



To: Chairman Alford, and Members, House Children and Seniors Committee
From: Rachel Monger, Vice President of Government Affairs
Date: February 14, 2017

Testimony in Opposition to House Bill 2232

Thank you, Chairman and Members of the Committee. I am Rachel Monger, Vice President of Government Affairs for LeadingAge Kansas, the state association for not-for-profit aging services. We have 150 members across Kansas, which include not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living, homes plus, housing, low-income housing, home health agencies, home and community based service programs, PACE and Meals on Wheels. Our members serve more than 25,000 elders each day.

HB 2232 is based upon a very similar law enacted more than fifteen years ago in Texas. We believe that if Kansas is to have an electronic monitoring statute for adult care homes, it should adhere strongly to the Texas law. The five other states that have passed electronic monitoring laws over the last decade have also closely based their laws on the Texas model.

We are testifying to day in opposition to House Bill 2232 in its current form. We have attached to our testimony amendments that we believe are essential in resolving the practical, legal and ethical concerns contained in the proposed law. Below we outline each amendment, and the reasoning behind our suggestion.

Amendment #1

Each adult care home shall require that a resident, or such resident's guardian or legal representative, who conducts electronic monitoring to post a conspicuous notice at the entrance to the resident's room stating that the room is being monitored electronically.

This notification and signage requirement can be found in nearly every state that has adopted electronic monitoring laws and regulations. That is not a coincidence. Giving notice to every person who enters the resident room being monitored avoids all manner of legal and ethical problems. It is also a strong deterrent meant to protect the monitored resident from any abuse before it happens.

Criminal and civil implications. There are some complicated legal arguments around breach of privacy and one party consent laws when it comes to recording interactions between a resident who has consented to recordings and a visitor or staff member interacting with them. What is without a doubt a crime is recording any interactions between two people not directly interacting with a resident in the room. This includes conversations between two or more staff persons, and conversations between family members and visitors. What makes the crime worse is recording, without notice or permission, interactions between friends and loved ones of *roommates*.

Along with criminal violations, failure to notify persons that they are being recorded could result in civil actions for invasion of privacy (intrusion upon seclusion), as well as compromise of legally privileged conversations with attorneys, therapists and members of the clergy.

Even if all legal arguments could be set aside in the situation of secretly recording people without their knowledge or permission, there is the simple fact that: *just because it's legal, doesn't make it right*. There are all kinds of situations in this world that may technically be allowed under our laws, but are morally offensive to those who are made to experience it. Being recorded without your knowledge while you have private conversations and interactions with your friend or loved one would be offensive to the average person. On this basis alone, conspicuous signs must be posted outside of electronically monitored rooms, notifying all who enter that their every word and action is being recorded and reviewed by the resident, the resident's legal representative, a roommate, or a roommate's legal representative.

Amendment #2

(3) making reasonable accommodations ~~and exhausting all reasonable options~~ if a resident in a multi-resident room wishes to conduct electronic monitoring pursuant to this section and the resident or residents with whom the resident shares the room do not consent to the monitoring, including offering to move the resident who wishes to conduct electronic monitoring to another shared room that is available or becomes available;

And

(4) making reasonable accommodations ~~and exhausting all reasonable options~~ if a resident wishes to conduct electronic monitoring and another resident begins residing in the multi-resident room who does not consent to the monitoring before moving the resident wishing to conduct electronic monitoring.

We request that the committee remove the extra wording in the above quoted subsections, because it opens the door for the violation of rights of other residents in the nursing home. The term "reasonable accommodations" is a familiar one in our various statutes, and fairly easy to interpret. However, "exhausting all reasonable options" is beyond any requirement we have encountered in statutes governing adult care homes, or anyone else for that matter. Our main concern is that what may be a "reasonable option" that must be exhausted for one resident, may not be so for the other residents being affected. Just as a resident has a right to electronically monitor themselves, other residents have an equal right not to be recorded, and not to have to limit themselves and their living situation in deference to a desire to record.

We agree that all reasonable accommodations should be made for a resident wishing to exercise their right to electronic monitoring. We do not agree that other residents must be barred from living in a room where they wish to live, just because they do not want to be monitored. They should not have to live with another person with whom they are not compatible, just because they do not want to be monitored. Unlike "reasonable accommodation", requiring homes and their residents to "exhaust all reasonable options" leaves little room for respect of other residents in the nursing home who do not want their most intimate spaces recorded.

Amendment #3

If electronic monitoring is conducted, the adult care home may require the resident, the resident's guardian or legal representative to conduct the electronic monitoring in plain view.

An adult care home would want to require a recording device to be in plain view for two reasons. The first reason is to protect the rights of anyone who enters the room. A recording device in plain sight is a reminder for visitors and staff that they are being recorded. The second reason for the requirement is practical. The resident being recorded, or their roommate, may have put restrictions on what types of care or activities can be recorded. In those cases, the adult care home staff, or residents themselves, need a recording device that is easily located and easily accessed in order to turn it off or point it in another direction.

Amendment #4

New Section: Authorized Electronic Monitoring: Reporting Abuse, Neglect and Exploitation

(a) A person who is conducting electronic monitoring on behalf of a resident under this section and has reason to believe that the resident is being or has been abused, neglected or exploited shall report, immediately from receipt of the information, such information to the department for aging and disability services.

(b) If a resident who has capacity to determine that the resident has been abused or neglected and who is conducting electronic monitoring under this section gives a tape or recording made by the electronic monitoring device to a person and directs the person to view or listen to the tape or recording to determine whether abuse or neglect has occurred, the person to whom the resident gives the tape or recording is considered to have viewed or listened to the tape or recording on or before the seventh day after the date the person receives the tape or recording for purposes of the duty to report abuse or neglect under subsection (a) and of the criminal penalty for the failure to report abuse, neglect or exploitation under subsection (e).

(c) A person is required to report abuse based on the person's viewing of or listening to a tape or recording only if the incident of abuse is acquired on the tape or recording. A person is required to report neglect based on the person's viewing of or listening to a tape or recording only if it is clear from viewing or listening to the tape or recording that neglect has occurred.

(d) If abuse or neglect of the resident is reported to the adult care home and the adult care home requests a copy of any relevant tape or recording made by an electronic monitoring device, the person who possesses the tape or recording shall provide the adult care home with a copy at the adult care home's expense.

(e) A person required to report information under subsection (a) who knowingly fails to make such report shall be guilty of a class B misdemeanor.

LeadingAge Kansas proposes the addition of a new section to the bill that would establish a mandatory abuse reporting requirement for anyone conducting electronic monitoring on behalf of a resident. Any such person who knowingly fails to make a report of suspected abuse of the resident to the Kansas Department for Aging and Disability Services would be guilty of a class B misdemeanor.

Currently, Kansas has a mandatory reporting law for elder abuse that is applicable to certain kinds of professionals, found at K.S.A. 39-1431. This proposed amendment would take those mandatory reporting requirements and make them applicable to those who have taken on the responsibility of electronic monitoring of a resident. Mandatory reporting of abuse is extremely important for the safety and well-being of the resident being recorded, as well as other residents in the facility.

The only reason to conduct electronic monitoring of a resident is to ensure they are safe and free from abuse, neglect and exploitation. If a person has been entrusted to conduct electronic monitoring on behalf of a resident, they take on a special protective duty and responsibility to make sure that the monitoring is fulfilling its intended purpose. They can only do that by reviewing the recordings they have made, and if suspected abuse or neglect is discovered, to immediately report that abuse or neglect in order to protect the resident, and the other potential victims around them. A failure to report suspected abuse means that the perpetrator is free to not only continue victimizing the resident being recorded, but potentially every other resident in the facility as well.

Amendment #5

(7) the legal requirement to report suspected abuse, neglect or exploitation when electronic monitoring is being conducted on behalf of a resident.

Subsection (h) of HB 2232 provides a list of information related to electronic monitoring that would have to be provided to a resident or their representative upon admission to an adult care home. Our proposed amendment would require the facility to inform the resident or their representative of the mandatory abuse reporting requirement contained in Amendment #4 outlined above.

We hope committee members will give serious consideration to our proposed amendments to HB 2232, and will not pass the bill out of committee without their inclusion. LeadingAge Kansas believes that our proposed amendments maximize resident rights and safety, while avoiding the many legal and ethical complications that accompany an issue like electronic monitoring of adult care home residents.

We thank the committee for its time and attention to such important issues, and we are always available to answer your questions.

HOUSE BILL No. 2232

By Committee on Children and Seniors

1-31

1 AN ACT concerning adult care homes; relating to electronic monitoring.

2
3 *Be it enacted by the Legislature of the State of Kansas:*

4 Section 1. (a) As used in this section:

5 (1) "Adult care home" means the same as defined in K.S.A. 39-923,
6 and amendments thereto;

7 (2) "authorized electronic monitoring" means the placement of one or
8 more electronic monitoring devices in the room of an adult care home
9 resident and making recordings with such devices after notifying the adult
10 care home of the resident's intent to conduct electronic monitoring; and

11 (3) "electronic monitoring device" means a surveillance instrument
12 used to broadcast or record activity or sound occurring in a room,
13 including a video surveillance camera or an audio device designed to
14 acquire communications or other sounds occurring in the room, but not to
15 intercept wire or electronic communications.

16 (b) A resident shall be permitted to conduct authorized electronic
17 monitoring in the resident's room subject to the requirements of this
18 section.

19 (c) An adult care home shall not discharge or refuse to admit a
20 resident or person or otherwise retaliate against a resident or person based
21 on conducting or consenting to authorized electronic monitoring.

22 (d) A resident, or such resident's guardian or legal representative, who
23 wishes to conduct authorized electronic monitoring shall notify the adult
24 care home on a form prescribed by the secretary for aging and disability
25 services. Such form shall be maintained in such person's resident file at the
26 adult care home and shall require the resident, or such resident's guardian
27 or legal representative, to:

28 (1) Release the adult care home from any civil liability for a violation
29 of the resident's privacy rights in connection with the use of the electronic
30 monitoring device;

31 (2) if the electronic monitoring device is a video surveillance camera,
32 choose whether the camera will always be unobstructed or will be
33 obstructed in specified circumstances to protect the dignity of the resident;
34 and

35 (3) if the resident resides in a multi-resident room, obtain the consent
36 of other residents in the room on a form prescribed for this purpose by the

1 secretary.

2 (e) An adult care home shall make reasonable physical
3 accommodations for authorized electronic monitoring, including:

4 (1) Providing a reasonably secure place to mount the electronic
5 monitoring device;

6 (2) providing access to power sources for the electronic monitoring
7 device;

8 (3) making reasonable accommodations ~~and exhausting all reasonable~~
9 ~~options if~~ a resident in a multi-resident room wishes to conduct electronic
10 monitoring pursuant to this section and the resident or residents with
11 whom the resident shares the room do not consent to the monitoring,
12 including offering to move the resident who wishes to conduct electronic
13 monitoring to another shared room that is available or becomes available;
14 and

15 (4) making reasonable accommodations ~~and exhausting all reasonable~~
16 ~~options if~~ a resident wishes to conduct electronic monitoring and another
17 resident begins residing in the multi-resident room who does not consent
18 to the monitoring before moving the resident wishing to conduct electronic
19 monitoring.

20 (f) A resident, or such resident's guardian or legal representative, shall
21 pay all costs associated with installing and maintaining an electronic
22 monitoring device requested under this section.

23 (g)(1) Each adult care home shall post a conspicuous notice at the
24 entrance to the adult care home stating that the rooms of some residents
25 may be monitored electronically by or on behalf of the room's resident or
26 residents.

(2) Each adult care home shall require that a resident, or such resident's
guardian or legal representative, who conducts electronic monitoring to post a
conspicuous notice at the entrance to the resident's room stating that the room is
being monitored electronically.

(h) If electronic monitoring is conducted, the adult care home may require
the resident, the resident's guardian or legal representative to conduct the electronic
monitoring in plain view.

27 (i) On or before a person's admission to an adult care home, such
28 person shall complete and sign a form prescribed by the secretary for
29 aging and disability services. Such form shall be maintained in such
30 person's resident file at the adult care home and shall state the following:

31 (1) That a person who places an electronic monitoring device in a
32 resident's room or discloses a recording made by such device may be
33 civilly liable for any unlawful violation of the privacy rights of another
34 person;

35 (2) that a resident, or such resident's guardian or legal representative,
36 is entitled to conduct authorized electronic monitoring under this section;

37 (3) the basic procedures required to request authorized electronic
38 monitoring;

39 (4) who may request authorized electronic monitoring;

- 40 (5) who may consent to authorized electronic monitoring; and
- 41 (6) restrictions that a resident may elect to place on electronic
- 42 monitoring conducted in the resident's room, including, but not limited to:
- 43 (A) Prohibiting video recording;
- 44 (B) prohibiting audio recording;
- 45 (C) turning off the device or blocking the visual recording component
- 46 of the device during an exam or procedure administered by a healthcare
- 47 professional;
- 48 (D) turning off the device or blocking the visual recording component
- 49 of the device while the resident is dressing or bathing; or
- 50 (E) turning off the device or blocking the visual recording component
- 51 of the device during a resident's visit with a spiritual adviser, ombudsman,
- 52 attorney, financial planner, intimate partner or other visitor; and
- (7) the legal requirement to report suspected abuse, neglect or exploitation
- when electronic monitoring is being conducted on behalf of a resident.
- 53 (8) any other information related to authorized electronic monitoring
- 54 that the secretary deems necessary or appropriate to include on such form.
- 55 (j) Any electronic monitoring device installed or operated pursuant to
- 56 this section shall comply with the requirements of the national fire
- 57 protection association 101 life safety code, or other standards determined
- 58 by the secretary for aging and disability as having substantially equivalent
- 59 requirements.
- 60 (k) (1) A person is prohibited from knowingly hindering, obstructing,
- 61 tampering with or destroying, without the consent of the resident or
- 62 individual who authorized electronic monitoring, an electronic monitoring
- 63 device installed in a resident's room in accordance with this section.
- 64 (2) A person is prohibited from knowingly hindering, obstructing,
- 65 tampering with or destroying, without the consent of the resident or
- 66 individual who authorized electronic monitoring, a video or audio
- 67 recording obtained in accordance with this section.
- 68 (3) (A) Any person who violates this subsection shall be guilty of a
- 69 class B nonperson misdemeanor.
- 70 (B) Any person who violates this subsection with the intent to
- 71 commit or conceal the commission of a misdemeanor offense shall be
- 72 guilty of a class A nonperson misdemeanor.
- 73 (C) Any person who violates this subsection with the intent to
- 74 commit or conceal the commission of a felony offense shall be guilty of a
- 75 severity level 4, nonperson felony.
- 76 (l) The secretary for aging and disability services shall adopt rules
- 77 and regulations as may be necessary to administer the provisions of this
- 78 section.
- 79 Sec. 2. This act shall take effect and be in force from and after its
- 80 publication in the statute book.

New Section: Authorized Electronic Monitoring: Reporting Abuse, Neglect and Exploitation

- (a) A person who is conducting electronic monitoring on behalf of a resident under this section and has reason to believe that the resident is being or has been abused, neglected or exploited shall report, immediately from receipt of the information, such information to the department for aging and disability services.
- (b) If a resident who has capacity to determine that the resident has been abused or neglected and who is conducting electronic monitoring under this section gives a tape or recording made by the electronic monitoring device to a person and directs the person to view or listen to the tape or recording to determine whether abuse or neglect has occurred, the person to whom the resident gives the tape or recording is considered to have viewed or listened to the tape or recording on or before the seventh day after the date the person receives the tape or recording for purposes of the duty to report abuse or neglect under subsection (a) and of the criminal penalty for the failure to report abuse, neglect or exploitation under subsection (e).
- (c) A person is required to report abuse based on the person's viewing of or listening to a tape or recording only if the incident of abuse is acquired on the tape or recording. A person is required to report neglect based on the person's viewing of or listening to a tape or recording only if it is clear from viewing or listening to the tape or recording that neglect has occurred.
- (d) If abuse or neglect of the resident is reported to the adult care home and the adult care home requests a copy of any relevant tape or recording made by an electronic monitoring device, the person who possesses the tape or recording shall provide the adult care home with a copy at the adult care home's expense.
- (e) A person required to report information under subsection (a) who knowingly fails to make such report shall be guilty of a class B misdemeanor.