



Arkansas Department of Human Services

Division of Medical Services

Office of Long Term Care Mail Slot S409

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MEMORANDUM

LTC-A-2004-18

TO: Nursing Facilities; ICFs/MR 16 Bed & Over; HDCs;
 ICFs/MR Under 16 Beds; ALF Level I; ALF Level II;
 RCFs; Adult Day Cares; Adult Day Health Cares;
 Post-Acute Head Injury Facilities; Interested Parties;
 DHS County Offices

FROM: Carol Shockley, Director, Office of Long Term Care

DATE: September 15, 2004

RE: Advisory Memo - Electronic Records and Signatures

The Centers for Medicare and Medicaid Services has issued a position statement regarding the use of electronic records and electronic signatures. Please see that attached S&C-04-46.

CMS permits the use of electronic records or electronic signatures, including but not limited to the MDS, when:

1. State law permits the use of electronic records or electronic signatures;
2. The facility has policies and procedures authorizing and outlining the use of electronic records or electronic signatures; and,
3. The facility has policies in place to implement proper security measures to protect from unauthorized or impermissible creation or alteration of records or signatures, and to ensure that access to clinical records is made available to surveyors and others authorized by law.

Arkansas has enacted laws governing electronic records and electronic signatures. A copy of the law is attached. However, regulations currently are written such that

electronic records or signatures would not be permitted. For example, Section 607 of the Rules and Regulations for Nursing Homes states:

All entries in the resident records will be recorded in ink. There will be no alteration of information in the resident records. If an error is made, a single line will be drawn through the error, the word "error" written above and initialed.

This precludes the use of electronic records or signatures.

The Office of Long Term Care recognizes that technological advances are such that the use of electronic regulations or signatures should be permitted. Accordingly, the Office of Long Term Care will convene a committee of stakeholders – including but not limited to the nursing home industry – to develop amendments to the regulations to permit electronic records and signatures, and for guidelines in their use. Facilities are urged to refrain from implementing any system for electronic records or signatures until these changes are promulgated and implemented. This will ensure that any system implemented will meet the requirements of both state law and regulations. Notice of the amendment will be provided once the regulations are completed and promulgated.

If you need this material in alternative format such as large print, please contact our Americans with Disabilities Act Coordinator at 501-682-8317 (voice) or 501-682-6789 (TDD).

CS/bcs

Center for Medicaid and State Operations/Survey and Certification Group

Ref: S&C-04-46

DATE: September 9, 2004

TO: Associate Regional Administrators
State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Electronic Signature Guidance

Letter Summary

- Long-term care providers, that is Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs), may implement/accept the use of electronic signatures for their clinical record documentation including the Minimum Data Set (MDS) if this is permitted by state and local law and authorized by the long term care facility's policy.
- A long-term care facility that implements/accepts the use of electronic signatures must have policies in place that identify those who are authorized to sign electronically and have safeguards in place to prevent unauthorized use of electronic signatures.

The purpose of this memorandum is to provide guidance to Regional Office (RO) and State Agency (SA) personnel regarding the use of electronic signatures by certified long-term care providers who have the capability to implement electronic signatures for their clinical records.

Background

The use of electronic medical records appears to be increasing in nursing homes. The Centers for Medicare & Medicaid Services (CMS) has received requests for authorization to use electronic signatures on the MDS and the individual health record. Demand for the use of electronic signatures and current CMS requirements to retain hard copies of the MDS and clinical record has raised operational issues and concerns by both facility staff and authorized reviewers.

CMS has adopted the hospital guidelines for electronic medical records and electronic signatures for other providers that do not have specific regulations governing the use of electronic signatures, such as Rural Health Clinics and Federally Qualified Health Centers. Some States have specific requirements that include requirements for the use of electronic signatures. A few States do not address electronic signatures in their statutes or regulations, but may permit the use of electronic signatures with approval from fiscal intermediaries or State authorities.

Discussion

Based on the review of the State Operations Manual (SOM), conflicting messages exist in current CMS policy, as guidance requires the need for a hard copy of all MDS forms whether or not the facility's clinical record is entirely electronic. Another reference in the guidance allows the use of electronic signatures rather than a hard copy; the contradiction is noted in the following:

- Appendix PP, Guidance to Surveyors – Long-Term Care Facilities on page PP-76, [42 CFR 483.20(d)] tag F286 states “Whether or not the facility’s clinical record system is entirely electronic, a hard copy of all MDS forms, including the signatures of the facility staff attesting to the accuracy and completion of the records must be maintained in the resident’s clinical record.” Similar language is also found in the guidance for tag F278 on PP-81 [42 CFR 483.20(i)].
- In addition, Appendix R, the Revised Long-Term Care Resident Assessment Instrument User’s Manual, version 2.0, December 2002 with updates through June 2004 on page 1-27, Section 1.18 Reproduction and Maintenance of the Assessments, states “Until such time as CMS adopts an electronic signature standard that is compatible with pending HIPAA requirements for electronic signature, all facilities are required to sign and retain hard copies of the MDS.” Current policy found in the RAI Manual states “There is no requirement to maintain two copies of the form in the resident’s record (the hand written and computer-generated MDS). Either a hand written or a computer-generated form is equally acceptable.”
- However, guidance found in Appendix PP, [42 CFR 483.75(l)(1)], tag F515, Clinical records, references the facility’s “option for an individual’s record to be maintained by computer, rather than a hard copy, electronic signatures are acceptable.” Further guidance provides an example of how the facility may set up a system with safeguards to prevent unauthorized access to an individual’s record maintained by computer.

Decision

Nursing homes may use electronic signatures in a clinical record including the MDS when permitted to do so by state and local law and when this is authorized by the long-term care facility’s policy. As noted above, the guidance language found in Appendix PP, tag 515, Clinical records currently reflects the use of electronic signatures in the clinical record. Facilities must have written policies in place to ensure that they have proper security measures to protect from the use of an electronic signature by anyone other than to which the electronic signature

belongs. The policy must also ensure that access to clinical records is made available to surveyors and others who are authorized by law.

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Long-term care facilities that are not capable of maintaining an individual's record electronically must adhere to the current requirements that address the need for either a hand written copy or a computer-generated form. All state licensure and state practice regulations continue to apply to certified long-term care facilities. Where state law is more restrictive than federal requirements, the provider needs to apply the state law standard. In the future, long-term care facilities may be required to conform to a CMS electronic signature standard should CMS adopt one.

For questions regarding this memo, please contact Rosemary Dunn at (410) 786-1372 or e-mail at Rdunn@cms.hhs.gov.

Effective Date: October 15, 2004

Training: The information contained in this announcement should be shared with all survey and certification staff, their managers, the RO/state training coordinators, and all long-term care providers.

cc: Survey and Certification Regional Office Management (G-5)

/s/
Thomas E. Hamilton

25-31-101. Short title.

This chapter shall be known and may be cited as the "Arkansas Electronic Records and Signatures Act".

History. Acts 1999, No. 718, § 1.

25-31-102. Construction.

The provisions of this chapter shall be construed to promote the development of electronic government and electronic commerce. The Secretary of State shall develop guidelines for the use of electronic signatures and provide a register of electronic signature verification companies.

History. Acts 1999, No. 718, § 2.

25-31-103. Definitions.

As used in this chapter the term:

(1) "Electronic signature" means an electronic or digital method executed or adopted by a party with the intent to be bound by or to authenticate a record, which is:

(A) Unique to the person using it;

(B) Capable of verification;

(C) Under the sole control of the person using it; and

(D) Linked to data in such a manner that if the data are changed the electronic signature is invalidated;

(2) "Electronic signature verification company" means a company providing verification of an electronic signature. An electronic signature verification company shall obtain a surety bond in the amount of two hundred fifty thousand dollars (\$250,000);

(3) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity and also includes any department, agency, authority, or instrumentality of the state or its political subdivisions; and

(4) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. "Record" includes both electronic records and printed, typewritten, and tangible records.

History. Acts 1999, No. 718, § 3.

25-31-104. Agreement to electronic record or signature.

(a) Any person may, but shall not be required to, accept or agree to be bound by an electronic record which is:

- (1) Executed or adopted with an electronic signature; and
- (2) Witnessed or notarized using an electronic signature, when that acceptance or agreement is otherwise required to be witnessed or notarized.

(b) When a person or other entity accepts or agrees to be bound by an electronic record as provided in this section, then any rule of law which requires

- (1) A record of that type to be in writing shall be deemed satisfied;
- (2) A signature shall be deemed satisfied; and
- (3) A witness or notary shall be deemed satisfied by the electronic signature of the witness or notary.

History. Acts 1999, No. 718, § 4.

25-31-105. Unauthorized use of electronic signature.

(a) A person whose electronic signature is used in an unauthorized fashion may recover or obtain any or all of the following against the person who engaged in such an unauthorized use, provided that the use of the electronic signature in an unauthorized fashion was negligent, reckless, or intentional:

- (1) Actual damages;
- (2) Equitable relief, including, but not limited to, an injunction or restitution of money or property;
- (3) Punitive damages under the circumstances set forth in Arkansas law;
- (4) Reasonable attorney's fees and expenses; and
- (5) Any other relief which the court deems proper.

(b) Nothing in this section shall preclude criminal sanctions.

(c) Nothing in this section shall be deemed to waive the sovereign immunity otherwise provided by law to the state or any of its political subdivisions.

History. Acts 1999, No. 718, § 5.