Stricter Scrutiny, Reporting and Enforcement of Elder Abuse Is on Its Way Through Elder Justice Act

By Karen R. Palmersheim and Tammy M. Ward, Locke Lord Bissell & Liddell LLP

Although Congress declared elder abuse to be a national concern during congressional hearings in the 1970s, Congress did not take significant action to address elder abuse until passing the Elder Justice Act of 2009 (EJA) in the Patient Protection and Affordable Care Act (PPACA).[1] The EJA brings forth the most comprehensive effort to curb elder abuse to date and is elevating the issue of elder justice to the national spotlight. The EJA provides for spending hundreds of millions of dollars to promote awareness, education, prevention, reporting and enforcement of elder abuse. The EJA also creates strict self-reporting requirements on long-term care facilities. Facilities that do not immediately report any reasonable suspicion of elder abuse will be subject to a $200,000 or $300,000 fine per incident. With an overall goal of assuring that adequate public-private infrastructure and resources exist to combat elder abuse, neglect and exploitation, the EJA could significantly increase the risk of elder abuse lawsuits and regulatory enforcement costs for long-term care providers. Consequently, the EJA could prove costly for long-term care providers. Because the EJA does not specify an effective date its provisions became effective upon the PPACA's enactment, which was March 23, 2010.

Application of the EJA

The EJA focuses on protecting "elders" (defined as individuals age 60 years or older) receiving long-term care services.[2] The EJA broadly defines "long-term care" to mean the supportive and health services specified by the Secretary of the U.S. Department of Health and Human Services (HHS) for individuals who need assistance because of a loss of capacity for self-care due to illness, disability or vulnerability. The EJA further defines "loss of capacity for self-care" to mean an inability to engage in one or more activities of daily living, including eating, dressing, bathing, management of one's financial affairs and other activities the Secretary determines appropriate. The EJA vaguely defines a "long-term care facility" to mean a residential care provider that arranges for, or directly provides, long-term care. The EJA references nursing and skilled nursing facilities but unlike similar definitions already used in federal law, such as the Older Americans Act, the EJA does not specify what types of long-term care providers fall under the definition. In addition, the EJA affects caregivers providing supportive service in any setting, regardless of whether the caregiver is a family member, provides the services on behalf of a family member or public or private agency, organization or institution, or is compensated. The EJA also regulates conduct of fiduciaries, which could include an elder's trustee, a guardian, a conservator, an executor or an agent under a financial power of attorney or healthcare power of attorney.

The EJA targets activities including (1) "abuse" (the "knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm"); (2) "neglect" ("the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an elder" or self neglect); and (3) "exploitation" (the fraudulent or illegal, unauthorized or improper act or process of an individual, such as a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit or gain that deprives an elder of access to or use of benefits, resources, belongings or assets).[3]

Self-Reporting Elder Abuse

One of the EJA's most pressing aspects is its requirement for long-term care facilities receiving at least $10,000 the preceding year in federal funds to *self report* instances of elder abuse. Such entities are required to report to the Secretary and one or more law enforcement official "any reasonable suspicion" of a crime against any individual who is a resident of, or is receiving care from, the facility.[4] If the suspicion results in serious bodily injury, the suspicion shall be reported "immediately, but not later than two hours after forming the suspicion."[5] If the suspicion does not result in serious bodily injury, the suspicion must be reported within 24 hours after forming the suspicion.[6] Not only must the reporting be done immediately, but the fines for failing to do so are significant—$200,000, or, alternatively, $300,000 if the violation exacerbates the harm to the victim or results in further harm.[7] An owner, operator employee, manager, agent or contractor of a long-term care facility that is subject to the self reporting requirement also could lose the right to participate in any federal healthcare program.[8] In assessing fines, the Secretary may take into account the financial burden on providers with underserved populations.[9]

The EJA also prohibits long-term care facilities from retaliating against an employee for making a report, causing a report to be made, or for taking steps to make a report. Retaliation includes discharge, demotion, suspension, threats, harassment, denial of a promotion or other employment-related benefit, or any other manner of discrimination against an employee in the terms or conditions of employment.[10] Long-term care facilities also may not retaliate against a nurse by filing a complaint or report with a state professional disciplinary agency. If a long-term care facility does improp-

erly retaliate against an employee, it will be subject to a civil monetary penalty of up to $200,000, or the Secretary of HHS may exclude it from participation in any federal healthcare program for a period of two years. Each long-term care facility must conspicuously post a sign specifying these employee rights.[11] The sign shall include a statement that an employee may file a complaint against the facility for violating reporting provisions and must include information regarding how to file the complaint.[12]

The EJA does not define "reasonable suspicion," although it is typically a low threshold of suspicion—based on some fact and more than a mere hunch, but far from certainty. For example, California's statutory scheme requiring reporting for elder abuse defines "reasonable suspicion" as "an objectively reasonable suspicion that a person would entertain, based on facts that would cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to report abuse."[13] Such a standard is not only easily met, but subject to interpretation. Long-term care facilities would be wise to ensure they have in place internal policies, procedures, and training so that employees understand when the duty to report arises and the strict reporting deadlines to avoid potentially serious consequences. The EJA does not specify an effective date for this section, which is presumably effective upon the PPACA's enactment.

The Council and Advisory Board

In order to expand the infrastructure for supporting elder abuse protections, the EJA establishes the Elder Justice Coordinating Council (Council) to make recommendations relating to elder abuse, neglect and the exploitation of crimes against elders to the HHS Secretary, the Department of Justice, and other federal, state and local agencies and private entities.[14] The Council shall meet twice a year and, every two years, submit to Congress a report that describes the activities of the Council and recommends legislation, model laws or other action as the Council sees appropriate.[15]

The EJA also establishes an Advisory Board "to create short-and long-term multidisciplinary strategic plans for the development of the field of elder justice" and to make recommendations to the Council.[16] The Advisory Board shall establish multidisciplinary panels to address and develop consensus on subjects relating to improving the quality of long-term care and will examine research and data and identify best practices.[17] The Advisory Board will submit to the Council and Congress a report on the status of federal, state and local public and private elder justice activities, and recommendations regarding elder justice programs, research, training, services, practice, enforcement, and coordination regarding elder justice efforts and activities relating to adult fiduciary systems. The Advisory Board also will submit recommendations for specific modifications and regulations needed in federal and state laws or for programs, research, and training "to enhance prevention, detection, and treatment (including diagnosis) of, intervention in (including investigation of) and prosecution of elder abuse, neglect, and exploitation."[18]

The EJA brings forth the most comprehensive effort to curb elder abuse to date and is elevating the issue of elder justice to the national spotlight.

Finally, the EJA requires the Secretary to promulgate guidelines to assist researchers working in the area of elder abuse, neglect, and exploitation with issues relating to human subject protections, without specifics as to the types of regulations that are to be promulgated.[19]

Support for Elder Abuse, Neglect and Exploitation Forensic Centers

In order to fight the exploitation of elders, the EJA provides the Secretary of HHS with $26 million in grants through 2014 for the establishment and operation of both stationary and mobile forensic centers, to develop expertise and provide services relating to elder abuse, neglect and exploitation.[20] Four grants will be awarded to higher education institutions to establish and operate stationary forensic centers and six grants will be awarded to entities that will establish and operate mobile forensic centers.[21] Grant funds shall be used to (1) develop forensic markers that would determine whether abuse, neglect, or exploitation occurred and whether a crime has been committed, conduct research and disseminate information; (2) provide medical and forensic evaluation, therapeutic intervention, victim support and advocacy, case review, and case tracking, as well as to collect evidence of elder abuse, neglect and exploitation; and (3) in coordination with the Attorney General, use data made available by grant recipients to develop the capacity of geriatric healthcare professionals and law enforcement to collect forensic evidence, including forensic evidence relating to a potential determination of elder abuse, neglect, or exploitation.[22]

Protecting Against Elder Abuse in the Long-Term Care Setting

The Secretary also will establish mechanisms for incentivizing individuals to train and seek employment in long-term care. Grants will be available to entities to offer, and financially

reward employees to participate in continuing training and certification.[23] Grant funds also shall be used to provide training and assistance with developing policies, programs and methods to establish better performance, increased motivation and the cultivation of values that will result in better long-term care.[24]

Additional grants will be available to long-term care facilities to offset costs related to the implementation of electronic health record (EHR) technology to improve patient safety and reduce adverse events and healthcare complications resulting from medication errors.[25] Funds from the grants may be used for electronic improvements, such as obtaining or making improvements to computers and computer software, or for education and training.[26] The Secretary also will establish electronic standards for the exchange of clinical data by long-term care facilities.[27] In order to carry out these provisions, the EJA appropriates $67.5 million through 2014.

Adult Protective Services Functions and Grant Programs

State and local adult protective services programs that investigate reports of abuse, neglect and exploitation of elders also will be eligible to receive additional grant funding under the EJA.[28] Funds may be used by state and local units of government to conduct demonstration programs that test: (1) training modules developed for the purpose of detecting or preventing elder abuse; (2) methods to detect or prevent financial exploitation and elder abuse; (3) whether training on elder abuse forensics enhances the detection of abuse by employees of state or local government; and (4) any other related matters. The Secretary will work with such programs to collect and disseminate data, develop best practices and offer training, conduct research, and otherwise provide technical assistance for the provision of adult protective services.[29] The EJA authorizes a significant amount of spending to carry out these provisions. The EJA authorizes $19 million to be spent through 2014 for the adult protective services offices.[30] Grants will be issued to enhance adult protective services provided by states and local governments in the amount of $400 million through 2014.[31] Another $100 million in grant money shall be used to conduct demonstration programs to test training modules, methods to detect financial exploitation and elder abuse.[32]

Long-Term Care Ombudsman Grants and Training

The EJA also provides grants to entities for improving state long-term care ombudsman programs that respond to and resolve complaints about abuse and neglect, conduct pilot programs, and provide support for ombudsman programs.[33] The Secretary shall also establish programs to provide and improve ombudsman training.[34] The EJA authorizes $72.5 million in appropriations for ombudsman grants and training through 2014.[35]

One of the EJA's most pressing aspects is its requirement for long-term care facilities receiving at least $10,000 the preceding year in federal funds to self report instances of elder abuse.

Risk and Liability Provisions for Long-Term Care Facilities

The EJA does not create a private right of action for violation of its provisions. However, all 50 states have some form of elder abuse protection laws, which may provide for punitive or trebled damages and the award of attorneys' fees to a successful plaintiff. Worse, due to dramatically increased litigation against nursing home providers in the 1990s, many insurance carriers have left the market, leaving nursing home facilities either without insurance, self-insured, or with less desirable coverage through surplus lines carriers.[36]

The EJA's enactment will likely lead to more liability exposure for long-term care providers due to the increased detection, awareness, and enforcement of elder abuse. Additionally, the EJA will spend $12 million each year through 2014 to create a National Training Institute for federal and state surveyors, to improve the training of surveyors who investigate allegations of abuse, neglect and misappropriation of property.[37] A grant for $5 million also will be available to design and implement complaint investigation systems to increase response time and improve collaboration between authorities and involved parties.[38] Such initiatives would be expected to cause increased enforcement activity against the long-term care industry, which could expose providers to significantly more state and federal penalties.

Final Thoughts

Long-term care facilities must begin reviewing, improving and implementing polices and procedures and staff training methodology for detecting and reporting elder abuse in a timely manner. The EJA's creation of infrastructure and financial support for anti-elder abuse programs will inevitably lead to increased elder abuse regulatory enforcement and elder abuse litigation. While the EJA honorably aims to prevent elder

abuse, neglect and financial exploitation, its financial impact on long-term care facilities will likely be significant. C

About the Authors

Karen R. Palmersheim
(kpalmersheim@lockelord.com) is a Partner in the Los Angeles, CA, office of Locke Lord Bissell & Liddell LLP and a member of AHLA. She represents healthcare entities, insurers and other companies in complex business and reimbursement litigation, class actions and related regulatory matters.

Tammy M. Ward
(tward@lockelord.com) is an attorney in the Austin, TX, office of Locke Lord Bissell & Liddell LLP and a member of AHLA. She focuses on transactional, regulatory and administrative health law issues.

ENDNOTES

1 Pub. L. No. 111-148, at Title VI, Subtitle H, Sections 6701-6703. This article's citations to the sections refer to the Elder Justice Act sections (2011-2046) identified in Section 6703 of the PPACA, which will be codified in Title XX of the Social Security Act at 42 U.S.C. § 1397 *et seq*.
2 Section 2011(5).
3 Section 2011(8), 2011(16), 2011(1).
4 Section 2046(b).
5 Section 2046(b)(2).
6 *Id*.
7 Section 2046(c).
8 *Id*.
9 Section 2046(c)(4).
10 Section 2046(d).
11 Section 2046(d)(3).
12 *Id*.
13 Cal. Welf. & Inst. Code § 15610.65.
14 Section 2021.
15 Section 2021(f).
16 Section 2022(a).
17 Section 2022(f)(2).
18 Section 2022(f)(3).
19 Section 2023(a).
20 Section 2031(a), (f).
21 Section 2031(b) and (c).
22 Section 2031(d).
23 Section 2041(a)(2).
24 Section 2041(a)(3).
25 Section 2041(b).
26 Section 2041(b)(2).
27 Section 2041(c).
28 Section 2042(a).
29 *Id*.
30 *Id*.
31 Section 2042(b).
32 Section 2042(c).
33 Section 2043(a).
34 Section 2032(b).
35 Section 2043(a) and (b).
36 Brian Burwell, David Stevenson, Eileen Tell, Michael Schaefer and Thomson Medstat, *Recent Liability Trends in the Nursing Home Liability Insurance Market, prepared for Office of Disability*, Aging and Long-Term Care Policy, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, June 1, 2006, at p. 1.
37 Section 2046(b)(1).
38 Section 2046(b)(2).

AHLA's offices with be closed on Monday September 6, 2010 in observance of Labor Day.

Health care regulations are
COMPLEX.
Our goal is
SIMPLE:
to help you build better cases that lead to better outcomes.

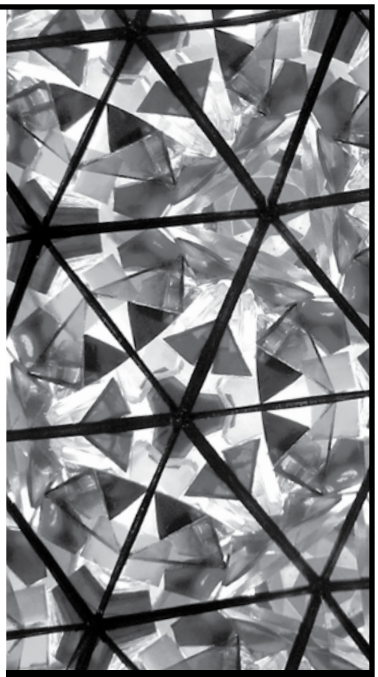
Coding Compliance Solutions is uniquely qualified to provide a variety of health care compliance services to attorneys.

Our ability to review and interpret complex clinical data and relate it to the myriad of complicated regulations is unparalleled.

The depth of our experience in health care coupled with our extensive knowledge of the regulatory environment, makes Coding Compliance Solutions an ideal resource.

For more information, please contact our president, Georgeann Edford at (800) 832-4144.

www.codingcompliance.com



coding | Compliance solutions
YOUR PARTNER FOR HEALTH CARE CONSULTING