http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_180346&RevisionSelectionMethod=LatestReleased\)](http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&dDocName=dhs16_180346&RevisionSelectionMethod=LatestReleased).

must confirm this consent in a written consent form (even if they then do not have to give that form to anyone). Currently, the subsection dealing with this issue (part 10 below) could be modified to clarify that no form is needed if the resident themselves is consenting.

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 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 **broad 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 consensus** that the resident representative must go directly to the resident and explain why monitoring is being considered, what will be placed in the room, what conditions the resident may want on the monitoring.

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 morning a resident 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).

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 suggested language is not always the most reliable 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 wide 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 suggested 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.**

Suggested 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'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 reasons for placing an electronic monitoring device;

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

(3) the resident can place conditions may be placed on the electronic monitoring device's use, 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 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? How should we frame the hierarchy concept? Is this the right spot for it?]

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 what the questions on the consent form and its purpose are all about.

7. Roommate Consent

While roommate situations in long-term care settings are much more infrequent than single occupancy dwellings and rooms, there is consensus that roommate issues must be addressed by the law.

There is widespread agreement 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).

Suggested Language

Subd. (.). Roommate Consent. (a) Prior to implementing electronic monitoring, a resident or a resident’s legal 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
- (3) 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 resume 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.

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 roommate's resident representative is only told if they are consenting on the roommate behalf. There would be no reason for the resident representative to be involved if they are not consenting on behalf of the roommate.

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 proposed in the 2018 session spelled out exactly 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 suitable alternative wording.** In sum there are three general options to choose from: general reasonable accommodation, specific definition of what reasonable accommodation might be, and no reference at all to this concept in the statute.

Suggested 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.

Suggested Language – Option 2

Subd. (). Reasonable 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 the resident who wants to conduct electronic monitoring. A facility has met the requirement to make a reasonable attempt to accommodate 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 either 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.

Comment – Version 2

[Comment to Work Group: Let's discuss the language of this option.]

Suggested Language – Version 3 – No language suggested, 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?

Resident Consent Only

There is not total agreement on this issue. Many 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 camera.

It seems to be a broad consensus among individual providers and provider organizations that a facility should receive notice of monitoring, there seems to be less consensus among those stakeholders (and all other stakeholder) about whether it is required in this specific instance. A primary reason for requiring notice is so the facility can protect the resident's right to privacy. In this scenario, however, that concern is much less pressing as the resident is freely giving up that right (as it pertains to the monitoring of themselves and activities). The resident should not expect the facility to protect their right to privacy as it pertains to the camera. The workgroup discussed, but did not develop, language that clarifies a residents is waving this right, though it could be added to the consent form.

The issue was never fully settled one way or another, and the suggested 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.

The issue turns in large part on facility's duty to protect the privacy of a resident vs. a resident representative's fear of retaliation. As described above, some view required notice as being a barrier to placing a camera because the situation already likely involved a breakdown of communication and trust. A resident or resident representative may be worried about retaliation for inserting camera. The workgroup noted that while retaliation has been discussed in other

workgroups related to these issues, this particular instance of camera placement will need to be flagged as another inflection point.

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 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. Some note that unless cameras are in all rooms, someone seeking to maltreat a resident (i.e. theft or drug diversion) may simply move to the next room. In sum, there are strong opinions on both sides of the issue.

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 suggested 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 reports that it is not prepared to play that role nor is really within the scope of the 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.⁸

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 period of time. This suggested 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, we discussed but did not develop language about ensuring notice to facility when roommate is involved with no exceptions.

⁷ The workgroup considered, but did not conclude on way or another, that the issue of waiver of 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).

⁸ 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.

Suggested Language – Version 1

Subd. (). Notice of monitoring to the facility. (a) If a resident representative is consenting on behalf of a resident, 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.

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 to submit the form to in the facility would create more confusion.

Suggested 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.

Suggested 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 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

[Note to work group: Let’s discuss both the policy and specific language of this version to see where we have agreement/disagreement]

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

Comment

[Note to work group: Let’s discuss this from a policy perspective, as it came up in a language sub-group meeting and has not been discussed by the larger group.]

10. Notification/Consent Form

There is generally broad consensus that in order to ensure that consent has been obtained, a template form should be available to the public. While mandating the Commissioner to develop a form would come with fiscal implications, the standardization it would bring would be good policy.

Suggested 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 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) 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.

11. Costs and Installation

[Note to Workgroup: This language was in both SF 3437 and SF 3656 (the Omnibus bill), but we have not really discussed this in depth and request input from workgroup members on this issue.]

One question is whether the law should make a distinction about who bears the costs when a resident representative is consenting on behalf of the resident (i.e. should it allow the representative to pay for the monitoring out of the resident's account – or should it stay silent on this point?).]

Suggested 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 paying 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 telecommunications or equipment room. A facility has the burden of proving that a requested accommodation is not reasonable.

(d) All electronic monitoring device installations and supporting services must be UL-listed.

Comment

This language was included in both the 2018 Elder Care Bill SF3437 and the language in the Omnibus Bill SF 3656.

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 widespread consensus 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 also widespread 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.

Suggested 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 representative own the device and the data emanating from that device.

The more pressing question, however, that the workgroup widely 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 widely 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 and yet in the person’s welfare to share. In response to this consideration, the workgroup considered that a resident could narrow the reasons for dissemination, as laid out in the contents of the consent form section.

Another issue related to this subdivision is the actual 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 suggested 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 suggested language on, 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 labor representatives, should weigh in on any future discussions of this issue.

Suggested 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 legal 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 [recording or copy of a recording made as provided in this section] in violation of this subsection may be civilly or criminally liable.

Comment

[Note to work group: let's consider word choice here when referring to the data. Should we talk only about recordings, when the data can also be a live feed/broadcast? Is the word data enough to capture everything possibly covered in the definition of monitoring device? Also – should we replace the word facility with person to be more broad?]

14. Facility Liability

There is broad 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.

Suggested 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.

15. Obstruction of Electronic Monitoring

[Note to workgroup: This language was in both SF 3437 and SF 3656 (the Omnibus bill), but we have not reviewed the issue. Let's review thoughts on this language and issue again as we have not discussed if there is general agreement here]

Suggested 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 legal 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 legal representative, or if consent has been withdrawn.

16. Resident Rights and Protections | Penalties

There is broad consensus that resident's ability to place a camera according to the provisions of this chapter should be protected. These sections outline two ways to do that.

First, the workgroup has broad consensus that there should be language preventing refusal to admit, retaliation, and preventing camera use. 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.⁹ There is no consensus as to how to approach retaliation in this particular scenario.

There is also **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.

⁹ The four other statutes include: [Forthcoming]

Suggested 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 health may impose a fine between \$50 and \$500 upon a finding of noncompliance with a correction order issued according to this paragraph.

Comment

Language introduced in 2018 included the phrase “retaliate or discriminate”. The workgroup largely agreed that the action needing prevention is retaliation and did not include the word discriminate.