

NURSING HOME ELECTRONIC MONITORING DEVICES

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<http://www.house.mi.gov/hfa>

Senate Bill 77 as enrolled

Sponsor: Sen. Jim Runestad

House Committee: Families, Children and Seniors [Discharged]

Senate Committee: Health Policy and Human Services

Complete to 1-21-21

Analysis available at
<http://www.legislature.mi.gov>

(Pocket vetoed 1-5-21)

SUMMARY:

Senate Bill 77 would amend the Public Health Code to require a nursing home to allow a resident or his or her representative to monitor the resident using an electronic monitoring device. Under the bill, a nursing home that received a written request for *electronic monitoring* on an approved consent form from a resident or his or her representative would have to allow monitoring of the resident in the resident's room through an *electronic monitoring device*.

Electronic monitoring would mean the placement and use of an electronic monitoring device in a resident's room under the bill.

Electronic monitoring device would mean a camera or other device that captures, records, or broadcasts audio or video, or both, or logs events in accordance with the federal Health Insurance Portability and Accountability Act (HIPAA), and that is installed in a resident's room to monitor activities occurring in the room. Electronic monitoring device would include a monitoring system, video surveillance camera, web-based camera, or video phone that is installed in the room of a resident. An electronic monitoring device could be an interactive or recording device.

The bill would not allow the use of such a device to capture, record, or broadcast audio; to take still photographs; or to intercept private communications without consent. It also would not affect a resident's right to use a device lawfully to record audio or video in his or her room.

Resident consent

A resident would have to consent to the electronic monitoring in writing on a notification and consent form. A representative of the resident could consent on the resident's behalf if the following requirements were met:

- A licensed health professional determines that the resident cannot understand and appreciate the nature and consequences of electronic monitoring.
- The resident's representative explains all of the following to the resident:
 - The type of electronic monitoring to be used.
 - Standard conditions or restrictions that can be placed on use of the device.
 - Who the recording could be shared with.
 - The resident's ability to decline all recording.
- After explaining the above, the representative asks the resident if he or she wants electronic monitoring. The resident's response would have to be documented on the notification and consent form.
- The resident does not affirmatively object to electronic monitoring by declining the monitoring orally, visually, or through the use of auxiliary aids or services.

If a resident shared a room, the consent of the roommate or roommate's representative would have to be obtained in writing on the form before electronic monitoring could be conducted.

A resident's consent could include any conditions he or she chose. The electronic monitoring device could be turned off, the visual recording component of the device could be blocked, or a curtain could be used to screen an individual from the visual recording part of the monitoring device during care according to a plan of care at the request of the resident or roommate (or representative). The nursing home would have to comply with such a plan of care or request and would also have to ensure that its staff are familiar with the requirements and follow a plan of care or request, including by assisting a resident or roommate as necessary in accordance with the plan of care or request.

The resident or roommate (or representative) could withdraw consent at any time by giving written notice to the nursing home and any other resident who shares the room. If consent is withdrawn or if a new roommate moves into the shared room and does not consent, either of the following would have to happen:

- If the nursing home provides electronic monitoring services to the resident, the nursing home would have to turn off the device within 24 hours and remove it from the room within seven days.
- In other cases, the resident or representative would have to turn off the device within 24 hours and remove it from the room within seven days. If they failed to do so, the nursing home could turn it off or remove it.

A nursing home would have to make a reasonable effort to allow a resident to change rooms if a roommate or his or her representative does not consent. If a resident chose to reside in a private room in order to accommodate the use of a device, he or she would have to pay the private room rate. If a nursing home could not accommodate a resident's request to change rooms, it would have to reevaluate the request every two weeks until it was fulfilled.

Notification and consent form

A resident or representative would have to make a request to the nursing home to install a device in writing on a notification and consent form that must be approved by the Department of Licensing and Regulatory Affairs (LARA) within 60 days after the bill takes effect. The notification and consent form would have to include at least all of the following:

- The resident's or his or her representative's signed consent to electronic monitoring and, if applicable, the roommate's or his or her representative's signed consent.
- The type of electronic monitoring device to be used or a statement indicating that electronic monitoring services provided by the nursing home will be used.
- The proposed date of installation.
- A copy of any contract for maintenance of the device.
- A list of standard conditions or restrictions that the resident or a roommate could elect to place on the use of the device, including the following:
 - Prohibiting broadcasting of video.
 - Turning off the device or blocking its visual recording component during a medical exam or procedure or while bathing or dressing.
 - Turning off the device during a visit with a spiritual advisor, ombudsman, attorney, financial planner, intimate partner, or other visitor.
- Any other condition or restriction of the resident or roommate on the use of the device.

- An explanation of the right to report suspected abuse or neglect based on a video recording created by the device to the nursing home, the long-term care ombudsman program, or LARA. (The explanation would have to include telephone numbers for the long-term care ombudsman program and LARA.)
- A statement that an individual is advised to report suspected abuse or neglect after viewing the recording on which the suspected abuse or neglect is based.
- An acknowledgment of the explanation of rights and statement, above. signed by the resident or the resident's representative.

The nursing home would have to place a copy of the completed notification and consent form in the resident's and any roommate's clinical record and provide a copy to the resident and any roommate. If an electronic monitoring device is installed or used without a completed notification and consent form, a video or audio recording created by the device is inadmissible as evidence in a civil action against the nursing home.

A nursing home could not refuse to admit an individual as a resident or remove a resident from the nursing home because of a request to install an electronic monitoring device. A nursing home could not require an applicant to agree to forgo electronic monitoring as a condition of admission or otherwise retaliate against a resident because of a request to install a device.

Conducting electronic monitoring

Except as provided below, if a resident or resident's representative chose to conduct electronic monitoring, the resident or representative would have to pay all costs of the monitoring, including:

- The purchase cost of the electronic monitoring device.
- Installation costs.
- Maintenance costs.
- Activation costs.
- Removal costs, including, deactivation costs and cancellation fees.

If the device uses internet technology for visual monitoring, the resident or his or her representative would be responsible for contracting with an internet service provider or paying any additional costs incurred by the nursing home for using its provider for the monitoring.

A nursing home would have to make reasonable accommodation for electronic monitoring by providing a reasonably secure place to locate the device, which must be placed in a conspicuously visible location in the room, and providing access to a power source for it. (A nursing home could not charge a fee for the cost of electricity used by a device.)

A nursing home could provide electronic monitoring services, including on a subscription basis. A resident or resident's representative choosing this option would have to pay the amount charged by the nursing home under a written agreement. A nursing home could contract with a third-party video monitoring service that meets both of the following:

- Provides video monitoring through live-streaming, nonrecording video systems that include video privacy features and event log capabilities.
- Has at least one trained staff member monitoring the live-stream video at all times for resident and staff safety.

All electronic monitoring device installations and supporting services would have to comply with the National Fire Protection Association (NFPA) 101 Life Safety Code (2000 edition).

Nursing home signage

If a resident of a nursing home is electronically monitored, the nursing home would have to post a sign clearly and conspicuously at all building entrances accessible to visitors. The sign would have to be entitled “Electronic Monitoring” and state, in large, easy-to-read type, “The rooms of some residents may be monitored electronically by or on behalf of the residents.”

The signs would also have to include a warning to visitors that they could be electronically monitored, that recordings made by an electronic monitoring device could be disclosed, and that they should not have an expectation of privacy.

Video recordings

An electronic monitoring device would have to include a time and date stamp on all video recorded. A video recording created by an electronic monitoring device is admissible in a civil, criminal, or administrative proceeding in Michigan, subject to rules of evidence, except that a video recording created by an electronic monitoring device could not be used as evidence in a civil, criminal, or administrative proceeding that is initiated more than eight years after the date of the video recording.

A video recording created by a device under the bill would belong to the resident.

A nursing home would not be not civilly or criminally liable for the inadvertent or intentional disclosure of a recording by a resident or a resident’s representative for a purpose not authorized by law.

If suspected abuse or neglect of a resident based on a video or audio recording is reported to the nursing home and the nursing home requests a copy of the relevant recording, the individual in possession of the recording would have to provide a copy to the nursing home. The nursing home would have to pay all reasonable costs incurred by the individual in doing so.

Rules promulgation

LARA could promulgate rules in consultation with the long-term care ombudsman program to establish all of the following:

- The procedure by which a resident or a resident’s representative must submit a notification and consent form to a nursing home as required to begin electronic monitoring.
- Requirements for obtaining and documenting a determination by an individual licensed in a health profession that a resident currently lacks the ability to understand and appreciate the nature and consequences of electronic monitoring.
- The process a resident or resident’s representative would have to follow to obtain consent to electronic monitoring from the resident’s roommate or his or her representative.
- Requirements for retention and distribution of the completed notification and consent form.
- Standards for reasonable accommodation by the nursing home to allow for the installation, maintenance, and use of an electronic monitoring device.

- Requirements and procedures for turning off an electronic monitoring device or audio recording, blocking the visual recording component of an electronic monitoring device, or using a curtain to screen an individual from the visual recording component of an electronic monitoring device pursuant to a condition on consent, request, or plan of care.
- The procedure a resident, resident’s representative, roommate, or his or representative would have to follow to withdraw his or her consent to electronic monitoring.
- Requirements and procedures for turning off an electronic monitoring device and removing an electronic monitoring device when consent is withdrawn or cannot be obtained from a new roommate or the roommate’s representative.
- Requirements and procedures a nursing home would have to follow installing and maintaining the signage.

In promulgating rules, LARA would have to consider similar rules of other states. LARA could not promulgate rules regarding electronic monitoring except as specified in the bill.

The bill would take effect June 1, 2021.

MCL 333.20199 et al.

FISCAL IMPACT:

Senate Bill 77 would not have a significant fiscal impact on any unit of state or local government. The bill would create minor administrative responsibilities for the Department of Licensing and Regulatory Affairs, including prescribing notification and consent forms and rules promulgation, but these would not create any costs that would not be sufficiently offset by existing appropriations.

Pocket veto 1-5-21:

If the governor does not sign a bill within 14 days after getting it and the legislature has adjourned to end the legislative session, the bill does not take effect and is said to have been “pocket vetoed.” The term dates from the nineteenth century and is based on the metaphor of putting a bill in one’s pocket instead of either signing it into law or returning it unsigned as a regular veto. Unlike a regular veto, a pocket veto does not oblige the governor to provide the legislature with his or her objections to the bill.

Senate Bill 77 was pocket vetoed on January 5, 2021, when it was still unsigned 14 days after being presented to the governor on December 22, 2020. The legislature adjourned *sine die* (without day) to end the legislative session on December 23.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.