

Texas Health and Human Services Commission (HHSC)

Information Regarding Authorized Electronic Monitoring

A resident, or the resident's guardian or legally authorized representative, is entitled to conduct authorized electronic monitoring (AEM) under Health and Safety Code §247.003. To request AEM, you, your guardian, or your legally authorized representative, must:

- (1) complete the Request for Authorized Electronic Monitoring form (available from the facility);
- (2) obtain the consent of other residents, if any, in your room, using the Consent to Authorized Electronic Monitoring form (available from the facility); and
- (3) give the form to the facility manager or designee.

Who may request AEM?

- (1) The resident, if the resident has capacity to request AEM and has not been judicially declared to lack the required capacity.
- (2) The guardian of the resident, if the resident has been judicially declared to lack the required capacity.
- (3) The legally authorized representative of the resident if the resident does not have capacity to request AEM and has not been judicially declared to lack the required capacity.

Who determines if the resident does not have the capacity to request AEM?

The resident's practitioner will make the determination regarding the resident's capacity to request AEM. When the resident's practitioner has determined the resident lacks capacity to request AEM, a person from the following list, in order of priority, may act as the resident's legally authorized representative for the limited purpose of requesting AEM:

- (1) a person named in the resident's medical power of attorney or another advance directive;
- (2) the resident's spouse;
- (3) an adult child of the resident who has the waiver and consent of all other qualified adult children of the resident to act as the sole decision-maker;

(4) a majority of the resident's reasonably available adult children;

(5) the resident's parents; or

(6) the individual clearly identified to act for the resident by the resident before the resident became incapacitated or the resident's nearest living relative.

Who must consent to AEM?

(1) Any other resident residing in the room.

(2) The guardian of the other resident, if the resident has been judicially declared to lack the required capacity.

(3) The legally authorized representative of the other resident if the resident does not have capacity to sign the form but has not been judicially declared to lack the required capacity. The legally authorized representative is determined by following the procedure for determining a legally authorized representative, as stated above, under "Who determines if the resident does not have the capacity to request AEM?"

Can a resident be discharged or refused admittance for requesting AEM?

A facility may not refuse to admit an individual and may not discharge a resident because of a request to conduct AEM. If either of these situations occur, you should report the occurrence to the local office of Long-term Care Regulation, HHSC.

What about covert electronic monitoring?

A facility may not discharge a resident because covert electronic monitoring is being conducted by or on behalf of a resident. A facility attempting to discharge a resident because of covert electronic monitoring should be reported to the local office of Long-term Care Regulation, HHSC.

What is required if a covert electronic monitoring device is discovered?

If a covert electronic monitoring device is discovered by a facility and is no longer covert as defined in §553.3 of this chapter (relating to Definitions), the resident must meet all requirements for AEM before monitoring is allowed to continue.

Is notice of AEM required?

Anyone conducting AEM must post and maintain a conspicuous notice at the entrance to the resident's room. The notice must state that an electronic monitoring device is monitoring the room.

What is required for the installation of monitoring equipment?

The resident, or the resident's guardian or legally authorized representative, must pay for all costs associated with conducting AEM, including installation in compliance with life safety and electrical codes, maintenance, removal of the equipment, posting and removal of the notice, or repair following removal of the equipment and notice, other than the cost of electricity.

A facility may require an electronic monitoring device to be installed in a manner that is safe for residents, employees, or visitors who may be moving about the room. A facility may also require that AEM be conducted in plain view.

The facility must make reasonable physical accommodation for AEM, which includes providing:

- (1) a reasonably secure place to mount the video surveillance camera or other electronic monitoring device; and
- (2) access to power sources for the video surveillance camera or other electronic monitoring device.

If the facility refuses to permit AEM or fails to make reasonable physical accommodations for AEM, you should report the facility's refusal to the local office of Long-term Care Regulation, HHSC.

Are facilities subject to administrative penalties for violations of the electronic monitoring rules?

Yes. HHSC may assess an administrative penalty (see §553.751 of this chapter (relating to Administrative Penalties)) against a facility for each instance in which the facility:

- (1) refuses to permit a resident, or the resident's guardian or legally authorized representative, to conduct AEM;
- (2) refuses to admit an individual or discharges a resident because of a request to conduct AEM;
- (3) discharges a resident because covert electronic monitoring is being conducted by or on behalf of the resident; or
- (4) violates any other provision relating to AEM.

How does AEM affect the reporting of abuse and neglect?

Section 553.293 of this subchapter (relating to Abuse, Neglect, or Exploitation Reportable to HHSC by Facilities) requires facility staff to report abuse or neglect. If abuse or neglect has occurred, the most important thing is to report it. Abuse and neglect cannot be addressed unless reported.

For purposes of the duty to report abuse or neglect, the following apply:

- (1) A person who is conducting electronic monitoring on behalf of a resident is considered to have viewed or listened to a recording made by the electronic monitoring device on or before the 14th day after the date the recording is made.
- (2) If a resident, who has capacity to determine that the resident has been abused or neglected and who is conducting electronic monitoring, gives a recording made by the electronic monitoring device to a person and directs the person to view or listen to the recording to determine whether abuse or neglect has occurred, the person to whom the resident gives the recording is considered to have viewed or listened to the recording on or before the seventh day after the date the person receives the recording.
- (3) A person is required to report abuse based on the person's viewing of or listening to a recording only if an incident of abuse is indicated on the recording. A person is required to report neglect based on the person's viewing of or listening to a recording only if it is clear from viewing or listening to the recording that neglect has occurred.
- (4) If abuse or neglect of the resident is reported to the facility and the facility requests a copy of any relevant recording made by an electronic monitoring device, the person who possesses the recording must provide the facility with a copy at the facility's expense. The cost of the copy cannot exceed the community standard.
- (5) A person who sends more than one recording to HHSC must identify each recording on which the person believes an incident of abuse or evidence of neglect may be found. Tapes or recordings should identify the place on the recording that an incident of abuse or evidence of neglect may be found.

What is required for the use of a recording by an agency or court?

- (a) Subject to applicable rules of evidence and procedure, a recording created through the use of covert monitoring or AEM may be admitted into evidence in a civil or criminal court action or administrative proceeding.
- (b) A court or administrative agency may not admit into evidence a recording created using covert monitoring or AEM or take or authorize action based on the recording unless:
 - (1) the recording shows the time and date the events on the recording occurred, if the recording is a video recording;
 - (2) the contents of the recording have not been edited or artificially enhanced; and
 - (3) any transfer of the contents of the recording was done by a qualified professional and the contents were not altered if the contents have been transferred from the original format to another technological format.

Are there additional provisions of the law?

A person who places an electronic monitoring device in the room of a resident or who uses or discloses a recording made by the device may be civilly liable for any unlawful violation of the privacy rights of another.

A person who covertly places an electronic monitoring device in the room of a resident or who consents to 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.

Signature of Resident/Person Signing of Behalf of Resident Date