

May 3, 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Grassley,

Thank you for the opportunity to respond to your April 18th letter regarding incidents of elder abuse via social media and smartphone technology. The American Health Care Association/National Center for Assisted Living (AHCA/NCAL) is also extremely sensitive to these incidents of abuse, and we cannot overstate the degree to which they are appalling and egregious. While new technologies such as smartphones and social media platforms have allowed care providers—as well as residents and patients themselves—to enhance quality of life, they have also unfortunately proven to be a new set of tools used by offenders to violate the privacy and dignity of vulnerable residents. Whether they occur on Snapchat, Instagram, Facebook, or any other social media platform, actions that jeopardize the privacy and dignity of the elderly should be condemned and prosecuted to the fullest degree possible.

We understand the sweeping changes that social media has brought to health care settings over the past decade, and the pace of these changes has presented a significant challenge not just for skilled nursing, assisted living, and post-acute providers, but to all organizations throughout the health care spectrum.

AHCA/NCAL recognizes that as technology evolves, so do the opportunities for abuse. Although these instances are rare, they require long term and post-acute care providers to be ever vigilant in both determining and evaluating how technology impacts the lives of our patients, residents, and families. We are, and have been, committed to preventing this type of abuse. And our Association and its members support laws and regulations that seek to prevent such abhorrent behavior.

As you and members of the Committee know, skilled nursing and assisted living centers must comply with numerous regulations, along with state and federal laws, that protect resident rights and resident dignity. AHCA/NCAL members are committed to ensuring that we guarantee

those rights. Further, federal privacy and inspection laws are clear about health care providers' responsibilities to protect a resident's private health information, and we make every effort to guarantee those protections. We stand four-square with this Committee and its members in fostering zero tolerance for these incidences. Anything less is unacceptable.

Since the advent of the iPhone in 2007—and subsequent rise of similar technologies and social media channels—our members have sought the counsel of their peer groups, their attorneys, and AHCA/NCAL to determine the best, most feasible approaches to fostering these technologies, while also ensuring that residents are protected from any type of abuse, even in situations where there are no bad intentions.

AHCA/NCAL and its member organizations are committed to honoring the privacy and dignity of residents and patients, and we will continue to carry out this mission. To that end, we are pleased to share with you these answers to the following questions in your April 18th letter:

1. Please provide detail on what, if any, best practices and model policies AHCA/NCAL advises its members on employee background screening.

The safety and security of patients, residents, and families begin with recruiting staff of the highest integrity.

Since early 2000, AHCA/NCAL has supported criminal background checks for direct care workers by submitting recommendations and edits to proposed federal legislation and regulations, and partnering with both the Centers for Medicare & Medicaid Centers (CMS) and the National Association of Attorneys General (NAAG). In 2009, we also supported the creation of a national background check registry, so that inappropriate or abusive long term or post-acute care center staff would not cross state lines and work in nursing or assisted living centers undetected. We also support the national criminal background and the Elder Justice Act (EJA) implementation under the Affordable Care Act (ACA), which requires providers to report any “reasonable” suspicion of a “crime” resulting in “serious bodily injury” to an elderly resident.

To provide you with more information on our efforts in this area, we have attached the following documents:

- *August 29, 2013, Letter to CMS Regarding Comment on the Report of the National Background Check Program Long-Term Care Criminal Convictions Work Group*¹
- *June 14, 2011, Memorandum: Request for Information - ACA National Criminal Background Check*²

¹ AHCA's Letter to CMS:

<https://www.ahcancal.org/Email%20Templates/docs/13%20Aug%20final%20comments%20Criminal%20Background%20Check%20report.pdf>

² AHCA's Board Memo:

<https://www.ahcancal.org/Email%20Templates/docs/2011nationalcriminalbkgmemo1.pdf>

2. Please provide detail on what, if any, best practices and model policies AHCA/NCAL has created on the use of cell phones and preventing victimization using social media.

AHCA/NCAL is currently working with AHCA/NCAL general counsels as well as privacy, security, and compliance officers on guidance specifically written to better educate our members regarding social media abuses and possible responses. Entitled *Social Media Guidance for Nursing and Assisted Living Facilities*, this guidance will contain a sample social media policy and other important tips for responding to instances of social media abuse. The Association expects this document to be completed no later than June 15. We also have covered this topic in the majority of resources listed in question 3 below.

Since 2001, AHCA/NCAL has participated in monthly conference calls and regular in-person meetings with the Long Term Care Consortium (LTCC), focusing specifically on the federal privacy and security laws and regulations.³ AHCA/NCAL also has developed a proprietary privacy manual specifically for nursing and assisted living centers, which many of our membership organizations have posted to their corporate and facility intranet sites for broader distribution.⁴

Additionally, it is important for the Committee and all interested parties to keep in mind just how critical a role the survey and inspection process plays in monitoring and enforcing privacy laws in our nursing centers.

Every year, state-assigned and federally-trained surveyors enter facilities unannounced and conduct a rigorous examination of all facets of caregiving, food preparation, facility fire and life safety, resident quality of care and quality of life, safety systems impacting resident care, medication management, and more. If a deficiency is found, citations can result, as well as remedies imposed. Depending on the degree of noncompliance, the result may be deficiency citations and imposition of remedies. Remedies may include directed plans of correction (i.e., where CMS dictates how a nursing center will fix a deficiency, prevent its recurrence, and monitor improvement), required training for relevant staff, monitoring by a consultant, civil money penalties, denial of payment for new admissions, and decertification if noncompliance is not corrected within a specified period of time. CMS and state surveyors have many tools at their disposal to encourage facilities to achieve and maintain compliance with all requirements of participation.

Even before the advent of social media, however, it's important to note that federal law and regulations are explicit about providing residents of nursing centers protection from abuse.

§1819(g)(1)(c) INVESTIGATION OF ALLEGATIONS OF RESIDENT NEGLECT AND ABUSE AND MISAPPROPRIATION OF RESIDENT PROPERTY provides the basis for the Requirements of Participation at CFR §483.13.⁵

³ LTC Consortium: https://www.ahcancal.org/facility_operations/privacysecurity/Pages/LTCCConsortium.aspx

⁴ AHCA/NCAL Privacy Manual: attached as separate pdf. Because of its proprietary nature, we ask that you please do not distribute without first notifying AHCA/NCAL staff.

⁵ Requirements for, and Assuring Quality Care In, Skilled Nursing Facilities:
https://www.ssa.gov/OP_Home/ssact/title18/1819.htm

CFR §483.13 “Resident behavior and facility practices” clearly delineates the expectations for nursing homes related to protecting residents from abuse. These regulations include reporting requirements as well as investigation requirements (Note: investigation requirements include additional notification to the state of investigation findings.)⁶ Further, at F223, F224, and F226 in the State Operations Manual, Guidance to Surveyors, CMS lays out the expectation that facilities must report to the state [as a representative of CMS] such occurrences (or suspicion of such) as soon as possible and not to exceed 24 hours after discovery of the incident.⁷

Also, the ACA in the EJA amends Part A of title XI of the Social Security Act to require “Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities.”⁸ This section requires any owner, operator, employee, manager, agent, or contractor of a long term care facility that receives at least \$10,000 in federal funds during the preceding year, to report any reasonable suspicion of a crime against any individual who is a resident of, or receiving care from a long-term care facility to the Secretary and one or more law enforcement entities. CMS has adopted requirements to enforce this section of law.

3. What, if any, efforts is AHCA/NCAL undertaking to prevent elder abuse via social media (i.e. training, programming, advocacy, etc.)?

AHCA/NCAL has worked consistently for many years to provide education and guidance to our members to ensure that they are aware of potential abuses to residents via social media. Below is a listing of AHCA/NCAL educational sessions, as well as other partnerships with key stakeholders who reach our members:

- Webinar – *Minimizing the Legal Risks of Social Media and Technology in Assisted Living* (April, 2010)⁹
- *Provider* magazine cover story: *Social Media - Know the Law* (October 2010 issue)¹⁰
- *Best Practices for Social Media at Your Skilled Nursing Center or Assisted Living Community*: a one-page document designed to help nursing and assisted living care centers better focus on this important issue (April 2016).¹¹
- Social Media strategy training in the following states and during these conferences:
 - North Dakota (July 2013)
 - Delaware (November 2013)

⁶ Resident behavior and facility practices: <https://www.gpo.gov/fdsys/pkg/CFR-2012-title42-vol5/pdf/CFR-2012-title42-vol5-sec483-13.pdf>

⁷ State Operations Manual: https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf

⁸ Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities: https://www.ssa.gov/OP_Home/ssact/title11/1150B.htm

⁹ AHCA/NCAL Webinar: “Minimizing the Legal Risks of Social Media and Technology in Assisted Living: <http://webinars.ahcancal.org/session.php?id=4357>

¹⁰ *Provider* magazine (AHCA/NCAL’s in-house magazine) cover story: “Social Media-Know the Law”: <http://www.providermagazine.com/archives/archives-2010/Pages/1010/Social-Media-Know-The-Law.aspx>

¹¹ AHCA/NCAL’s “Best Practices for Social Media at Your Skilled Nursing Center or Assisted Living Community”: <https://www.ahcancal.org/News/Documents/SocialMediaBestPractices.pdf>

- New Jersey (April 2014)
 - Georgia (June 2014)
 - NCAL State Leaders (April 2014)
 - State Executive Conference in Nevada (December 2015)
 - Illinois (December 2015)
 - Virginia (February 2016)
 - Regional Multifacility Owners presentation (April 2016)
 - Regional Multifacility Owners Spring CEO Conference (May 2016)
- *#Winning at Social Media*, a PowerPoint presentation available to members that can be used as the skilled nursing or assisted living center develops or revises its own social media training materials.
 - Social Media Webinar (August 2015)¹²
 - New Mexico Health Care Association Convention & Expo (September 2015)
 - Missouri Health Care Association Spring Conference (March 2016)
 - Kansas Health Care Association Spring Conference (April 2016)
 - South Dakota Health Care Association Fall Annual Convention (September 2016)
- 2016 Annual Convention Training Sessions: In addition to continuing to carry out trainings on this topic throughout the year, we will host three education sessions at our Annual Convention & Expo October 16-19, 2016. Our goal is to continue to raise visibility of this issue to our membership and provide them with the resources they need to ensure the privacy of residents and patients. These trainings include:
 - *Social Media: Your Organization with New Audiences*
 - *How to Manage Social Media*
 - *What You Could be Missing on the Digital Wave*
 - *10 Minutes from Normal – Social Media Do's and Don'ts*
- Previous year convention training sessions include:
 - 2015: *Increasing Your Customer Experience IQ*
 - 2015: *The New Face of Privacy: Facebook, Other Social Media Sites, and Increased Enforcement*
 - 2015: *Let's Get Social*
 - 2015: Presentation to state-based communications managers
 - 2014: *Facebook and Twitter and Blogs, Oh My!*
 - 2014: *Quick Fire Advocacy: A Tale of Many Voices*

¹² AHCA/NCAL's Webinar: "#Winning at Social Media": <http://webinars.ahcancal.org/session.php?id=16607>

- AHCA/NCAL General Counsel sits on two Curriculum Planning Committees for American Health Lawyers Association (AHLA) Long Term Care (LTC) and the Law and Health Care Compliance Association (HCCA) Compliance Institute, LTC Track, focusing specifically on critical long term and post-acute care issues, including social media. In recent years, those tracks have included:
 - (2016 AHLA LTC and the Law) AA. *Social Media Management and the Risk of Being Connected through Electronic Communications in Health Care* by Elizabeth P. Tyler (materials not enclosed as they are copyrighted)
 - (2016 HCCA Compliance Institute) *Social Media, Care Providers Texting: How Do You Protect PHI (Personal Health Information)?* (materials included in enclosures)¹³
 - (2012 HCCA Compliance Institute) *Texting, Social Media, and Technology* (materials included in enclosures)¹⁴
- NCAL hosts an annual roundtable discussion for in-house general counsels of senior living companies in conjunction with the AHLA LTC and the Law Conference. The February 2016 event included a small group discussion among attendees regarding social media policies and further efforts to address them.
- NCAL also convenes a group comprised of representatives from the largest assisted living companies in the country, called the Senior Living Executive Council. Social media will be discussed at its next in-person meeting in June.

Policies & Training

Below are some highlights of the guidance AHCA/NCAL provides to members on ensuring the privacy of residents and patients. More detail can be read in the attached enclosures.

Policies

- We encourage all nursing and assisted living care centers to have a social media policy that protects not only the residents and patients, but also the employees and the care center. The policy should define what employees can or cannot do on social media, and if written correctly, is essentially a “code of conduct” that clearly defines what the center expects from its employees when it comes to online behavior.
- If care centers already have a social media policy, then it should be reviewed and updated frequently. The social media landscape is rapidly changing, with new technologies and tools emerging all the time, and it is important to consistently ensure that the social media policy is not only effective but legal.

¹³ Social Media, Care Providers Texting: How Do You Protect PHI:

<https://www.ahcancal.org/Email%20Templates/docs/HCCA%20Compliance%20Institute%202016.pdf>

¹⁴ Texting, Social Media, and Technology:

<https://www.ahcancal.org/Email%20Templates/docs/HCCA%20Compliance%20Institute%202012.pdf>

Training

- Nursing and assisted living centers should not only train new employees during orientation; but also should retrain existing employees periodically about its privacy (e.g., Health Insurance Portability and Accountability Act [HIPAA]) and social media policies.)
- Training should clearly articulate the center's process for monitoring and/or taking corrective action against individuals who inappropriately use social media.
- Care centers should prominently post the center's social media policy and procedures for residents, families, and staff.

Recommendations to the Committee

Per your request following our meeting on April 26, the Association believes acting on the following policy items in the near-term would significantly aid our efforts to better address and mitigate these violations, including:

1. **National Background Checks** - The ACA provided grants to states to implement background check programs for prospective long term care employees. The ACA also required the Office of Inspector General (OIG) to conduct an evaluation of this grant program—known as the National Background Check Program—after its completion. In January 2016, the OIG published a report recommending that the Centers for Medicare & Medicaid Services (CMS) “continue to work with participating states to fully implement their background check programs and to improve required reporting to ensure that CMS can conduct effective oversight of the grant program.”¹⁵ AHCA/NCAL supports those recommendations. Further, AHCA/NCAL recommends that CMS share the critical information it has learned about criminal background check systems over the last six years, and reinvestigate a strategy to create a national criminal background check system across the entire health care spectrum, that effectively and efficiently keeps criminals out of the health care setting and that protects vulnerable patients and residents.
2. **National Abuse Registry** - Currently, federal regulations (42 CFR § 483.156) require each state to establish and maintain a registry of individuals who have completed training and who are competent to function as nurse aides. Nurse aide registries also must include information on any substantiated finding of abuse, neglect, or misappropriation of property made by the state survey agency related to an individual. Used properly, state nurse aide registries prevent unemployable individuals from being employed in nursing facilities in that state. CMS must develop, maintain, and keep current a national abuse registry to identify direct care providers (including nurse aides, nurses, advanced practice nurses, all relevant therapists, physicians, physician extenders, and all individuals who might provide care in any acute care, post-acute care and assisted living setting). The

¹⁵ U.S. Department of Health and Human Services, Office of Inspector General. “National Background Check Program for Long-Term-Care Employees: Interim Report.” Jan. 2016. <http://oig.hhs.gov/oei/reports/oei-07-10-00420.pdf>

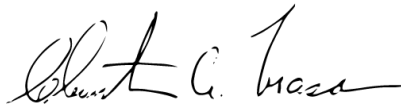
Association believes this registry must be accessed by all acute care, post-acute care and assisted living providers prior to and during the employment of any of these individuals.

AHCA/NCAL greatly appreciates your leadership on this serious, troubling issue, and we stand ready to work with you to continue to address and prevent these incidents of abuse aggressively. We welcome your support of the national background check program and other measures that would protect the privacy and integrity of residents and patients in skilled nursing and assisted living care centers. We are committed to working with you toward common sense solutions to these new forms of elder abuse.

Sincerely,



Mark Parkinson
President and CEO
American Health Care Association



Christian Mason
Chairman
National Center for Assisted Living