Danger from Within?

# Sex Offenders in Long-Term Care Facilities

By Caroline J. Berdzik and Angeline Ioannou

**Operators and their counsel need to keep apprised of legal developments in this area and should adhere to proactive policies to protect residents and mitigate risk.**

As evidenced by continued legislation on the controversial topic of sex offenders in long-term care facilities, it is clear that this is a difficult issue with many ethical, legal, and operational dimensions and consequences. This article will explore the history of registered sex offenders in long-term care facilities, the current state of the law throughout the country as it pertains to registered sex offenders living in these facilities, and the unique challenges long-term care facilities and their legal providers encounter in managing registered sex offenders and others demonstrating propensities to commit sexual abuse that reside in these facilities. Additionally, the impact that housing and caring for registered sex offenders may have on the facility, fellow residents, employees, and visitors will be explored. As the population continues to age and as acuity levels increase, more registered sex offenders will need treatment in long-term care facilities. The industry needs to be prepared to manage the difficulties and risks that these individuals may pose to a facility and its residents and staff.

Unfortunately, registered sex offenders may also find themselves working in long-term care facilities due to inadequate or incomplete background checks or for other reasons. Operators and their attorneys have to do their best to ensure that employees that are providing care to residents do not pose a danger to these residents by conducting thorough background checks and by monitoring of employee-resident relations vigilantly.

Suggested solutions will be explored in the article, as well how to handle these delicate situations to try to ensure the safety of all.

## A Brief History of the Prevalence of Sex Offenders in Facilities

In 2006, Congress asked the Government Accountability Office (GAO) to evaluate the prevalence of sex offenders living in long-term care facilities such as skilled nursing and intermediate care facilities. The study examined the national sex offender database and eight state databases for sex

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offender registries and found about 700 registered sex offenders living in nursing homes or intermediate care facilities for people with mental retardation. Most of these registered sex offenders were male and younger than 65 and represented .05 percent of the approximately 1.5 million residents of nursing homes and intermediate care facilities. In this survey, about three percent of nursing homes housed at least one identified sex offender. A more recent survey on this topic does not exist, but ostensibly this number has increased as states have continued to broaden and refine the categories of sex offenses and as the relevant population has continued to age.

Interestingly, the GAO report did not necessarily determine that individuals with prior sexual convictions were more likely than other residents to commit sexual abuse. In fact, administrators of these facilities expressed more concern about cognitively impaired individuals and individuals with mental health issues committing sex crimes than registered sex offenders. It is true that if facilities take a myopic view and focus solely on registered sex offenders, another subset of residents may be even more prone to committing these types of behaviors, and they can go virtually unchecked. Therefore, it is imperative that facilities have policies and procedures to monitor these types of individuals, in addition to registered sex offenders.

## Some States Have Laws Concerning Registered Sex Offenders in Skilled Nursing Facilities

Federal law requires that law enforcement in the 50 states enact sex offender registries and notification laws to receive funding for law enforcement initiatives. States are free to set their own laws on how registries and notifications are made, and this has created a hodgepodge of conflicting regulations. Consequently, this can be very confusing for operators of long-term care facilities that operate in a variety of states. Currently, there are more than a handful of states with laws on the books regarding notification of registered sex offenders in long-term care facilities or establishing certain procedures on the admission or the prohibition of admission of certain registered sex offenders in facilities. The following explains some of these state laws.

### California

California requires any releasing authority, such as the Department of Corrections, to notify the nursing home or skilled nursing facility that a sex offender is going to become a resident. Cal. Code Regs. Health and Safety Code §1336-1336.4 (2013). The notification must be in writing and provided 45 days before admission. The law also requires an individual sex offender to provide the same notification even if the person is not being discharged from any such authority. Proof of registration as a sex offender must also be provided. Upon such notice the facility must inform all residents and employees. The regulation does not establish whether the actual names of the sex offenders can be released; however, it allows a facility to discharge a resident after or upon learning that the resident is a sex offender, assuming that the facility did not receive prior notification of that status at the time of admission.

### Illinois

The Illinois law is weak in comparison to the notification statutes passed in California and other states. Illinois only requires nursing homes to advise their residents that they can search an online police registry to determine if a sex offender resides in a facility. There is no requirement to inform the residents that a sex offender lives in a facility. A 2009 article in the *Chicago Tribune* by David Jackson and Gary Marx noted the obvious shortcomings in this law, namely that facility administrators have no legal obligation to notify their residents if there is a registered sex offender residing in a facility. The article highlighted the concern about relying on these residents to search for this information themselves. Some residents are cognitively impaired or do not have access to a computer. The safety concerns for these residents are compounded if facilities accept increased numbers of these felons to fill the beds.

### Minnesota

Minnesota's notification law is more comprehensive than the law in Illinois. The person seeking admission to the nursing home must disclose his or her status as a registered sex offender. A corrections officer is also required to notify the nursing home. However, this corrections officer has the additional obligation to notify the administrator and to provide him or her with a "fact sheet" stating (1) the name and physical description of the offender; (2) the offender's conviction history, including the dates of conviction; (3) the risk level classification assigned to the offender, and (4) the profile of likely victims. Upon receipt of such a fact sheet, a facility must provide it to all residents or their next of kin if the administrator deems it inappropriate to distribute that information due to the resident's physical condition or mental capacity. This law promotes more knowledge regarding sex offenders in nursing homes, but it also leaves some notification to the discretion of the administrator.

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### Oklahoma

In 2008 Oklahoma passed the nation's first law requiring the state to build a long-term care facility to house only sex offenders. 63 Ok. Stat. §§1-1900 *et seq.* (2008). That law authorized the state department of health to seek proposals for operating an existing stand-alone, long-term care facility for high-risk sex offenders. The facility would have specially trained staff and surveillance and security equipment to protect the public as well as other residents of the facility. Under the Oklahoma Nursing Home Care Act, a facility must provide residents with "[a] copy of any notification from the local law enforcement authority of the registration of any person residing in the facility who is required to register pursuant to the provisions of the Sex Offenders Registration Act or the Mary Rippy Violent Crime Offenders Registration Act." *Id.* at §63-1-1909. This law fur-

ther requires the state Board of Health to promulgate rules that place the burden on the facility to determine if a sex offender is applying for either residency or employment at the facility. If so, the facility is required to notify the board of health. *Id.* at §63-1-1946. This strict notification requirement applies equally to employees and employee applicants for the state Department of Health who will be working in long-term care facilities. *Id.*

**Opponents** of these laws cite obvious privacy issues and point out that most sex offenders in nursing homes are not predatory, such as those required to register following a conviction for statutory rape.

Oklahoma's strict laws passed, in part, due to the advocacy group A Perfect Cause, which in 2008 was instrumental in lobbying the Oklahoma legislature to pass the strict notification law by a unanimous vote. At that time, A Perfect Cause claimed that Oklahoma nursing homes had almost 60 sex offenders in residency across the state. Notwithstanding such strict notification requirements, a long-term care facility in Enid, Oklahoma, was recently fined 1.3 million dollars by the state Department of Health for allegedly failing to stop a resident and registered sex offender from "inappropriately" touching other patients. .

### Virginia

As a result of the GAO report, Virginia, in 2007, passed a fairly comprehensive law that required both assisted living facilities and nursing homes to receive notification of registered sex offenders in the area. Other some states passed similar laws. In Virginia, long-term care facilities are required to register with the Virginia State Police to receive automatic notification if a sex offender registers or re-registers with the sex offender registry, or if the sex offender's home or work address is in the same or a contiguous zip code of the facility. Even more importantly, facilities in Virginia must determine prior to admission whether potential residents are registered sex offenders if the facility anticipates that the individual will stay longer than three days, or if the person does stay longer than three days.

Virginia also requires that every long-term care facility ensure that every resident, prospective resident, or his or her legal representative is informed on how to access the sex offender registry prior to and during admissions. Every facility is required to obtain a signed acknowledgment that each resident has received the notification. Further, a facility must assist residents in locating the information if they are unable to do so.

### Oregon

In Oregon, if the Department of Human Services or an area agency knows that a person who is on probation, parole, or post-prison supervision after being convicted of a sex crime is applying for admission to a long-term care facility or a residential care facility, the department or area agency is required to notify the facility that a sex offender is seeking admission. Similar to California, anyone who is a registered sex offender must notify the facility of his or her status when applying for admission. Interestingly, Oregon law, similar to Oklahoma law, allows a facility to refuse admission to a convicted sex offender. Or. Rev. Stat. 441.372

### Massachusetts

Massachusetts took it one step further and passed a law that prohibits a level-3 sex offender from knowingly and willingly establishing residency in a nursing home or similar facility under Section 71 of Chapter 111. If a sex offender violates this provision, there is a potential for jail time as well as monetary fines. In 2011, a challenge was brought against this law by a 65-year-old level-3 registered sex offender who was mugged, hospitalized, and sent to a nursing home to recuperate from his serious injuries. He then moved to a resting home, where the Boston police told him he could not live because he was a registered level-3 offender. He sued, challenging the constitutionality of Mass. Gen. Laws ch.6, §178K(2)(e). The court agreed with the plaintiff and found that the statute violated his due process rights because there was no individualized assessment that the public safety risks of him leaving the home outweighed the public safety concerns of him residing in the rest home. Based on that case, providers in Massachusetts would be well advised to conduct a risk assessment of any sex offender seeking admission to a facility.

### Texas

In Texas, similar to Illinois, the notification law is not particularly restrictive. The state is required by law to inform a care facility's neighbors that a sex offender lives there, but it need not inform other residents of the facility.

## Some States Have Pending Legislation

Some states have pending legislation concerning registered sex offenders in long-term care facilities. Among others, Iowa, Ohio, and South Carolina have pending legislation.

### Iowa

Iowa has proposed legislation that would require a facility to notify staff, residents, and family when a sex offender is placed in the facility. The legislation also seeks to build a facility specifically to house sex offenders. *Editorial: Pending Sex Offender Bill a Sensible Solution*, The Daily Iowan (Mar. 1, 2013), http://dailyiowan.com/2013/03/01/Opinions/32131.html (last visited June 19, 2013). As of March 2013, these bills remained pending before the Iowa Legislature. The legislation would mandate a facility to craft a safety plan if a facility admitted a sex offender . If the notification legislation passes, Iowa facilities would have three months to provide the identities of sex offenders living in the facilities, and then facilities would have to report it to the Department of Inspections and Appeals immediately when any new sex offenders entered the facilities.

### Ohio

The Ohio Legislature has a bill in place that would require managers of long-term care facilities to provide a copy of the notice re-

ceived from the county sheriff to all residents of the facility and to the sponsor of each of those residents. Most long-term care facilities are privately owned and operated in the state; however, there are a number of county-operated facilities in the state. According to the Ohio County Home Association, 33 counties operate county or district homes that would fall under the bill's definition of a long-term care facility. The annual cost to distribute these notices to residents and sponsors is likely to be negligible.

There are approximately 2,500 total long-term care facilities in the state. These facilities include adult foster homes, adult care facilities or group homes, nursing homes, residential care and assisted living, and intermediate care facilities for persons with mental retardation. It is possible that in addition to county or district homes certain counties may also operate other types of long-term care facilities that may house sex offenders.

#### South Carolina

The proposed new law in South Carolina would require some new admissions standards and procedures if a facility sought to admit a registered sex offender. It would require a facility to determine if someone was a registered sex offender by following certain delineated procedures, and if this person was admitted, to provide notice to other residents and if applicable, their legal guardians.

### What Advantages and Disadvantages Do Notification Laws Have?

Most proponents argue that these laws provide information to residents that are not easily accessible to them because not all residents have Internet access. More importantly, many residents are elderly, infirm, or cognitively impaired and as such unable to appreciate the potential dangers present when a registered sex offender is living in their facility. Thus, notification laws provide valuable personal safety information to residents and their families.

Opponents of these laws cite obvious privacy issues and point out that most sex offenders in nursing homes are not predatory, such as those required to register following a conviction for statutory rape. Thus, the notification laws will "out" those residents as sex offenders when they never posed any real threat to the other residents. Therefore, in the absence of any real risk of sexual assault in a facility, a notification law will stigmatize a resident and create fear and possibly hysteria when the incidence and risk of harm is very low.

### Don't Ask, Don't Tell—How Should a Facility Obtain Information About Potential Residents of Long-Term Care Facilities?

Obviously, depending on the state in which a long-term care facility is in, the population that it treats, and its tolerance for risk, a facility needs to determine policy to handle admitting sex offenders or not admitting them. As many providers will tell you, because of regulatory requirements regarding readmissions and difficulty in discharging residents, the best time to prevent registered sex offenders from living in a long-term care facility is during the admission stage. However, as illustrated by the case in Massachusetts, it may be difficult for a facility to outright ban the admission of registered sex offenders because it may implicate due process rights, the Americans with Disabilities Act, as amended, or other laws.

There are different ways that providers can seek to obtain or conversely, not obtain this important information. Long-term care facilities can conduct background checks of all prospective residents after seeking legal authorization to run these checks from a resident, or from his or her legal representative if he or she is incompetent to authorize such a background check. In addition to the significant costs associated with conducting a criminal background check of all potential residents, there is the time associated with conducting such a check. However, if a facility chooses to do a background check, it should conduct a thorough background check or the check could be useless. Many times national registries are insufficient to pick up state level crimes. These background screening results can take several days, and many times admissions to these facilities arrive at night or on weekends, and facilities must act quickly to accept these admissions from hospitals or other medical providers or the facilities may potentially lose a steady flow of patients from the admitting source to a competing facility.

Perhaps, a facility will instead decide to make passage of a successful background check a condition of admission in the admissions agreement and then seek to discharge a resident or void the admissions agreement if negative information is received. However, as many operators will attest, this can become quickly complicated by regulatory agencies that more often than not will intervene on behalf of a resident and will make such a discharge or transfer a complicated and legally risky endeavor for a facility.

> **Some facilities** will outright deny admission to any registered sex offenders without conducting any type of risk analysis and would rather deal with litigation.

Some long-term care facilities, in an effort to save money on background screenings of potential residents and to leverage their internal resources better, will have staff members conduct background checks or similar searches on prospective residents. Unfortunately, many times these searches may run afoul of the Fair Credit Reporting Act (FCRA) because a facility has not secured the authorization of the resident or his or her legal representative before conducting the search. As these registries vary greatly from state to state in terms of how they are organized) and how the various offender levels are defined, there is significant room for mistaken identity and error, which could lead to regulatory action and litigation.

Another possibility is to have a question on the admission application inquiring whether the individual is a registered sex offender. While this self-disclosure may be the least administratively intensive way of obtaining this information, such a query will obviously invite further questions from potential residents and their families on how the facility safeguards against admission of registered sex offenders in addition to the self-disclosure. Admissions staff may

also be wary of such a question on an application, believing that it would chill admissions or signal to a prospective resident that a facility has had a problem with registered sex offenders in the past.

Other long-term care facilities that are located in states that do not requiring disclosing the existence of registered sex offenders in a facility may decide not to inquire about the status of a resident upon admission at all. This could stem from concern that if a facility knows that it has admitted a registered sex offender and a negative outcome then results, this can increase potential liability to the facility. Many times these types of policies are called into question when another resident, employee, or family member discovers it after doing his or her own research on the sex offender registry and discovers that a registered sex offender lives in a facility.

## Should a Facility Admit or Not Admit Registered Sex Offenders?

While there do not appear to be any laws that strictly prohibit a facility from denying admission to a registered sex offender, facilities need to be careful not to violate the law inadvertently by not admitting someone who may have committed a sex crime based on a mental disability or other medical condition or by failing to administer a policy on a consistent basis, for instance by denying admission to male registered sex offenders but admitting female registered sex offenders. A facility would be prudent to weigh the pros and cons of admitting a registered sex offender, weighing things such as level of offense, years since an offense was committed, the nature of the offense, any rehabilitation that the offender received, and the resident's current medical condition. If the risk of admitting someone is too great to bear, then a facility may decide not to move forward with the admission. Some facilities will outright deny admission to any registered sex offenders without conducting any type of risk analysis and would rather deal with litigation.

On the other hand, if a facility decides to admit a registered sex offender, any notification required by law must be made. Further, it is also wise to devise a safety plan to deal with the resident. It may not be possible to place this resident in a semi-private room based on a risk assessment. The resident may need more frequent checks by staff than other residents.

## What Should a Facility Do After Discovering that a Registered Sex Offender Lives in a Long-Term Care Facility?

More often than not, the first time that a facility learns that a registered sex offender is living in its midst is when a curious family member, resident, employee, or someone in the community informs the administrator of the facility. When this is brought to the attention of an administrator, the person providing the information normally expects that an immediate discharge or transfer will follow. Obviously, a facility will first need to validate whether the information is accurate. A facility must then decide in reviewing its state laws and policies if it will notify the community that a registered sex offender resides there. For example, even in Virginia if a facility determines that a registered sex offender currently lives in the facility, notice is not required by law, nor is it advised. However, facilities must let residents know to exercise all due diligence deemed necessary with respect to information on any sex offenders registered. *See* Va. Code §32.1-138(A)(16).

Disclosing the existence of a current registered sex offender must be closely weighed against not disclosing the existence of this individual. Obviously, a variety of factors will come into play, and first and foremost is whatever the federal and state law or regulatory guidance may provide. It is not completely clear how and if the Health Insurance Portability and Accountability Act (HIPAA) privacy rule may come into play. In Virginia, for example, the law only requires that the facilities advise residents to search the registry independently so that there is no disclosure of potential private health information by the facilities. The U.S. Department of Health and Human Services Office for Civil Rights does not have any formal guidance on the topic but has stated that

> to the extent that such information is maintained by Long Term Care Facilities as protected heath information under the HIPAA privacy rule, such information could be used or disclosed for specifically permitted purposes, such as when necessary to run the health care operations of a facility or required by another federal or state law.

Nevertheless, any information relating to a resident's status as a sex offender should be maintained separate and apart from the resident's medical file.

In these types of situations, it is a good practice to get the state ombudsman or state Department of Health involved, particularly if a facility potentially wishes to discharge or to transfer the resident. First, it a facility must determine if the individual poses any risk to the community. Operators should think beyond the residents and also consider visitors such as children and any risks that a registered sex offender could potentially impose on the community. Additionally, facilities should discuss the issue with in-house and outside counsel to determine the most prudent course of action that would entail the least amount of risk. For example, if an level-3 sex offender resides in a facility and is still potentially physically capable of committing a sex crime and currently demonstrating a propensity to commit such a crime, the facility may want to place the resident in a separate room immediately and place the resident on 1:1 care. However, this sometimes raises complications as other residents may question the isolation of the resident, and employees may become suspicious, inquire about the reasons why the resident is on 1:1 care, and refuse to provide care. As this example illustrates, a situation can quickly escalate, a resident's privacy can become compromised, and the ability to continue to care for the resident may become difficult.

## Registered Sex Offenders May Be the Least Prone to Commit Sex Crimes

Statistics show that registered sex offenders in nursing homes are not more likely to be repeat offenders unless they currently are demonstrating behavioral issues of concern. As previously stated, residents that are cognitively impaired or suffering from other behavior disorders or mental conditions may be more dangerous to the residents of a long-term care community. Facilities need to be very vigilant and observant of behaviors of residents that suggest abuse or sex crimes. This includes behavior directed at other residents, as well as employees and visitors to the facilities. Facilities should not take the

naive approach that they have addressed all issues regarding potential sex abuse by closely scrutinizing who they admit. Opportunity for the commission of these crimes must be limited as much as it can be without infringing on the privacy rights of the residents.

## How Should a Facility Handle Employee and Volunteer Sex Offenders?

Long-term care providers usually do conduct criminal background checks of potential employees, but they may miss key information depending on how they conduct their searches. Additionally, the changing legal landscape regarding using criminal convictions in hiring has affected how employers conduct these searches. Many employers wisely choose to outsource background checks as the process is time-consuming, confusing, and administratively burdensome. However, providers and their attorneys may not realize that not all searches are created equal. A robust background check should consist of state and federal records checks, in addition to sex offender registries. Furthermore, fingerprint-based checks are encouraged.

Background checks should be run on all candidates, irrespective of position. Any positive results are going to have to be closely screened against whether that candidate has direct access to residents by reviewing the candidate's job duties and position and whether the facility is legally prohibited from hiring the employee due to the nature of the conviction. Additionally, the legal landscape of criminal background checks is rapidly evolving. Many states and cities have enacted "ban the box" legislation, which prohibits an employer from asking on an employment application whether the individual was ever convicted of a crime. Notwithstanding some of the regulations prohibiting the hire of individuals with certain criminal convictions, there has been a very public movement analyzing whether outright bans from employment still make sense in light of the labor shortage for long-term care facilities and not conducting an individualized assessment of each individual hire. Additionally, facilities should strongly consider conducting background checks of volunteers in their facilities as these individuals have direct and sometimes unsupervised access to residents and could equally pose a danger to residents.

In December 2012, the Centers for Medicare and Medicaid Services National Background Check Program Long-Term Care Convictions Work Group released a report. This report looked into all types of long-term care facilities and contemplated whether a federal regulation should be developed that would mandate the use of a common definition of "direct access employee" and set forth specific considerations for disqualifying convictions and rehabilitation factors. The work group's review of all state laws indicated that they varied significantly in terms of how they defined "direct care" or "direct access" was and also the types of convictions that may limit or preclude employment in a long-term care facility. There was also significant variation in the length of time since conviction and whether states imposed lifetime bans or time-limited disqualification periods. In sum, the report makes clear that there is a balancing approach that needs to be taken to protect residents from those individuals that may cause them harm and in giving employers some guidance on how to evaluate candidates that may have a criminal history.

## Conclusion

As the above discussion demonstrates, state and federal laws pertaining to registered sex offenders in long-term care facilities vary. The state and federal governments have not adopted a one size fits all approach to dealing with registered sex offenders in the resident or employee population in long-term care facilities. However, facilities and their lawyers clearly must institute certain protocols to protect residents and to limit liability without compromising the interests of the registered sex offenders. Operators and their counsel need to keep apprised of legal developments in this area and should adhere to proactive policies to mitigate risk. FD