



## Long-Term Care Regulatory Provider Letter

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| <b>Number:</b> PL 2024-03   |
| <b>Title:</b> Authorized Electronic Monitoring Devices and Other Electronic Devices |
| <b>Provider Types:</b> Assisted Living Facilities (ALF), Nursing Facilities (NF)    |
| <b>Date Issued:</b> January 19, 2024  |

### 1.0 Subject and Purpose

This provider letter clarifies what may constitute authorized electronic monitoring (AEM) and offers guidance for ALF and NF providers around resident use of electronic devices, particularly those with recording capabilities.

### 2.0 Policy Details & Provider Responsibilities

Residents of both ALFs and NFs, or their representatives, are entitled to conduct AEM according to the guidelines described in Texas rule and statute.<sup>1</sup> AEM is defined in rule as the resident or representative placing an electronic monitoring device in the resident's room and using the device to make tapes or recordings after submitting a request to the facility to allow electronic monitoring.<sup>2</sup> Examples of what may or may not constitute AEM are not included in rule, but the AEM definition describes devices that can record video, audio, or both, and be reviewed at a later time. Some devices that cannot record audio or video, while not considered as AEM, could potentially still be used to view or monitor a resident in their room. Section 2.5 of this provider letter discusses a broad range of electronic devices and contains more information regarding general considerations for their use.

AEM can be used to facilitate residents' interactions with family and friends, monitor the quality of their care and identify any concerns regarding their

<sup>1</sup> 26 TAC [§553.267\(d\)\(1\)](#) (ALF) and THSC [§242.847](#) (NF)

<sup>2</sup> 26 TAC [§553.3\(12\)](#) and 26 TAC [§554.101\(14\)](#).

safety. Residents, representatives, and facility staff may have questions regarding the proper use of AEM in ALFs and NFs. A resident's individual circumstances may warrant evaluation of how to best ensure that the resident's right to AEM, dignity, privacy, and communication with others are protected. Providers should work with residents and their representatives, as applicable, to ensure that they are fully informed and that all of the resident's rights are protected.

## **2.1 Requirements for Residents to Conduct AEM**

To begin conducting AEM, a resident or their LAR must complete [HHSC Form 0066 - Request for Authorized Electronic Monitoring](#). If a resident has a roommate, the resident or their LAR<sup>3</sup> must obtain consent to AEM from the roommate or the roommate's LAR using [HHSC Form 0067 - Consent by Roommate for Authorized Electronic Monitoring](#). The roommate may condition their consent, such as by requiring the camera to be pointed away from them if the proposed device is a video surveillance camera, or by limiting or prohibiting the use of an audio monitoring device.<sup>4</sup>

According to AEM rules, the monitoring must only be conducted with the consent of other residents in the room and according to any limitation the other residents may place on it. A resident's roommate or their LAR is responsible for ensuring that the AEM is conducted according to any conditions for the roommate's consent to it. If the roommate refuses to provide consent for AEM, the facility may consider mediation between the roommates, moving one resident to a different room, or some other solution that is agreeable to both the residents or their representatives.

When the resident or their LAR who is requesting AEM submits the completed forms to the manager (ALF), administrator (NF), or the designee of either, the AEM may begin.

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<sup>3</sup> See 26 TAC [§553.3\(41\)](#) (ALF) and 26 TAC [§554.805\(a\)\(5\)](#) (NF) for the definition of an LAR.

<sup>4</sup> See 26 TAC [§553.267\(d\)\(5\)\(B\)](#) (ALF) and 26 TAC [§554.422\(e\)\(2\)](#) (NF).

The resident conducting AEM or having it conducted on their behalf must post and maintain a conspicuous notice at the entrance to the room stating that the room is being monitored by an electronic monitoring device.<sup>5</sup> It is the responsibility of the ALF or NF to post the monitoring notice on the resident's behalf.

The resident or their representative is responsible for all costs associated with conducting AEM, including all equipment, its installation in compliance with life safety and electrical codes, and maintenance, and repair, apart from the cost of electricity used to operate the device and repair or replacement if facility staff cause a device to be damaged or stolen.

If a resident has AEM in their room and another resident moves into the room who has not yet consented to it, the rules state that the AEM must stop until the new roommate, or their LAR, provides their written consent to it.<sup>6</sup> To avoid disruption to the AEM when a new roommate moves into the room, the facility should work with the new roommate ahead of their move-in date and obtain their consent for the AEM. The facility must consider the use of AEM by the current resident as a factor for its determination of an appropriate new roommate.

## **2.2 Facility Requirements Regarding AEM**

Regardless of whether residents are conducting AEM, all ALFs and NFs must post an 8- by 11-inch notice at their main facility entrance entitled "Electronic Monitoring," in large, easy-to-read type, stating: "The rooms of some residents may be monitored electronically by or on behalf of the residents. Monitoring may not be open and obvious in all cases."<sup>7</sup> The facility must make reasonable accommodations for AEM, including providing a reasonably secure place to mount a surveillance camera or other electronic monitoring device and access to power sources for the device.

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<sup>5</sup> See 26 TAC [§553.267\(d\)\(6\)\(A\)](#) (ALF) and 26 TAC [§554.422\(f\)\(1\)](#) (NF).

<sup>6</sup> See 26 TAC [§553.267\(d\)\(5\)\(D\)](#) (ALF) and 26 TAC [§554.422\(e\)\(4\)](#) (NF).

<sup>7</sup> See 26 TAC [§553.267\(d\)\(7\)](#) (ALF) and 26 TAC [§554.422\(g\)](#) (NF).

An AEM device must meet the Life Safety Code requirements for the type of facility in which it will be in operation. A NF must not use electrical extension cords or multi-receptacle plug-in adaptors as a substitute for approved wiring methods. An ALF must ensure that electrical appliances, devices, and lamps do not overload circuits or use extension cords of excessive length.<sup>8</sup> There may be other life safety or electrical code requirements related to the installation and use of AEM devices and the resident or their LAR should discuss with the facility.

### **2.3 Authority to Make Decisions Regarding AEM**

If a resident has the capacity to request AEM and has not been judicially declared to lack the required capacity, only the resident may request AEM. The resident has the right to object or agree to such monitoring, and the facility must comply with the resident's decision. In the event that a resident is judicially declared to lack the capacity required to request AEM, only the resident's guardian may request it. However, if a resident has not been judicially declared to lack the capacity required to request AEM but does not have the capacity to request it, only the resident's LAR may request AEM.

If a resident's physician determines the resident lacks capacity to request AEM, and the resident does not have a guardian, a person from the following list, in order of priority, may act as the resident's LAR for the limited purpose of requesting AEM:

1. a person named in the resident's medical power of attorney or other 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

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<sup>8</sup> See 26 TAC [§553.104\(j\)\(2\)\(B\)](#) (ALF) and 26 TAC [§554.326\(r\)](#) (NF)

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.<sup>9</sup>

If the resident lacks capacity to request AEM and does not have a legal guardian and a person from the list above is not available, a decision about AEM may not be possible to make unless a court of law appoints a guardian.

#### **2.4 Facility and Resident Responsibilities Regarding AEM**

The person requesting or using AEM must inform the facility that AEM is being requested or used. Each facility must have the proper documentation and signage in place for the monitoring and **must permit** a resident or their guardian or legal representative to monitor the resident's room through the use of electronic monitoring devices.<sup>10</sup> A facility **must not refuse to admit an individual and must not discharge a resident** because of a request to conduct AEM, as long as all monitoring requirements are met. A facility may not place conditions on the AEM that conflict with state rule or statute.

Covert electronic monitoring takes place when a resident or their representative places and uses an electronic monitoring device that is not open and obvious, and the facility has not been informed about it.<sup>11</sup> A facility **must not discharge a resident because they are conducting covert electronic monitoring in the resident's room** or because it is being conducted on their behalf.<sup>12</sup> If a facility discovers a covert electronic monitoring device, rendering it no longer covert, monitoring must immediately stop until the resident meets the requirements in rule for AEM described in Section 2.1.

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<sup>9</sup> See 26 TAC [§553.267\(d\)\(4\)](#) (ALF) and 26 TAC [§554.422\(d\)](#) (NF).

<sup>10</sup> See 26 TAC [§553.267\(d\)\(1\)](#) (ALF) and 26 TAC [§554.422\(a\)](#) (NF).

<sup>11</sup> See 26 TAC [§553.3\(19\)](#) (ALF) and 26 TAC [§554.101\(29\)](#) (NF).

<sup>12</sup> See 26 TAC [§553.267\(a\)\(3\)\(X\)](#) (ALF) and 26 TAC [§554.502\(b\)](#) (NF) for requirements regarding resident discharge.

A facility:

- must require an electronic monitoring device to be installed in such a way that resident, employee, and visitor safety is ensured, while meeting all local and state regulations;
- may require AEM to be conducted in plain view; and
- if necessary, place a resident in a different room in order to accommodate an authorized request for AEM.<sup>13</sup>

## **2.5 Considerations Regarding AEM, Resident Capacity for Decision-making, and the Provision of Care**

While residents have the right to conduct AEM, they also have rights to a safe environment, a dignified existence, to receive visitors, and to have privacy in their care and communications. Situations may arise in which a resident's right to AEM may need to be balanced with their rights to privacy, dignity, visitation, or some combination of these and other rights.

A facility must comply with a resident's request to have a video camera obstructed to protect their dignity.<sup>14</sup> This applies to the roommate of a resident conducting AEM, and it also may apply to the resident themselves, if the resident requests the camera to be obstructed while they are receiving or recovering from care. Both [HHSC Form 0066 - Request for Authorized Electronic Monitoring](#) and [HHSC Form 0067 - Consent by Roommate for Authorized Electronic Monitoring](#) include a section about preferences for obstructing the camera. Providers should determine the best method for communicating this information to staff, such as including the information in the resident's care plan and ensuring staff adhere to a resident's preferences. It is not necessary for a resident or their LAR to state their preferences for obstructing the camera on the camera recording itself.

When a resident with a roommate receives care, staff are expected to take appropriate measures to ensure a resident's privacy, such as by drawing a privacy curtain while the care is being provided. If the staff's actions to protect the resident's privacy may obscure an AEM camera,

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<sup>13</sup> See 26 TAC [§553.267\(d\)\(8\)](#) (ALF) and 26 TAC [§554.422\(h\)](#) (NF)

<sup>14</sup> See 26 TAC [§553.267\(d\)\(6\)\(C\)](#) (ALF) and 26 TAC [§554.422\(f\)\(3\)](#) (NF).

it should be discussed with the resident and LAR and their choices should be documented in their medical record. When a resident lacks capacity to make decisions regarding AEM, facility staff may have questions regarding when or whether to obstruct the camera from recording the resident. If a resident lacks capacity to make decisions regarding AEM, their LAR makes decisions about conducting AEM and the curtain remaining open during care to the degree the LAR deems necessary to ensure the camera is able to record care.

There may be times when the choices and priorities of the resident, the resident's roommate, and their respective representatives need to be addressed and reconciled. In these cases, the facility should work with the residents who are involved and their LARs, if applicable, to reach an agreement that meets the needs of both residents in the situation. With consent from the residents or LARs involved, a long-term care ombudsman for the facility may be invited to help facilitate the conversation between residents and LARs.

## **2.6 Additional Considerations for Electronic Devices in General**

A wide range of technological devices used for communication, entertainment, and informational purposes have the ability to capture, record, retain, and transmit both audio and video. These include devices such as cell phones, televisions, computers, tablets, watches, and other devices. In addition, services such as Alexa, Siri, and Google Assistant can record questions that may later be reviewed by technology company personnel for the purposes of conducting research on consumer interest. Recordings that may be accessed by individuals not affiliated with these companies, and not for the purpose of conducting this type of research, however, could require the consent of individuals included in them in order to be taken, shared, or retained.

A device that has the capacity to make a recording has the potential to become an AEM device **if used for the purposes of monitoring a resident**. If the resident or his or her representative uses it as a monitoring device in a resident's room in an ALF or a NF, then they must meet the requirements for AEM: completing the request form

and the roommate consent form if applicable, and posting a sign to advise that the room is being monitored.

Even if the device is not explicitly used for the purpose of monitoring, if it has the potential to record or transmit images or audio that includes another resident, the rights to privacy and dignity must be considered.

### **3.0 Background/History**

AEM is a topic of significant interest to providers, residents and resident representatives. With continual advances and nuances in technology and its varying capabilities, providers, residents, family members, and other representatives, have requested clarification regarding the protocol and procedures around AEM. This letter is intended to address these questions and concerns regarding AEM and technology with AEM capability.

### **4.0 Resources**

[Form 0065, Information Regarding Authorized Electronic Monitoring for Nursing Facilities](#)

[Form 3100, Information Regarding Authorized Electronic Monitoring for Assisted Living Facility](#)

[Form 0066, Request for Electronic Monitoring](#)

[Form 0067, Consent by Roommate for Authorized Electronic Monitoring](#)

### **5.0 Contact Information**

If you have any questions about this letter, please contact the Policy and Rules unit by email at [LTCRPolicy@hhs.texas.gov](mailto:LTCRPolicy@hhs.texas.gov) or call (512) 438-3161.