

**EMPLOYEE NOTICE –**

**Obligation to Report Suspected Crimes Under the Federal Elder Justice Act**

Section 6703(b) (3) of the Patient Protection and Affordable Care Act (ACA), in part, amends Title XI of the Social Security Act (the Act) by adding a new section 1150B. Under Section 1150B, the Elder Justice Act (EJA) requires long-term care facilities that receive at least \$10,000 in federal funds under the Act during the preceding year to annually notify each covered individual of their obligation to report to the secretary (now assigned to the State Survey Agency) and at least one local law enforcement entity “any reasonable suspicion of a crime,” as defined by local law, committed against an individual who is a resident of, or is receiving care from, the facility.

**WHO IS A “COVERED INDIVIDUAL”?**

A “covered individual” is an owner, operator, employee, manager, agent or contractor of this facility.

**WHAT IS “REASONABLE SUSPICION OF A CRIME”?**

“Reasonable suspicion of a crime” is not defined in Section 1105B, and the Centers for Medicare and Medicaid Services (CMS) has not issued any regulation, guidance or further information on this term. The Tennessee Health Care Association (THCA) has discussed this issue with the Tennessee Department of Health (TDH) and believes that individuals may use the following test as a guide for what is to be reported:

***Reasonable Suspicion:*** “Reasonable suspicion” means that there are sufficient, identified and undisputed factual details to allow an ordinary person similarly situated and in the same circumstances to conclude that a crime had been committed. It is not a violation of this reporting requirement when a “covered individual” fails to report a “suspected crime” because either they 1) were not aware and under the circumstances could not have been aware that such actions constituted a crime, and/or 2) did not have sufficient knowledge of or belief in the accuracy or veracity of the factual information available to them to determine what had occurred.

**WHAT IS A “CRIME” THAT MUST BE REPORTED?**

Section 1150B (b) (1) of the Act provides that a “crime” is defined by law of the applicable political subdivision where a long-term care facility is located. THCA has discussed this issue with TDH and believes that individuals may use the following as a guide for what is to be reported:

***Crime:*** “Crime” for reporting purposes under Section 1150B of the Act, is defined as any intentional act by an individual that constitutes abuse or neglect of a resident or individual receiving care in this facility, or misappropriation of the property of a resident or individual receiving care in this facility, and that is punishable as criminal act under state law.

**WHAT MUST EACH COVERED INDIVIDUAL DO?**

If a covered individual observes events or becomes aware of information that gives him the reasonable suspicion that a crime has occurred against a resident or individual receiving care in this facility, he **MUST** notify **BOTH** –

- 1) **The State Survey Agency (SSA).** You may use a form developed by TDH and available from the facility to make your report. Multiple individuals can make a joint report.
- 2) **A Local Law Enforcement Entity.** The covered individual is responsible for reporting to at least one (1) local law enforcement entity. The facility has identified [LOCAL SHERIFF OR POLICE] as one such entity, but you may report to any local law enforcement entity.

**HOW QUICKLY MUST YOU REPORT?**

- 1) Within **24 hours** (if there is not *serious bodily injury*) after forming your reasonable suspicion.
- 2) Within **2 hours** (if there is *serious bodily injury*) after forming your reasonable suspicion.

“*Serious bodily injury*” is an injury involving extreme physical pain; involving substantial risk of death; involving protracted loss or impairment of the function of a bodily member, organ or mental faculty; or requiring medical intervention such as surgery, hospitalization or physical rehabilitation. In the case of “criminal sexual abuse” which is defined as serious bodily injury/harm shall be considered to have occurred if the conduct causing the injury is relating to aggravated sexual abuse or relating to sexual abuse. (See CMS S&C: 11-30-NH.)

**REPORTING REQUIREMENTS FOR INDIVIDUALS**

- 1) When a *covered individual* has *reasonable suspicion of a crime* committed against a resident or individual receiving care in this facility of [FACILITY NAME], he must report the incident to TDH and *local law enforcement*.
- 2) A *covered individual* must report a *reasonable suspicion of a crime* to the state survey agency and at least one *local law enforcement* entity within a designated time frame by email, fax or telephone. [FACILITY NAME] has identified [LOCAL SHERIFF OR POLICE] as a local law enforcement entity. An individual does not need to determine which *local law enforcement* entity to report a *reasonable suspicion of a crime* but must report to at least one *local law enforcement* entity. This will meet the individual’s obligation to report.
- 3) If the report involves *serious bodily injury* to a a resident or individual receiving care in this facility, the staff member shall report the suspicion immediately, but not later than 2 hours after forming the suspicion.
- 4) If the reportable event does not result in *serious bodily injury*, the staff member shall report the suspicion not later than 24 hours after forming the suspicion.
- 5) An individual can use the facility form to report a *suspicion of a crime*. There is no requirement to use the form.
- 6) An individual may report the same incident as a single complaint or multiple individuals may file a single report that includes information about the suspected crime from each staff person using the facility form.
- 7) If, after a report is made regarding a particular incident, the original report may be supplemented by additional staff who become aware of the same incident. The supplemental information may be added to the form and must include the name of the additional staff along with the date and time of their awareness of such incident or suspicion of a crime. However, in no way will a single or multiple person report preclude an individual from reporting separately. Either an individual or joint report will meet the individual’s obligation to report.
- 8) Failure to truthfully report in the required time frames may result in disciplinary action by [FACILITY NAME], including up to termination.
- 9) As part of the responsibility of every employee’s obligation under [FACILITY NAME]’s abuse policy and 42 C.F.R. §483.13, the reporting individual must also report the *reasonable suspicion of a crime* to the <insert appropriate person. [NOTE: Facilities should determine the appropriate person within the facility for reporting a suspicion of a crime such as the staff’s supervisor, director of nursing (DON) or administrator].

**RETALIATION IS PROHIBITED**

This Facility may not retaliate against any individual who lawfully reports a reasonable suspicion of a crime under Section 1105B. This facility may NOT:

- 1) Discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee.

## EMPLOYEE NOTICE - SAMPLE

- 2) File a complaint or a report against a nurse or other employee with the state professional disciplinary agency because of lawful acts done by the nurse or employee, for making a truthful report or causing such a report to be made, or for taking steps in furtherance of making a truthful report pursuant to their responsibility under 1150B of the Act.

If you believe you have been the target of retaliation, you may file a complaint with TDH (the state survey agency).

### **PENALTIES FOR NOT REPORTING**

If a covered individual FAILS TO REPORT A REASONABLE SUSPICION OF A CRIME, he may be subject to a civil money penalty (CMP) of up to \$300,000 and the Department of Health and Human Services (HHS) may take action to exclude the individual from participation in any federal health care program. The facility provides this notice annually to each covered individual as required by the Section 1150B of the Act, as established by section 6703(b) (3) of the ACA.

You are required to acknowledge your receipt of this notice by signing the facility's attestation sheet for this purpose.

If you have any questions, the referenced guidance was issued June 17, 2011, by CMS. This letter, Federal S&C Letter No. 11-30-NH Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Act is available at <http://www.cms.gov/surveycertificationgeninfo/pmsr/itemdetail.asp?filterType=none&filterByDID=0&sortByDID=2&sortOrder=descending&itemID=CMS1248845&intNumPerPage=10>.

[WITH THE INITIAL NOTICE TO EMPLOYEES AND COVERED INDIVIDUALS, IT IS RECOMMENDED THAT THE FACILITY INCLUDE THE CMS S & C LETTER WITH THE NOTICE ITSELF.]