

Granny Cams: Privacy and Liability Issues with Video Surveillance

North Dakota's Granny Cam Law

- Senate Bill No. 2113
- Signed by Speaker of the House and President of the Senate on April 8, 2019 and signed by the Governor on April 12, 2019

N.D. Cent Code § 50-10.2-01 and § 50-10.2-02.1
Effective August 1, 2019

Rule Making Process

- Facilitated by Karla Backman, ND Long-Term Care Ombudsman
 - Included many stakeholders
 - ND Long Term Care Association
 - Long Term Care Providers (approximately 10 agencies)
 - Protection and Advocacy
 - Legal
- Monthly meetings held starting in June

Rule Making Process (con't)

- Timeline – New Section 75-03-40-01 to 75-03-40-06
 - Legal advisory committee later this year
 - Public hearings
 - Effective date: April 2020
 - Rules provide details surrounding language in the statute

What is an Authorized Electronic Monitoring Device?

- Video surveillance cameras
- Monitoring devices
- Web-based cameras
- Video phones
- Audio recording
- Transmitting devices, or
- A combination of these devices

...installed in the room of a resident which are designed to...

What is an Authorized Electronic Monitoring Device? (con't)

- Acquire
- Transmit
- Broadcast
- Interact
- Record video, communications, or
- Other sounds occurring in the room

Does not include:

- Still cameras or devices
 - Used for the purpose of the resident having contact with another person but not for the purpose of electronically monitoring a resident

Facility Cooperation

- Shall cooperate to accommodate placement unless doing so would place an undue burden.
- A facility may not refuse to admit an individual and may not remove a resident because resident has or wants a camera. § 50-10.2-02.1 Subd. 7.
- No discrimination or retaliation against a resident for using or requesting an authorized electronic device.

Protections for Facility

- Use of a device or camera in compliance with Chapter 50-10.2-02.1 shields a facility from criminal charges or civil liability for invasion of a resident's privacy. § 50-10.2-02.1 Subd. 2.

Criteria for Placement of a Device

1. Placed in resident's room.
2. Fixed stationary position.
 - Monitors only resident and not roommate.
 - Protects privacy and dignity of resident.
3. Resident or representative provides written notice of placement and use which must include installation plan.
4. Video tape or recording created records the date and time.
5. All costs except electricity – paid by resident.
 - Installation, operation, removal, repairs, room damage, and maintenance.
6. Roommate or representative of roommate has to sign a consent for the device.

Criteria for Placement of a Device (con't)

Resident's Written Notice

- Form developed by State Long Term Care Ombudsman and available on DHS website (nd.gov - Services and Help tab) [forms and information have to be accessible and understandable including in an alternate format or language (proposed rule)]
 - Notice
 - Consent by resident
 - Waiver and release of liability for privacy rights
 - Understanding of costs, installation and access to recordings
 - Understanding of restrictions on placement of the device
 - Understanding of consent from roommate required and limitations placed by roommate
 - Ability to withdraw device
 - Section for consent by roommate
 - Roommate's acknowledgment of all details relating to the placement of the device
 - Any limitations by roommate
 - Right to withdraw consent and receive assurances of device being disabled
 - Section for installation plan
 - Section for withdrawal by either resident or roommate
 - Signed by both resident and roommate (if applicable)

Consent for Placement by Resident's Roommate

- Roommate Definition (proposed rule)
 - “A resident occupying the same room as the resident requesting to install and use an authorized electronic monitoring device.”

Consent for Placement by Resident's Roommate (con't)

- Roommate must consent in writing to the device.
 - Resident requesting device is responsible for obtaining consent from roommate.
 - Roommate has ability to restrict device to only video or only audio monitoring.
 - Roommate can limit the device's time of operation, direction, and focus [including viewing area (proposed rule)].
 - Roommate can withdraw consent at any time and resident responsible for disabling of device.
 - Consent provisions for roommate on the Authorization Form also confirms facility is not criminally or civilly responsible for violations of privacy rights as a result of consent to device.

Consent Required by Any New Roommates

- Resident with electronic monitoring device must disable device when new roommate moves into the room unless new roommate also consents to device.
- New roommate has right to limit:
 - Only audio or only video
 - Device's
 - Time of operation
 - Direction
 - Focus, and
 - Viewing area captured by camera (proposed rule)

Electronic Monitoring Documentation

Section I: Notice to Facility

Section I and II may be completed and signed only by the resident wanting to place and use an authorized electronic monitoring device in the resident room, or the person authorized to act as the resident's agent through a power of attorney for health care document (must be in effect according to the terms of the document), or the resident's guardian.

Name of Resident: _____ Room Number: _____

Name of Resident Representative (if resident doesn't have capacity to consent):

Check One: Power of Attorney for Health Care _____ OR Guardian _____

Contact Number of Resident Representative: _____

This serves as notice to _____
Name and location of facility

that I have chosen to place and use an authorized electronic monitoring device in the resident room indicated above in accordance with ND Century Code 50-10.2.

Section II: Consent by Resident

The monitoring device is just a video monitoring device. (circle one) Yes No

The monitoring device is just an audio recording device. (circle one) Yes No

The monitoring device records both video and audio. (circle one) Yes No

Please initial each statement below to indicate you have read and understand its contents.

_____ I hereby understand and agree to the following requirements from ND Century Code 50-10.2 for an authorized electronic monitoring device.

The authorized electronic monitoring device shall be in a fixed, stationary position;

The authorized electronic monitoring device shall monitor only the area occupied by the resident requesting the monitoring and not the area occupied by the roommate;

The authorized electronic monitoring device will be placed for maximum protection of the privacy and dignity of the resident and the roommate.

_____ I understand that if I have a roommate and my roommate does not consent to authorized electronic monitoring, I may not place or use an authorized monitoring device. I understand that if my roommate limits the use of the authorized electronic monitoring device, I must comply with the limits.

_____ I understand I must disable the authorized electronic monitoring device if my roommate withdraws consent in compliance with the facility's standards and regulations after receipt of the written withdrawal.

_____ I understand if there is audio recording used it will likely record conversations with staff, other health care providers, family and friends, and other parties in the facility. This may mean private information about finances, family relationships, and protected health information may be recorded.

_____ I hereby release the facility from liability for violations of my right to privacy regarding the use of the authorized electronic monitoring device, and I hereby waive my right to privacy in connection to the use of the authorized electronic monitoring device.

_____ I understand I must submit and follow an installation plan that complies with the facility's standards and regulations.

_____ I understand I am responsible for all costs, except for electricity, associated with the authorized electronic monitoring device.

_____ I understand I am responsible to contract with an Internet provider, if that is needed as part of the authorized electronic monitoring and must comply with facility policy.

_____ I understand that facility staff may not access any video or audio recording created through the authorized electronic monitoring device without my written consent or the written consent of my resident representative

_____ I understand I may not use or disclose a tape or other recording made by the authorized electronic monitoring device if there would be any unlawful violation of the privacy rights of another.

_____ I understand I can revoke this decision to place and use an authorized electronic monitoring device at any time during my stay in the facility by submitting a written notice.

A person may be subject to a Class B misdemeanor if they:

- Intentionally hamper, obstruct, tamper with or destroy a recording or an authorized electronic monitoring device placed in a resident's room without the express written consent of the resident or resident representative.

A person may be guilty of a crime or civilly liable if they:

- Unlawfully violate the privacy rights of another by placing an electronic monitoring device in the room of a resident or by using or disclosing a tape or other recording made by the device.

(07/2019)

(07/2019)

I hereby consent to the placement and use of an electronic monitoring device in my room in accordance with ND Century Code 50-10.2.

(This may be signed only by the resident or the resident representative.)

Resident Signature Date

OR

Resident Representative Signature Date

Does the resident have a roommate? Yes _____ No _____

If the resident has a roommate, **Section III must be completed and signed before an authorized electronic monitoring device can be placed and used in the resident's room.** If a new roommate has moved into the room the authorized electronic monitoring device cannot be used until Section III is completed and signed by the new roommate.

Section III: Consent by Roommate

I, _____, live in the same
Roommate Name

room as _____, room
resident

number _____ at _____
(name and location of facility)

I understand that _____ wants to place
resident

and use an authorized electronic monitoring device in the room.

I **do not** consent to the placement and use of an authorized electronic monitoring device in the room.

Signature of Roommate or Resident Representative Date
***If you have chosen to not consent to the placement and use of an authorized electronic monitoring device, return this to the resident named on page 1. You do not need to complete the remainder of the form.**

Complete the remainder of Section III if you are choosing to consent to the placement and use of an electronic monitoring device.

I require the following **limits** on the use of the authorized electronic monitoring device.

____ Audio recording only.

____ Video recording only.

____ Limit the use of the authorized electronic monitoring device to the following times: _____

____ Limit the direction and focus of the authorized electronic monitoring device to the following conditions: _____

(07/2019)

(07/2019)

Please initial each statement below to indicate you have read and understand its contents.

_____ I hereby understand and agree to the following requirements from NDCC 50-10.2- for an authorized electronic monitoring device.

The authorized electronic monitoring device shall be in a fixed, stationary position;

The authorized electronic monitoring device shall monitor only the area occupied by the resident requesting the monitoring and not the area occupied by the roommate;

The authorized electronic monitoring device will be placed for maximum protection of the privacy and dignity of the resident and the roommate.

_____ I understand if there is audio recording used it will likely record conversations with staff, other health care providers, family and friends, and other parties in the facility. This may mean private information about finances, family relationships, and protected health information may be recorded.

_____ I must sign an authorization for the disclosure of protected health information prior to placement and use of the monitoring device.

_____ I hereby release the nursing home from liability for violations of my right to privacy regarding the use of the authorized electronic monitoring device, and I hereby waive my right to privacy in connection to the use of the authorized electronic monitoring device

_____ I understand that facility staff may not access any video or audio recording created through the authorized electronic monitoring device without the written consent of the resident who requested the use of the authorized monitoring device, or the written consent of the resident representative, or a court order.

_____ I understand that any limits I have listed above must be fully complied with.

_____ I understand a tape or other recording made by the authorized electronic monitoring device may not be used or disclosed if there would be any unlawful violation of the privacy rights of another.

_____ I understand I may revoke my consent for the placement and use of an authorized electronic monitoring device at any time by giving a written notice. Revocation of my consent means the authorized electronic monitoring device will be disabled in compliance with the facility's standards and regulations and I will be given written assurance by the resident, or resident representative, that the device has been disabled.

A person may be subject to a Class B misdemeanor if they:

- Intentionally hamper, obstruct, tamper with or destroy a recording or an authorized electronic monitoring device placed in a resident's room without the express written consent of the resident or resident representative.

A person may be guilty of a crime or civilly liable if they:

- Unlawfully violate the privacy rights of another by placing an electronic monitoring device in the room of a resident or by using or disclosing a tape or other recording made by the device.

I hereby consent to the placement and use of an authorized electronic monitoring device in compliance with NDCC 50-10.2 and with any limits listed above.

Resident Signature

Date

OR

Resident Representative Signature

Date

For Facility Use:

Date Written notice received: _____

Date Resident written consent received: _____

Date Installation plan received: _____

Date Roommate's written consent received (if applicable): _____

Signature and Title – Facility Representative

Date

(07/2019)

(07/2019)

Section IV: Revocation of Consent for the Placement and Use of an Authorized Electronic Monitoring Device

I, _____,
(name of resident or resident representative)

OR

I, _____
(name of roommate or resident representative)

hereby revoke my consent for an authorized electronic monitoring device to be placed and used in the room. The authorized electronic monitoring device must be disabled in compliance with the facility's standards and regulations upon receipt of this written revocation notice of the consent.

For Facility Use:

Date Revocation of Consent received: _____

Signature and Title of Facility Representative

Date

(07/2019)

Reasonable Accommodation

- If a resident or resident representative of a resident who is residing in a shared room wants to have an authorized electronic monitoring device placed in the room and another resident living in the same shared room refuses to authorize the use of the authorized electronic monitoring device – facility shall make a reasonable attempt to accommodate.

Facility to Provide Information (Proposed Rule)

- Facility shall provide a copy of the facility's standards and regulations regarding the installation, use, maintenance, and removal of the authorized electronic monitoring device to the resident or resident's representative. (Facility should adopt an internal policy and have form for the installation plan.)

Posting of Signs in Facility

- Post a sign in a conspicuous manner where authorized electronic monitoring is being conducted to alert and inform visitors.
 - Sign must be in a form and manner residents, staff, and visitors can access and understand, including in an alternative format or language, when applicable (proposed rule).

Retention of Authorization Forms and Consent

- Retain executed Authorization and Consent forms in accordance with your internal protocols.

Who Can Consent to Device?

- Resident, or
- Resident's representative which is limited to:
 - Agent in a healthcare power of attorney, or
 - Guardianship order. § 50-10.2-01.

Who Can Consent to Device? (con't)

- Guardianship – court order – follow language in the order.
- Healthcare power of attorney.
 - What if power of attorney is only triggered at time of incapacity?

Who Can Consent to Device? (con't)

Proposed rule provides clarification.

- Resident is presumed to have the capacity to consent if:
 - Understands and appreciates the nature and consequences of the decision to consent to authorized electronic monitoring including:
 - Benefits and risks of the decision.

Who Can Consent to Device? (con't)

Proposed rule says:

- If a resident has capacity to consent only the resident may consent to authorized electronic monitoring in the resident's room.

Who Can Consent to Device? (con't)

Proposed rule says:

- If resident lacks capacity to consent and valid healthcare power of attorney exists:
 - Lack of capacity must be certified in writing by the resident's attending physician.
 - Attending physician must also certify in writing if the resident regains the capacity to consent to authorized electronic monitoring.

Who Can Consent to Device? (con't)

Proposed rule if resident lacks capacity:

- Either through guardianship order, or
- Healthcare power of attorney that designates agent
 - Lack of capacity is certified in writing by resident's attending physician.

Then...resident's representative may consent and complete necessary forms.

Who Can Consent to Device? (con't)

If resident lacks capacity and resident's attending physician certifies lack of capacity for purposes of decision making authority under a healthcare power of attorney to make a decision for electronic monitoring, then healthcare agent can make decisions, or if guardianship is in place, guardian makes decision...**in accordance with the resident's wishes, values, preferences, and directives.**

Who Can Consent to Device? (con't)

Proposed Rule

If resident lacks capacity and healthcare agent under valid healthcare power of attorney or guardianship under a valid guardianship is making decisions or taking actions that are not in the best interests of a resident with regard to use of authorized electronic monitoring, the facility **shall** report this concern in the manner required to the Department of Human Services or its designee.

Decision Making on Behalf of Roommate to Consent to Use of Electronic Device

- Capacity analysis the same as for the resident's roommate.
- Roommate also has to release the facility of any right to privacy violations as a result of consent to the use of a device by other resident requesting the electronic device (proposed rule).
- Roommate has to complete a HIPPA compliant release for facility if agreeing to request by resident for an electronic monitoring device (statute and proposed rule).
 - Release – only 1 year
 - New release if new resident requesting electronic monitoring

**Roommate Authorization to Disclose Protected Health Information
Authorized Electronic Monitoring Device**

Name of Resident: _____ Date of Birth: ___/___/___

Name of Facility: _____

Street Address: _____

City: _____ State: ND Zip Code: _____

I hereby authorize the facility listed above and any and all my current and future medical and healthcare providers to disclose to:

(Name of Resident or Resident Representative Utilizing the Authorized Electronic Monitoring Device)

The following Protected Health Information: My likeness (video, audio, photograph) and any and all information regarding my past, present, or future physical or mental health that is individually identifiable that may be captured, recorded, maintained or transmitted by the authorized electronic monitoring device. This includes but is not limited to, information such as symptoms, diagnoses, treatments, prognosis, lab results, other test results, medications, durable medical equipment, and information regarding insurance, claims, and payment.

For the purpose of permitting my roommate or roommate's resident representative to conduct authorized electronic monitoring in our shared room.

Duration/Revocation: This authorization is voluntary and remains in effect for one year from the signature date. I may revoke this authorization by providing written notice to the facility named above, at any time. Revocation will not apply to disclosures of Protected Health Information that occur before the written revocation notice is received by the facility. A photocopy of this authorization is as effective as the original.

Treatment, payment, enrollment, or eligibility for applicable health benefits will not be conditioned upon my providing this authorization unless otherwise required by law. Any information disclosed pursuant to this authorization may be subject to re-disclosure by the recipient and may no longer be protected by state or federal privacy laws.

Unless otherwise agreed in writing, information may be disclosed under this authorization in any form or medium, including verbal, written or electronic transmission. I have a right to receive a copy of this authorization.

Roommate Authorization to Disclose Protected Health Information
07/2019

Signature of Resident Date

Resident Representative: If you are signing this authorization on behalf of the resident, documentation demonstrating your authority must be on file with the facility or attached to this document.

Signature of Resident Representative (if applicable) Date

Type of Authority: Power of Attorney for Healthcare OR Guardian

Roommate Authorization to Disclose Protected Health Information
07/2019

Use of Internet and Responsibilities

Proposed Rule

- If internet access is required the monitoring device must have at least 128-bit encryption and enable a secure socket layer (“SSL”).
- Resident or their representative is responsible to contract with an internet provider if that is needed to operate the authorized electronic monitoring device.
- Facility not required to allow internet access through facility or corporate networks that maintain confidential patient, medical, financial, or personal records.

Social Media

Proposed Rule

- No recording or portion of a recording from an authorized electronic monitoring device may be shared or posted on any social media.

Reporting Abuse, Neglect, or Exploitation

Proposed Rule

- Any person viewing or listening to a recording who has reason to believe an individual has been or is currently being abused, neglected, or exploited, the person shall:
 1. Report to the Department of Human Services and administrator of the facility where the alleged abuse, neglect, or exploitation occurred. The administrator shall also comply with all abuse and neglect reporting statutes under federal or state law.
 2. Ombudsman is exempt from this reporting requirement and will follow laws that apply to their reporting requirements.

Access to Recordings

- Facility or staff may not access any recording without written consent of the resident or resident's representative or court order.

Tampering or Destroying a Recording

- Do not hamper, obstruct, tamper with or destroy a recording or an authorized electronic monitoring device placed in a resident's room without consent as this is a Class B misdemeanor.
- No one can place a device in a resident's room or use or disclose a tape or other recording made by an unauthorized device – if you do, you may be guilty of a crime or civilly liable for the invasion of privacy of another.

Tampering or Obstructing a Recording

Material obtained through the use of an authorized electronic monitoring device may not be used in a:

- Civil proceeding
- Administrative proceeding, or
- Survey process

If a person:

- Intentionally hampered,
- Obstructed, or
- Tampered with the material without the express written consent of the resident or resident representative, or if the material was obtained through the operation of an electronic monitoring device which was not compliant with this section.

Intercepting a Communication or Use of an Intercepted Communication

- A person may not intercept a communication or disclose or use an intercepted communication of an authorized electronic monitoring device placed in a resident's room, without the express written consent of the resident or their representative.

Questions?



Contact Info

Presented by



Beverley L. Adams
(701) 237-8402
badams@fredlaw.com