

## Figure: 40 TAC §19.422(c)

### Texas Department of Human Services (DHS) Information Regarding Authorized Electronic Monitoring

A resident or the resident's guardian or legal representative is entitled to conduct authorized electronic monitoring (AEM) under Subchapter R, Chapter 242, Health and Safety Code. To request AEM, you, your guardian or your legal 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(s) to the facility administrator 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 legal 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 physician will make the determination regarding the capacity to request AEM. When the resident's physician 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 legal representative 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
- 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 may consent to AEM?

- 1) The other resident(s) in the room.
- 2) The guardian of the other resident, if the resident has been judicially declared to lack the required capacity.
- 3) The legal 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 legal representative is determined by following the procedure for determining a legal 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-Regulatory, Texas Department of Human Services.

#### 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-Regulatory, Texas Department of Human Services.

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 §242.843, Health and Safety Code, 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 legal 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-Regulatory, Texas Department of Human Services.

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

Yes, DHS may assess an administrative penalty of \$500 against a facility for each instance in which the facility:

- 1) refuses to permit a resident or the resident's guardian or legal 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 related to AEM.

How does AEM affect the reporting of abuse and neglect?

The Texas Health and Safety Code, §242.122, requires an individual to report abuse or neglect immediately. Section 242.131 establishes a criminal penalty for failure to report abuse and neglect. If abuse or neglect has occurred, the most important thing is to report it, regardless of whether the reporting meets the legal definition of timely. Abuse and neglect cannot be addressed unless reported.

For purposes of the duty to report abuse or neglect and the criminal penalty for the failure 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 tape or recording made by the electronic monitoring device on or before the 14th day after the date the tape or 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 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.

3) 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.

4) If abuse or neglect of the resident is reported to the facility and the facility requests a copy of any relevant tape or recording made by an electronic monitoring device, the person who possesses the tape or 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 tape or recording to DHS must identify each tape or 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 tape or recording that an incident of abuse or evidence of neglect may be found.

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

Subject to applicable rules of evidence and procedure, a tape or 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. A court or administrative agency may not admit into evidence a tape or recording created through the use of covert monitoring or AEM or take or authorize action based on the tape or recording unless:

- 1) the tape or recording shows the time and date the events on the tape or recording occurred, if the tape or recording is a video tape or recording;
- 2) the contents of the tape or recording have not been edited or artificially enhanced; and
- 3) any transfer of the contents of the tape or 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 tape or other 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.

A person who intentionally hampers, obstructs, tampers with, or destroys an electronic monitoring device installed in a resident's room in accordance with the Health and Safety Code, Subchapter R, Chapter 242, or a tape or recording made by the device, commits a Class B misdemeanor. It is a defense to prosecution that the person took the action with the effective consent of the resident on whose behalf the electronic monitoring device was installed or the resident's guardian or legal representative.

\_\_\_\_\_  
Signature of Resident/ Person Signing of Behalf of Resident

\_\_\_\_\_  
Date