

**Indiana State Department of Health
Health Care Quality and Regulatory Commission**

Program Advisory Letter

**Reporting a Reasonable Suspicion of a Crime Against a Resident
of a Long Term Care Facility**

Program Advisory Letter
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Cancels: n/a
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Revised: n/a

Summary of Program Advisory Letter:

- This ISDH Program Advisory Letter is intended to assist Indiana health care facilities in implementation of new Federal requirements for the reporting of a reasonable suspicion of a crime against a resident. The Program Advisory Letter is based on the ISDH's understanding of the Federal regulation and subject to change based on further Federal guidance or interpretation.
- The reporting of reasonable suspicion of crimes requirement applies to each covered individual not the facility. It is the responsibility of each covered individual to ensure their individual reporting responsibility is fulfilled.
- If the events that cause the reasonable suspicion of a crime against a resident result in serious bodily injury, the report must be made immediately after forming the suspicion but not later than two hours after forming the suspicion. Otherwise, the report must be made not later than 24 hours after forming the suspicion.
- For most facilities, there will be two local law enforcement entities with responsibilities for investigation of potential criminal activity – the County Sheriff and local police agency (City Police Department or Town Marshal). An individual may therefore fulfill their reporting requirement by reporting to either of these local law enforcement entities. The ISDH encourages discussions between the facility and local law enforcement entities to determine a reporting process for that facility.
- The requirements are effective immediately. The ISDH expects included facilities to begin implementation and demonstrate continued progress towards complete implementation. ISDH surveyors will request facilities to show documentation of progress towards completion. The ISDH expects all included facilities to fully implement requirements by November 1, 2011.

Purpose

The purpose of this program advisory letter is to inform health care facilities about the implementation of new federal regulations requiring the reporting of reasonable suspicion of a crime in a long term care facility committed against a resident of a facility.

Background Information

Section 6703(b)(3) of the Patient Protection and Affordable Care Act, in part, amends Title XI of the Social Security Act by adding a Section 1150B. Section 6703(b)(3) is part of Subtitle H referred to as the *Elder Justice Act*. Section 1150B requires long term care facilities that receive at least \$10,000 in Federal funds under the Act [referring to the Social Security Act] during the preceding year to annually notify each covered individual of their obligation to report 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.

The Reporting Requirement and Process

What Facilities are Included in the Reporting Requirement

Covered individuals must timely report any reasonable suspicion of a crime against a resident of, or who is receiving care from, a long term care facility. The long term care facilities included in this reporting requirement are:

- Nursing facilities (NFs)
- Skilled nursing facilities (SNFs)
- Hospices that provide services in long term care facilities
- Intermediate Care Facilities for the Mentally Retarded (ICF/MR)

Who is Required to Report

The reporting of reasonable suspicion of crimes applies to each covered individual not the facility. A “covered individual” is defined at Section 1150B(a)(3) as each individual who is an owner, operator, employee, manager, agent, or contractor of such long term care facility.

The reporting of a reasonable suspicion of a crime is an individual responsibility. Because the reporting is a responsibility of the individual, the Centers for Medicare and Medicaid Services (CMS) recommends that the “facility” (such as administrator, director of nursing, or corporate compliance) not submit a report on behalf of the covered individuals. Should the administrator or other administrative staff have a reasonable suspicion of a crime, that individual is required to report on their own behalf.

Penalties for Failure to Report

Covered individuals are subject to civil money penalty and exclusion sanctions for failure to meet the reporting obligations of the statute. A covered individual who fails to report is subject to a civil money penalty of up to \$200,000 and may be excluded from participation in a Federal health care program. If by failing to report the individual exacerbates the harm to the victim or results in harm to another individual, the allowed civil money penalty is increased to up to \$300,000.

Timing of Reports

If the events that cause the reasonable suspicion result in serious bodily injury, the report must be made immediately after forming the suspicion but not later than two hours after forming the suspicion. If the events that cause the suspicion do not result in serious bodily injury, the individual shall report the suspicion not later than 24 hours after forming the suspicion.

Formation of a reasonable suspicion of a crime may occur at the time of the event or after the event giving rise to the reasonable suspicion. Covered individuals may form a reasonable suspicion of a crime at different times based on the same event. The formation of a reasonable suspicion is what triggers the reporting requirement.

Survey Agency Recommendations and Implementation:

- a. Surveyors will review submitted reports to determine whether the report was submitted in a timely manner.

Process for Reporting to the ISDH

There is no prescribed form for reporting a reasonable suspicion of a crime against a resident to the ISDH. While there is no required form for reporting, the ISDH requests that reports be submitted in writing via either fax or email when possible. Individuals may use the ISDH *Incident Report Form* or use their own form. The ISDH *Incident Report Form* is the same form used by facilities to report unusual occurrences or reportable incidents. The form has been updated to include reports of suspected crimes.

The following are ways to report reportable incidents, to include unusual occurrences or suspected crimes, to the ISDH:

1. Email the report to the ISDH

Email address for incident reports: unusual occurrences and reasonable suspicion of crime reports: incidents@isdh.in.gov

2. Fax the report to the ISDH

Fax number for incident / crime reports: (317) 233-7494

3. Call the ISDH

Complaint / incident report line: 1-800-246-8909 [staffed during state business hours and includes voicemail capacity]; or

Incident report line voicemail: (317) 233-5359

Regardless of the method of reporting, the following information should be included if applicable and known by the individual when reporting a reportable incident or suspected crime against a resident. The *Incident Report Form* may be used for this purpose.

- Facility name
- Facility address
- Facility city, state and zip
- Person making the report and their title
- Date and time of incident
- Residents involved, room number, age and diagnosis
- Staff involved, their title, and professional license or aide registry number
- Brief description of incident
- Type of injury/injuries
- Immediate action taken
- Preventative measures taken
- Type of report (choose one): Initial / Follow-up / Initial with Follow-up

Reporting to the Local Law Enforcement Agency

Regulations require covered individuals to report a reasonable suspicion of a crime directly to their law enforcement entity. The law specifically states “law enforcement entities for the political subdivision in which the facility is located” which suggests the local law enforcement entity. For most facilities, there will be two local law enforcement entities with responsibilities for investigation of potential criminal activity – the County Sheriff and local police agency (City Police Department or Town Marshal). An individual may therefore fulfill their reporting requirement by reporting to either of these local law enforcement entities.

The ISDH encourages discussions between the facility and local law enforcement entities to determine a reporting process for that facility. The two local law enforcement entities may wish to designate a single source for reporting and provide that contact information. Facilities should then provide that contact information to covered individuals.

The individual’s responsibility is to report a reasonable suspicion of a crime to the local law enforcement entity. It is up to the local law enforcement agency to then determine an appropriate criminal investigation. The facility and individual should cooperate and assist with the local law enforcement entity in any investigation subsequent to the reporting of a reasonable suspicion of a crime.

The ISDH has provided information about the reporting requirements to the Indiana Sheriffs' Association and the Indiana Association of Chiefs of Police. Those associations were in turn providing the information to their members throughout the state so that they are aware of the reporting requirement and anticipate communication from local health care facilities about a reporting process.

The ISDH notes that there are other law enforcement entities with local jurisdiction to include the local prosecutor, Indiana State Police and Indiana Office of Attorney General. The local prosecutor is generally not an entity with immediate response capability like local police or county sheriffs. The Indiana State Police and Indiana Office of Attorney General are generally considered to be state law enforcement entities and not located within the political subdivision of the location of the facility. The ISDH has provided information about the reporting requirements to the Indiana Office of Attorney General for coordination with state and local entities.

Survey Agency Recommendations and Implementation:

- a. The ISDH recommends that facilities post information in a common area for covered individuals providing contact information for the local law enforcement agency and state survey agency. The ISDH has prepared a template of such a notice. The template is attached to this Advisory Letter.

Multiple Reporting of Incidents

The law places the responsibility of reporting a reasonable suspicion of a crime against a resident on every covered individual. It is the responsibility of each covered individual to ensure their individual reporting responsibility is fulfilled. Even if an individual with a reasonable suspicion knows that a report of a suspected crime was submitted to the local law enforcement entity and state survey agency, the individual must either submit his or her own report or ensure that his or her report is accurately included as part of a multiple individual (joint) report.

While the covered individual maintains the ultimate responsibility for reporting, a single report may be submitted on behalf of multiple covered individuals. If an individual submits a report on their own behalf and other individuals, the report should include the names of all individuals for whom the report is being submitted. Each individual for whom the report is being submitted should have reviewed the report prior to submission to ensure that it contains complete and correct information based on that individual's observations. If an individual has additional information in addition to what is contained in the submitted report, that individual is responsible for submitting the additional information.

More than one covered individual may form a reasonable suspicion of a crime against a resident arising from the same incident. Each individual forming a reasonable suspicion must either submit his or her own report or ensure that his or her report is accurately included as part of a multiple individual report. The ISDH has no preference as to whether individual reports or a multiple individual reports are submitted. The ISDH intake system can

accommodate either. If reports are submitted individually rather than part of a joint report, the ISDH realizes that it will receive multiple reports arising from one incident. If individuals have significant different knowledge of an incident from other individuals, it may be easier for each individual to submit his or her own report. Some individuals may prefer to submit their own report regardless of the situation. Individuals should not be pressured to be a part of a multiple individual report.

Survey Agency Recommendations and Implementation:

- a. If the ISDH receives multiple reports on a single incident, the ISDH will process and investigate the allegation as a single complaint or incident.

Reporting of Retaliation by a Facility

The facility may not retaliate against an individual who lawfully reports a reasonable suspicion of a crime under Section 1150B. A long term care facility may not 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 against an employee in the terms and conditions of employment because of lawful acts done by the employee for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to the Act, or file a complaint or a report against a nurse or other employee with the appropriate state professional disciplinary agency because of lawful acts done by the nurse or employee for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to the Act.

To report retaliation by a facility against a covered individual for reporting a reasonable suspicion of a crime against a resident, the individual should report the incident to the ISDH using the same process as described above for the initial reporting of the suspicion of a crime.

Survey Agency Recommendations and Implementation:

- a. The ISDH will investigate any allegation of retaliation through its survey process.

Long Term Care Facility Responsibilities

In general, long term care facilities have three responsibilities under the requirements:

1. Notify covered individuals annually of their report obligations;
2. Not retaliate against an employee who makes a report; and
3. Post information about employee rights, including the right to file a complaint if a long term care facility retaliates against an employee who files a report.

The following is information and recommendations to long term care facilities concerning facility responsibilities:

1. **Determine Applicability:** Determine annually whether the facility received at least \$10,000 in Federal funds under the Act [referring to the Social Security Act] during the preceding fiscal year. A facility that received at least \$10,000 must comply with provisions of the Act.

Survey Agency Recommendations and Implementation:

- a. Facilities potentially included within this regulation must have documentation showing that the facility annually determine the applicability of the Act to the facility. Surveyors will review that documentation during a survey.
2. **Notify Covered Individuals:** The facility must annually notify each covered individual of that individual's reporting obligations described in Section 1150(B).

Survey Agency Recommendations and Implementation:

- a. A facility covered by this regulation must annually notify each covered individual of that individual's reporting obligations. The ISDH expects that notice to be directed to each covered individual. A general notice posted in the facility does not meet the requirement. The facility shall maintain documentation of the notice to each covered individual.
 - b. While not required to be completed at one time, facilities will likely desire to provide notice to all covered individuals around the same time each year. Facility procedures should indicate a plan for providing notice to covered individuals. Surveyors will review facility policy and procedure for notice and review documentation for adherence to the policy.
 - c. As new covered individuals are added to the facility's staff, facilities are expected to provide individual notice within a reasonable period of time after the individual begins work at the facility. The ISDH expects the notice to occur as part of the orientation process and no later than the conclusion of orientation.
3. **Post Conspicuous Notice:** The facility must conspicuously post, in an appropriate location, a notice for its employees specifying the employees' rights, including the right to file a complaint under this statute. The notice must include a statement that an employee may file a complaint with the ISDH against a long term care facility that retaliates against an employee as well as include information with respect to the manner of filing such a complaint.

Survey Agency Recommendations and Implementation:

- a. State surveyors will ensure during a survey that an appropriate notice has been posted. The notice must be easily legible. Surveyors will review the notice to ensure that it includes at a minimum the required information:
 - 1) Notice of requirement to report a reasonable suspicion of a crime in a long term care facility against a resident;
 - 2) Notice of who is required to report;
 - 3) Time requirements for reporting
 - 4) Employee’s right to file a complaint under this reporting provision against a facility that retaliates against the employee for filing a complaint or report.
 - b. The ISDH has not prescribed a specific notice to be posted in a facility. A facility may create its own notice. To assist facilities, however, the ISDH created a template of a notice that may be used by facilities to fulfill the notice requirement. The notice template is attached to this Advisory Letter.
 - c. The ISDH recommends that a facility post a notice with contact information as to where the report should be sent to include:

Indiana State Department of Health
Applicable Local Law Enforcement Entity or Entities

A template of such a notice is attached to this Advisory Letter.
 - d. The Notice must be provided in a “conspicuous” and “appropriate location”. The ISDH expects the Notice to be located in an area or areas frequently utilized by employees and others required to report. Surveyors will review the location during a survey to ensure appropriate posting.
4. **Coordinate with Law Enforcement:** The facility must coordinate with the facility’s State and local law enforcement entities to determine what actions are considered crimes in their political subdivision.

Survey Agency Recommendations and Implementation:

- a. The facility must provide training to covered individuals as to what actions are considered crimes in their political subdivision. The facility must show documentation of efforts to coordinate the reporting with the local law enforcement entity or entities. The facility may want to consider inviting local law enforcement agencies to assist with the training of covered individuals. The facility may also want to coordinate with the local law enforcement entity to establish a form and contact information for reporting.
5. **Review Adherence to Existing CMS and State Policies:** The facility should review existing facility protocols and procedures to ensure adherence to existing CMS and State policies and procedures for reporting incidents and complaints. For example, nursing homes are already required to have policies and procedures in place to report abuse, neglect or misappropriation of resident property.

Survey Agency Recommendations and Implementation:

- a. Surveyors will review existing facility policies and procedures for adherence to CMS and State policies and procedures for reporting incidents and complaints.

6. **Develop Policies and Procedures for Section 1150B:** The facility must develop and maintain policies and procedures that ensure compliance with Section 1150B, including the prohibition of retaliation against any employee who makes a report, causes a lawful report to be made, or takes steps in furtherance of making a lawful report pursuant to the requirements of the statute.

Survey Agency Recommendations and Implementation:

- a. Surveyors will review facility policies and procedures for policies and procedures that ensure compliance with Section 1150B. At the least, the ISDH would expect to see facility policies and procedures regarding:
 - i. A process for annually determining receipt of Federal funds in excess \$10,000
 - ii. A process for providing annual notice to covered individuals
 - iii. Evidence of a plan for training covered individuals
 - iv. Steps that a covered individual must take to make a report to the ISDH and local law enforcement when the covered individual forms a reasonable suspicion of a crime (when to report, what to report, who to report to)
 - v. Steps taken to coordinate with local law enforcement regarding reporting and determination of crimes
 - vi. Information on where the posting of notice to employees regarding employee rights to be free from retaliation for complying with the reporting requirement
 - vii. Prohibition of retaliation against an employee for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to the Act.
 - viii. Employment of an individual who has been determined to be excluded participation in any Federal health care program.

7. **Penalties Against a Facility for Non-compliance**

Long term care facilities are ineligible to receive Federal funds for any period that they employ an individual classified as an excluded individual under Sections 1150B(c)(10)(B) or 1150B(c)(2)(B) of the Act.

Long term care facilities are subject to civil money penalty and exclusion sanctions for retaliating against any employee who makes a lawful report, causes a lawful report to be made, or for taking steps in furtherance of making a lawful report pursuant to the statute.

If a facility fails to comply with any of the requirements of Section 1150B, the failure could lead to a determination on a certification survey that the facility did not comply with existing Federal certification requirements. Examples of potential deficiencies are discussed in the CMS Survey and Certification Letter 11-30-NH.

Effective Date and Implementation

CMS issued its Survey & Certification Letter 11-30-NH on June 17, 2011, with an immediate effective date. State survey agencies were to ensure that all appropriate staff members were fully informed within 30 days of the letter. The ISDH informed its surveyors and staff of the CMS letter and requirements. Additional training of surveyors on the requirements is expected to occur at a coming staff meeting.

The ISDH expects included facilities to immediately begin implementation and demonstrate continued progress towards complete implementation. ISDH surveyors will request facilities to show documentation of progress towards completion. The ISDH expects all included facilities to fully implement requirements by November 1, 2011. Surveying for these requirements will begin on November 1, 2011.

To assist in the implementation of the requirements, the ISDH has prepared a facility checklist with expected completion dates. The checklist is attached to this Advisory Letter.

Additional Information

The ISDH has updated its online *Reporting an Incident* Web page to reflect these changes and provide resources. The page is located at <http://www.in.gov/isdh/23638.htm>.

Questions about this program advisory letter may be addressed to:

Kim Rhoades
Director, Division of Long Term Care
Indiana State Department of Health
Email: krhoades@isdh.in.gov
Phone: 317-233-7289

Attachments

- A. Template of required notice to be posted in facility
- B. Template of reporting contact information to be posted in facility
- C. Requirement Implementation Checklist
- D. Questions and answers
- E. Incident Report Form