

NORTH
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October 25, 2019

RE: Proposed creation of N.D. Admin. Code chapter 75-03-42
Authorized Electronic Monitoring

TO WHOM IT MAY CONCERN:

The Department of Human Services is proposing the creation of N.D. Admin. Code chapter 75-03-42, Authorized Electronic Monitoring. The department has adopted procedures to assure public input into the formulation of the rules prior to adoption.

In conformity with those procedures, we are providing you with a copy of the proposed rules and are requesting that you provide any written data, views, or arguments no later than 5:00 p.m. on December 20, 2019.

The department has scheduled an oral hearing for December 10, 2019. Further information concerning the public hearing is included in the attached notice of proposed rulemaking and public hearing.

Your participation is welcomed, as are your suggestions. Please send all written data, views, or arguments to: Rules Administrator, Department of Human Services, State Capitol - Judicial Wing, 600 E. Boulevard Ave., Bismarck, ND 58505-0250.

Sincerely,



Christopher Jones,
Executive Director

CDJ/rs

Enclosures

cc: Vonette Richter, Legislative Council
Karla Backman, Aging Services
Nancy Nikolas-Maier, Aging Services

EXECUTIVE OFFICE

GOVERNOR
Doug Burgum

EXECUTIVE DIRECTOR
Christopher Jones

600 E Boulevard Ave Dept 325 | Bismarck ND 58505-0250 | 701.328.2538 | 800.472.2622 | 711 (TTY)

www.nd.gov/dhs

NOTICE OF INTENT TO CREATE
ADMINISTRATIVE RULES RELATING TO
N.D.A.C. CHAPTER 75-03-42
AUTHORIZED ELECTRONIC MONITORING

TAKE NOTICE that the North Dakota Department of Human Services will hold a public hearing to address proposed creation of N.D. Admin. Code chapter 75-03-42 at 9:00 a.m. on Tuesday, December 10, 2019, in Bismarck, N.D. in AV Room 210, located on the second floor of the Judicial Wing of the State Capitol.

The proposed creation of N.D. Admin. Code chapter 75-03-42, Authorized Electronic Monitoring, is necessary to comply with 2019 Senate Bill No. 2113.

The proposed changes are as follows:

Section 75-03-42-01 is created to clarify that definitions used in this chapter are the same as the definitions contained in North Dakota Century Code section 50-10.2-01. The section also defines "roommate".

Section 75-03-42-02 is created to establish the process to determine whether a resident of a long-term care facility has the capacity to consent to authorized electronic monitoring in their room. The section also permits the resident's representative to consent to authorized electronic monitoring if the resident does not have capacity.

Section 75-03-42-03 is created to identify the documentation that must be submitted in order to permit authorized electronic monitoring in a resident's room. Required documentation includes: written notice to the facility of the intent to place an authorized electronic monitoring device; a statement that the facility is not civilly or criminally liable for a violation of any resident's right to privacy; written consent for placement from the resident's roommate, if applicable; and an authorization signed by the resident's roommate that complies with title 45, Code of Federal Regulations, parts 160 and 164 (HIPAA).

Section 75-03-42-04 is created to require a facility to post signage to ensure that residents, staff, and visitors are aware that authorized electronic monitoring is being conducted within the facility.

LEGAL ADVISORY UNIT

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Section 75-03-42-05 is created to establish encryption requirements for authorized electronic monitoring devices placed in a resident's room. The section establishes procedures for access to the internet to operate an authorized electronic monitoring device. The section also establishes that no recordings from an authorized electronic monitoring device may be shared or posted on social media.

The proposed amendments are not anticipated to have an impact on the regulated community in excess of \$50,000. No taking of real property is involved in this rulemaking action.

Copies of the proposed rules are available for review at county social services offices and at human service centers. Copies of the proposed rules and the regulatory analysis relating to these rules may be requested by telephoning (701) 328-2311. Written or oral data, views, or arguments may be entered at the hearing or sent to: Rules Administrator, North Dakota Department of Human Services, State Capitol - Judicial Wing, 600 E. Boulevard Ave., Dept. 325, Bismarck, ND 58505-0250. Written data, views, or arguments on the proposed rules must be received no later than 5:00 p.m. on Friday, December 20, 2019.

ATTENTION PERSONS WITH DISABILITIES: If you plan to attend the hearing and will need special facilities or assistance relating to a disability, please contact the Department of Human Services at the above telephone number or address at least two weeks prior to the hearing.

Dated this 25th day of October, 2019.

Section 1. Chapter 75-03-42 is created as follows:

CHAPTER 75-03-42
AUTHORIZED ELECTRONIC MONITORING

Section

<u>75-03-42-01</u>	<u>Definitions</u>
<u>75-03-42-02</u>	<u>Determination of Capacity to Consent</u>
<u>75-03-42-03</u>	<u>Documentation</u>
<u>75-03-42-04</u>	<u>Signs</u>
<u>75-03-42-05</u>	<u>Use of Internet and Responsibilities</u>

75-03-42-01. Definitions.

The terms used in this chapter have the same meanings as in North Dakota Century Code section 50-10.2-01. In addition, as used in this chapter, unless the context or subject matter otherwise requires, "roommate" means a resident occupying the same room as the resident requesting to install and use an authorized electronic monitoring device.

History: Effective April 1, 2020.

General Authority: NDCC 50-10.1-03, 50-10.2-02.1, 50-10.2-03

Law Implemented: NDCC 50-10.2-02.1, 50-10.2-03

75-03-42-02. Determination of capacity to consent.

1. A resident is presumed to have the capacity to consent to authorized electronic monitoring if the resident understands and appreciates the nature and consequences of the decision to consent to authorized electronic monitoring, including the benefits and risks of the decision. If a resident has capacity to consent, only the resident may consent to authorized electronic monitoring in the resident's room.
2. A resident's lack of capacity to consent to authorized electronic monitoring must be documented in writing by the resident's attending physician or by a court order pursuant to North Dakota Century Code chapter 30.1-28. If the resident is not under a guardianship, the attending physician shall also document in writing if the resident regains the capacity to consent to authorized electronic monitoring.
3. If a resident is determined to lack capacity to consent to authorized electronic monitoring, then the resident representative may consent to authorized electronic monitoring and complete the required forms.
4. The resident representative shall make the decision of whether to consent to authorized electronic monitoring in the resident's room in accordance with the resident's wishes, values, preferences, and directions.

5. If a facility has reason to believe that a resident representative is making decisions or taking actions that are not in the best interests of a resident regarding the use of authorized electronic monitoring, the facility shall report this concern in the manner required to the department or the department's designee.

History: Effective April 1, 2020.

General Authority: NDCC 50-10.1-03, 50-10.2-02.1, 50-10.2-03

Law Implemented: NDCC 50-10.2-02.1, 50-10.2-03

75-03-42-03. Documentation.

1. The forms and information relating to authorized electronic monitoring shall be provided by the facility upon request in a language, form, and manner residents, resident representative, and visitors can access and understand.
2. At the request of the resident or the resident representative, the facility shall provide a copy of the facility's standards and regulations regarding the installation, use, maintenance, disabling, and removal of the authorized electronic monitoring device to the resident or resident representative.
3. Before the use of authorized electronic monitoring or the installation of an authorized electronic monitoring device, the resident or resident representative shall submit the following documentation to the facility:
 - a. A written notice to the facility of the intent to place and use an authorized electronic monitoring device, including an installation plan that complies with the facility's standards and regulations.
 - b. A statement that the facility is not civilly or criminally liable for a violation of any resident's right to privacy arising from authorized electronic monitoring.
 - c. A written consent form for placement and use of an authorized electronic monitoring device signed by the existing or proposed roommate or roommate's resident representative. The form must:
 - (1) Allow the roommate or roommate's resident representative to specify any conditions or restrictions the roommate or roommate's resident representative may elect to place on the device's time of operation, direction, and focus, including verifying the viewing area captured by the camera, prohibiting audio, and turning off the authorized electronic

monitoring device during certain times when total privacy is wanted.

(2) State that roommate or roommate's resident representative has the right to withdraw consent at any time in writing and have the device disabled in compliance with the facility's standards and regulations after receipt of the written withdrawal.

(3) State that the facility will not be held civilly or criminally liable for a violation of the roommate's right to privacy arising out of authorized electronic monitoring conducted by the resident or the resident representative.

d. An authorization signed by the existing or proposed roommate or roommate's resident representative for the disclosure of protected health information in compliance with title 45, Code of Federal Regulation, parts 160 and 164.

4. The facility shall maintain a copy of the applicable consent and authorization forms submitted pursuant to this section.

History: Effective April 1, 2020.

General Authority: NDCC 50-10.1-03, 50-10.2-02.1, 50-10.2-03

Law Implemented: NDCC 50-10.2-02.1, 50-10.2-03

75-03-42-04. Signs.

A facility shall clearly and conspicuously post a sign where authorized electronic monitoring is being conducted to alert and inform other residents, staff, and visitors to the facility. The sign must be provided in a language, form, and manner residents, staff, and visitors can access and understand.

History: Effective April 1, 2020.

General Authority: NDCC 50-10.1-03, 50-10.2-02.1, 50-10.2-03

Law Implemented: NDCC 50-10.2-02.1, 50-10.2-03

75-03-42-05. Use of internet and responsibilities.

1. The resident or resident representative shall select the type of monitoring device that will be used in the resident's room, accounting for any restrictions imposed by the roommate or roommate's resident representative. If the resident or resident representative chooses to install a monitoring device that uses internet technology, the monitoring device must have at least 128-bit encryption and enable a secure socket layer.

2. The resident or resident representative is responsible to contract with an internet provider if that is needed to operate the authorized electronic monitoring device and shall comply with facility's standards and regulations. The facility is not required to allow internet access through facility or corporate networks that maintain confidential patient, medical, financial, or personnel records.
3. No recording, or portion of a recording, from an authorized electronic monitoring device may be shared or posted on any social media.

History: Effective April 1, 2020.

General Authority: NDCC 50-10.1-03, 50-10.2-02.1, 50-10.2-03

Law Implemented: NDCC 50-10.2-02.1, 50-10.2-03