

Hall of the House of Representatives
85th General Assembly - Regular Session, 2005
Amendment Form

Subtitle of House Bill No. 1392

"THE WILLIE MAE RYAN NURSING HOME RESIDENT PROTECTION ACT."

Amendment No. 2 to House Bill No. 1392.

Amend House Bill No. 1392 as engrossed, H2/21/05 (version: 02-21-2005 09:20):

Delete the Title and substitute the following:

"AN ACT TO AUTHORIZE USE OF ELECTRONIC MONITORING DEVICES IN LONG-TERM CARE FACILITY RESIDENT ROOMS; AND FOR OTHER PURPOSES."

AND

Delete the Subtitle and substitute the following:

"RESIDENT CARE MONITORING ACT."

AND

Delete everything after the Enacting Clause and substitute the following:

"SECTION 1. Arkansas Code Title 20, Chapter 10 is amended to add an additional subchapter to read as follows:

"20-10-2001. Title.

This subchapter shall be known and may be cited as the "Resident Care Monitoring Act."

20-10-2002. Definitions

As used in this subchapter:

(1) "Facility" means a long-term care facility which is required to be licensed under § 20-10-204;

(2)(A) "Monitoring device" means a video or audio device installed in the room of a resident which acquires visual images, activity, or sounds occurring in the room.

(B) "Monitoring device" includes video surveillance cameras, but does not include a still camera or any device used for the nonconsensual interception of wire or electronic communications;

(3) "Office" means the Office of Long-Term Care of the Division of Medical Services of the Department of Human Services;

(4) "Resident" means a person who is a resident of a facility;
and

(5) "Roommate" means a resident who occupies the same room as



the resident who has a monitoring device.

20-10-2003. Immunity of office or facility

(a) For purposes of this subchapter, the placement and use of a monitoring device in the room of a resident is considered to be covert if:

(1) The placement and use of the device is not open and obvious; and

(2) The facility is not informed about the device by the resident, by a person who placed the device in the room, or by a person who is using the device.

(b) The office and the facility may not be held civilly liable in connection with the covert placement or use of a monitoring device in the room of a resident.

20-10-2004. Required form on admission.

The office by rule shall prescribe a monitoring device information form that must be completed and signed on a resident's admission to a facility by or on behalf of the resident. The form must state:

(1) That a person who places a monitoring device in the room of a resident or who uses or discloses a tape or other recording made by the device may be criminally or civilly liable for any unlawful violation of the privacy rights of another;

(2) That a person who covertly places a monitoring device in the room of a resident or who consents or acquiesces in the covert placement of the device in the room of a resident has waived any privacy right the person may have had in connection with images or sounds that may be acquired by the device;

(3) That a guardian or legal representative who uses or operates a monitoring device on behalf of a facility resident is subject to criminal penalties if that person knowingly fails to notify the facility administrator or designated agent within twenty-four (24) hours of viewing or listening to a tape or recording created by a monitoring device that the guardian or legal representative reasonably believes constitutes evidence of resident maltreatment; and

(4) The basic procedures that must be followed to request a monitoring device.

20-10-2005. Monitoring device – Who may request.

(a) If a resident has capacity to request a monitoring device and has not been judicially declared to lack the required capacity, only the resident may request a monitoring device, notwithstanding the terms of any durable power of attorney or similar instrument.

(b) If a resident has been judicially declared to lack the capacity required for taking an action such as requesting a monitoring device, only the guardian of the person of the resident may request a monitoring device under this subchapter.

(c)(1) If a resident does not have capacity to request a monitoring device but has not been judicially declared to lack the required capacity, only the legal representative of the resident may request a monitoring device under this subchapter.

(2) The resident's physician shall make the determination regarding the resident's incapacity to request a monitoring device, and shall

record the determination in the resident's medical record.

(3) When the resident's physician determines the resident lacks capacity to request a monitoring device, a person from the following list, in order of priority, may act as the resident's legal representative for the limited purpose of requesting a monitoring device:

(A) An attorney-in-fact authorized by the terms of a valid durable power of attorney to make health care decisions on behalf of the resident;

(B) In the case of an unmarried patient under the age of eighteen (18), the parents of the patient;

(C) The patient's spouse;

(D) The patient's adult child or, if there is more than one (1), then a majority of the patient's adult children participating in the decision;

(E) The parents of a patient over the age of eighteen (18);

(F) The patient's adult sibling or, if there is more than one (1), then a majority of the patient's adult siblings participating in the decision;

(G) Persons standing in loco parentis to the patient; or

(H) A majority of the patient's adult heirs at law who participate in the decision.

20-10-2006. Monitoring device--Form of request -- consent of other residents in room.

(a) A resident or the guardian or legal representative of a resident who wishes to install or use a monitoring device in the resident's room must make the request to the facility on a form prescribed by the office.

(b) The form prescribed by the office shall comply with all requirements for the release of protected health information under the Health Insurance Portability and Accountability Act of 1996.

(c) The form prescribed by the office must require the resident or the resident's guardian or legal representative to:

(1) Release the facility from any civil liability for a violation of the resident's privacy rights in connection with the use of the monitoring device; and

(2) Obtain the consent of the resident's roommate(s), using a form prescribed by the office, if the resident resides in a multiperson room.

(d) Consent under Subsection (c)(3) may be given only by:

(1) The resident's roommate or roommates;

(2) The guardian of a person described by subsection (d)(1), if the person has been judicially declared to lack the required capacity; or

(3) The legal representative who under § 20-10-2005(c)(3) may request a monitoring device on behalf of a person described in subsection (d)(1) of this section.

(e) The resident or the guardian or legal representative of a resident may withdraw a request or consent to the use of a monitoring device at any time.

(f) The form prescribed by the office must condition the consent of the resident's roommate on the roommate also releasing the facility from any civil liability for a violation of the roommate's privacy rights in connection with the use of the electronic monitoring device.

(g) The resident's roommate may:

(1) When the monitoring device is a video surveillance camera, condition consent on the camera being pointed away from the consenting resident;

(2) Condition consent on the use of an audio monitoring device being limited or prohibited; and

(3) Withdraw consent to the use of a monitoring device at any time.

(h) If a monitoring device is being used in the room of a resident and another resident is moved into the room who has not yet consented to the use of a monitoring device, use of the monitoring device must cease until the new resident has consented in accordance with this section.

(i) The office may adopt rules prescribing the place or places that a form signed under this section must be maintained and the period of which it must be maintained.

(j) Use of a monitoring device:

(1) May not commence until all request and consent forms required by this section have been completed and returned to the facility;

(2) Must be conducted in accordance with any limitation placed on the monitoring as a condition of the consent given by or on behalf of any roommate of the resident; and

(3) Must cease upon the withdrawal of consent by the resident or the resident's guardian or legal representative or upon the withdrawal of the consent of the roommate or the roommate's guardian or legal representative.

20-10-2007. Monitoring device – General provisions.

(a) A resident shall have the option of requesting a monitoring device at any time.

(b)(1) A facility shall accommodate the request of a resident or the guardian or legal representative of a resident to use a monitoring device upon satisfaction of the requirements of § 20-10-2006, and if the installation or operation of the monitoring device does not place an undue burden on the facility.

(2) The office shall promulgate rules defining what constitutes an "undue burden" for purposes of this section.

(c) A resident or the guardian or legal representative of a resident who uses a monitoring device shall post and maintain a conspicuous notice at the entrance of the resident's room. The notice must state that a monitoring device is in use in that room, and must specify whether the device monitors visual activity, auditory activity, or both.

(d) The resident or the resident's guardian or legal representative must pay for all costs associated with the installation, maintenance, and operation of the monitoring device.

(e) The facility may require that installation and use of a monitoring device be conducted in a manner that is safe for residents, employees, or visitors who may be moving about the room.

(f) The monitoring device shall be installed and operated in plain view.

(g)(1)(A) The resident or the guardian or legal representative of a resident who requests a monitoring device must, when any sound, image, or other information acquired by a monitoring device is transmitted over an electronic communications network, implement reasonable technical security

measures to guard against unauthorized access.

(B) The office shall establish guidelines for technical security measures to guard against unauthorized access.

(2) A facility may not be held civilly liable in connection with any unauthorized access to a communications network containing sounds, images, or other information acquired by a monitoring device, or any subsequent unauthorized use or disclosure resulting from the unauthorized access.

(h) A facility may, but is not required to, place a resident in a different room to accommodate a request to install or use a monitoring device.

20-10-2008. Use of a tape or recording in a judicial or administrative proceeding or by the office.

(a) No court or administrative agency, nor the office, may admit into evidence a tape or recording created through the use of a monitoring device, including covert monitoring devices, or take or authorize action based on the tape or recording unless:

(1) If the tape or recording is a video tape or recording, the tape or recording shows the time and date that the events acquired on the tape or recording occurred;

(2) The contents of the tape or recording are continuous, and have not been edited or artificially enhanced; and

(3) If the contents of the tape or recording have been transferred from the original format to another technological format, the transfer was done by a qualified professional and the contents of the tape or recording were not altered.

(b)(1) A facility shall not be required to disclose a tape or recording to the office unless the office requests to view or copy a tape or recording in connection with an investigation into allegations of resident maltreatment.

(2) Any request by the office to view or copy a tape or recording in connection with an investigation into allegations of resident maltreatment shall be limited to the resident who is the subject of the allegations and to the time period during which the maltreatment is believed to have occurred.

20-10-2009. Use of tape or recording created by a monitoring device in civil action against a facility.

No tape or recording created by a monitoring device may be admitted or used in a civil action against a facility, owner, or management company unless the facility, owner, or management company seeks to admit or use the tape or recording.

20-10-2010. Request by facility or facility employee for copies of tapes or recordings.

(a) Upon written request by a facility, a person in possession of tapes or recordings created by a monitoring device installed in that facility shall provide a copy at the facility's expense.

(b) Upon written request by a facility employee accused of maltreating a resident, the person in possession of tapes or other recordings of the resident created by a monitoring device installed in that facility shall

provide a copy to the facility employee at that employee's expense.

(c) A person who provides a copy of a tape or recording to a facility or employee in accordance with subsection (a) or (b) shall also provide written certification that the copy meets the requirements of § 20-10-2008(a).

(d) A person in possession of tapes or other recordings of the resident created by a monitoring device installed in a facility shall, prior to erasing, obliterating, or otherwise disposing of a tape or recording, notify the facility in writing and permit the facility to purchase a copy of the tape or recording.

20-10-2011. Reporting of suspected maltreatment.

(a) For purposes of the duty to report resident maltreatment under § 5-28-203, no facility employee shall be deemed to have reasonable cause to suspect resident maltreatment by virtue of possession of a tape or recording created by a monitoring device unless:

(1) The employee has independent knowledge of the alleged maltreatment; or

(2) The employee actually views the tape or recording and reasonably believes that maltreatment has occurred; or

(b)(1) A guardian or legal representative who uses or operates a monitoring device on behalf of a facility resident shall, within twenty-four (24) hours of viewing or listening to a tape or recording created by a monitoring device that the guardian or legal representative reasonably believes constitutes evidence of resident maltreatment, notify the facility administrator or that person's designated agent.

(2) For purposes of the duty to report suspected adult maltreatment in accordance with this section, a guardian or legal representative who uses or operates a monitoring device on behalf of a facility resident is considered to have viewed or listened to a tape or recording created by the monitoring device on or before the 30th day after the date the tape or recording is created.

(3) A guardian or legal representative who knowingly fails to notify the facility administrator or designated agent in the time and manner provided in this subsection is guilty of a violation, and shall be punished as provided by law.

20-10-2012. Criminal acts.

(a) A person who intentionally hampers, obstructs, tampers with, or destroys a monitoring device installed in a resident's room in accordance with this subchapter or a tape or recording made by the device is guilty of a Class A misdemeanor;

(b) A person who uses or discloses a tape or recording created by a monitoring device without the consent of the resident depicted in the tape or recording or that resident's guardian or legal representative is guilty of a Class A misdemeanor, unless the tape is used or disclosed under the following circumstances:

(1) For health care operations, as defined in the Health Insurance Portability and Accountability Act of 1996;

(2) For public health activities, as described in the Health Insurance Portability and Accountability Act of 1996;

(3) For health oversight purposes, as described in the Health

Insurance Portability and Accountability Act of 1996; or

(4) To report suspected abuse, neglect, or maltreatment to law enforcement officials, the office, Adult Protective Services, or other government authority authorized by law to receive reports of abuse or neglect.”

The Amendment was read _____

By: Representative Bright

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Chief Clerk