



COMMISSIONER  
James R. Hine

June 9, 2005

To: Assisted Living Facility Managers

Re: **Provider Letter #05-17** – Rules Regarding Assisted Living Electronic Monitoring  
(Replaces Provider Letter #04-21)

The purpose of this letter is to provide information about rules at 40 Texas Administrative Code (TAC) §92.129 regarding authorized electronic monitoring. The rules are a result of Senate Bill 1012, 78<sup>th</sup> Regular Legislative Session. Under Health and Safety Code, Chapters 242 and 247, a resident or the resident's guardian or legal representative is entitled to conduct authorized electronic monitoring (AEM). AEM is defined as the placement of an electronic monitoring device in a resident's room and making tapes or recordings with the device after making a request to the facility. Please read the rules carefully and familiarize yourself with their provisions.

**Does a facility have to inform residents about their right to conduct AEM?**

Yes. All newly admitted residents must be given the Information Regarding Authorized Electronic Monitoring form (available on the Long - Term Care Policy website at <http://www.dads.state.tx.us/business/LTC-Policy/communications/providerletters/index.cfm>). By July 1, 2005, all residents in the facility must have received a copy of this form.

**How is AEM initiated?**

To request AEM, the resident, the resident's guardian or legal representative must:

1. Complete the Request for Authorized Electronic Monitoring form (available on the Long-Term Care Policy website);
2. Obtain the consent of other residents, if any, in that room, on the Consent to Authorized Electronic Monitoring form (available on the Long-Term Care Policy website); and
3. Give the form(s) to the facility manager or designee.

**Who may request AEM?**

1. *The resident, if he/she is capable of requesting it and has not been judicially declared as lacking the required capacity;*
2. *The guardian of the resident, if the resident has been judicially declared to lack capacity;*
3. *The legal representative of the resident, if the resident is not capable of requesting AEM and has not been judicially declared to lack the required capacity.*

**Who determines if the resident is not capable of requesting AEM?**

The resident's physician determines if the resident is capable of requesting AEM. When the resident's physician has determined the resident lacks this capacity, 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 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 and by the resident before he or she became incapacitated, or the resident's nearest living relative.

**Who may consent to AEM?**

1. The other resident(s) in the room, if the other resident(s) are capable of consenting to AEM and have not been judicially declared as lacking the required capacity;
2. The guardian(s) of the other resident(s), if the resident(s) have been judicially declared to lack the required capacity; or
3. The legal representative(s) of the other resident(s), if the resident(s) do not have capacity to sign the form but have not been judicially declared to lack the required capacity. The legal representative(s) are determined according to the procedure for determining a legal representative, as stated above under **Who May 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 authorized **electronic** monitoring.

***Does the rule address covert electronic monitoring?***

Yes, covert electronic monitoring is defined as the placement and use of an electronic monitoring device that is not open and obvious. Further, the facility and Department of Aging and Disability Services (DADS) will not have been informed about the device by the resident, the person who placed the device in the room, or the person who uses the device. A facility may not discharge a resident because covert electronic monitoring is being conducted by or on behalf of a resident.

***What is required if a covert electronic monitoring device is discovered by a facility?***

If a covert electronic monitoring device is discovered by a facility and is no longer covert, as defined in 40 Texas Administrative Code (TAC) § 92.3 (relating to definitions), the resident must meet all requirements for AEM before monitoring is allowed to continue.

***Is notice of AEM required?***

If AEM is being utilized, a conspicuous notice must be posted at the entrance to the resident's room. The notice must state that the room is being monitored by an electronic monitoring device. Additionally, after August 1, 2004, all facilities, whether AEM is being conducted or not, must post at the entrance to the facility an **8 1/2 x 11** sign titled "Electronic Monitoring" which states, "The rooms of some residents may be monitored electronically by or on behalf of the resident. Monitoring may not be open and obvious in all cases."

***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 electronic monitoring, 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 or 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 the AEM be conducted in plain view.*

The facility must make reasonable physical accommodation for AEM, including:

1. providing a reasonably secure place to mount the video surveillance camera or other electronic monitoring device; and
2. providing access to power sources for the video surveillance camera or other electronic monitoring device.

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

Yes, DADS may assess an administrative penalty (see §92.559 of this chapter [relating to the administrative penalty schedule]) 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.

**What is the facility's responsibility regarding the reporting of abuse and exploitation?**

40 TAC § 92.102 (relating to Abuse, Neglect, or Exploitation (ANE) reportable to DADS by facilities), requires facility staff to report ANE. If abuse or neglect has occurred, the facility must report it; it cannot be addressed unless reported.

For purposes of the duty to report abuse or neglect when AEM is used, the following protocols apply:

1. If a resident gives a tape or recording made by the electronic monitoring device to facility staff and directs them to view or listen to the tape or recording to determine whether ANE has occurred, facility staff will be considered to have viewed or listened to the tape or recording on or before the seventh day after the date they received the tape or recording. The abuse or neglect would have to be reported by the seventh day after receipt of the tape or recording.
2. Facility staff are required to report abuse or neglect based on their viewing of or listening to a tape or recording, only if the incident of abuse or neglect is evident on the tape or recording. Facility staff are required to report neglect based on their 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.
3. 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 (not to exceed the community standard).

4. A person who sends more than one tape or recording to DADS must identify each tape or recording on which the person believes that 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.

If you have questions about the content of this letter, please contact Dotty Acosta, Assisted Living and Adult Day Care Policy Specialist, Policy Development and Support, at (512) 438-2170.

Sincerely,

[signature on file]

Veronda L. Durden  
Assistant Commissioner  
Regulatory Services

VLD:ca

Attachments:

- <http://www.dads.state.tx.us/forms/0066/0066.pdf> – Request for AEM Form 0066
- <http://www.dads.state.tx.us/forms/0067/0067.pdf> – Consent by Roommate Form 0067
- <http://www.dads.state.tx.us/forms/3100/3100.pdf> – Information regarding Authorized Electronic Monitoring for Assisted Living Facility Form 3100