

CALIFORNIA DEPARTMENT OF AGING

INITIAL STATEMENT OF REASONS

Subject Matter of Proposed Regulations: State Long-Term Care Ombudsman, Posting of Notice, Facility Entry, and Interference with Actions of Office

Sections Affected: 8010, 8020 and 8040 of Articles 1, 2 and 3 of Division 1.8 of Title 22 of the California Code of Regulations (CCR)

Introduction and Problems Addressed

Welfare and Institutions Code (WIC) section 9102 mandates that the California Department of Aging (Department) administer all programs under the Older Americans Act of 1965 which includes the State Long-Term Care Ombudsman Program. The Department has authority to adopt and promulgate regulations to effectively carry out its responsibilities (WIC sections 9105 and 9745).

The California Office of the State Long-Term Care Ombudsman (Office), advocates for the health, safety, welfare and rights of individuals living in over 8,400 long-term care facilities. The Office approves 35 public and non-profit organizations throughout the state as long-term care Ombudsman programs and certifies approximately 820 Ombudsman representatives who serve within those programs.

Each year, thousands of complaints are received from residents, family members and others, involving issues ranging from violations of residents' rights to physical, verbal, mental or financial abuse, quality of care, dietary concerns, Medicare and Medi-Cal benefits, and improper transfers or evictions. Ombudsman representatives investigate and attempt to resolve complaints, observe and monitor the condition of residents and facilities, provide information about ombudsman services available and ensure that the residents have timely access to those services. They also conduct training sessions for facility staff on topics such as the role of the ombudsman in long-term care facilities, resident rights and care issues, elder abuse prevention, and mandated abuse reporting, to name a few.

WIC section 9722 authorizes Ombudsman representatives, access to long-term care facilities and residents and their medical and personal records, unescorted and unhindered, to carry out their lawful responsibilities. WIC sections 9730 and 9732 provide that anyone who willfully interferes with any lawful action of the Office will be referred to the appropriate licensing agency and be subject to a civil penalty.

Senate Bill (SB) 80 (Committee on Budget and Fiscal Review, Human Services Omnibus, Chapter 27, Statutes of 2019) amended WIC section 9712.5(d)(1) to require quarterly visits by Ombudsman representatives to each long-term care facility to provide residents with regular and timely access to Ombudsman services.

Prior to the passage of SB 80, there was no requirement that facilities be visited on a regular basis. Some facilities were visited quarterly, while others were visited once or twice annually. With the increased exposure that quarterly visits will bring, and to minimize the possibility of interference from facility personnel who may be unfamiliar with the Ombudsman program, the Office seeks to standardize the type of identification each representative will present and require each representative to provide a copy of the laws and regulations that govern the long-term care Ombudsman program to ensure access to facilities and define the full scope of lawful responsibilities of the Office.

Proposed amendments to the regulations delete obsolete language, correct references, simplify language to be consistent with law, and identify the scope of services provided by long-term care Ombudsman representatives. Proposed regulations also identify and make specific what constitutes willful interference with lawful actions of the Office and the statutory remedies available.

Summary of Benefits

As Ombudsman representatives begin quarterly visits to each long-term care facility, the proposed amendments and new regulations will enhance the process by (1) standardizing identification requirements; (2) providing facility personnel with a copy of the laws and regulations that govern the long-term care Ombudsman program; (3) clarifying the full scope of Ombudsman responsibilities; and (4) identifying what constitutes willful interference with Ombudsman responsibilities and the legal consequences. Reducing the possibility of willful interference will help Ombudsman representatives better serve long-term care residents as they advocate for their health, safety, welfare and rights.

Specific Purpose of Proposed Changes and Rationale

CCR Section 8010, Posting of Notice

Subsection (a) is amended to delete the phrase “confined to” wheelchairs and replace it with “who use” wheelchairs “and other mobility devices.” The phrase “confined to” wheelchairs is obsolete. The amendments are non-substantive but provide clarity to the regulation by recognizing that there are various mobility devices used by individuals.

CCR Section 8020, Facility Entry

Subsection (a) is amended to cite WIC section 9701(b) instead of 9701(a). This is necessary to correct the incorrect reference to WIC section 9701(a). Subsection (a) is also amended to include WIC sections 9712.5 and 9726.1. These sections define the full scope of services provided by the Office and provide clarity as to the specific responsibilities of the Office.

Subsection (b) is amended to change the word “ombudsmen” to “Ombudsman” and add the word “representatives” for clarity and consistency purposes throughout the regulations and delete the word “substate” to be consistent with the definition of “ombudsman coordinator” set forth in WIC section 9701(d). Subsection (b) is also amended to cite Section 9710(d) instead of 9701(e). This is necessary to correct the incorrect reference to 9701(e). Subsection (b) is further amended to delete the word “State” from “State Office” for consistency purposes throughout the regulations.

CCR Section 8040, Interference with Actions of Office

CCR section 8040 is renumbered as 8040(a) and is amended to delete the words “licensee”, “employee”, “agent”, “connected with a long-term care facility”, to simply state that “no person” shall willfully interfere with any lawful action of the Office. This change makes the language consistent with WIC section 9730.

CCR section 8040(a) is renumbered as 8040(a)(1) and amended to delete the words “prevent”, “impede” and “or” to be consistent with the language of WIC section 9730.

CCR section 8040(a)(1)(A) is adopted to require Ombudsman representatives seeking entry into long-term care facilities to have on their person clearly visible photographic identification issued by the Office. This regulation standardizes the type of identification used by Ombudsman representatives for consistency purposes as quarterly visits to long-term care facilities begin.

CCR section 8040(a)(1)(B) is adopted to require Ombudsman representatives seeking entry into long-term care facilities to present a copy of the laws and regulations that specify their authority to access long-term care facilities, residents, patients and their medical and personal records. This regulation provides facility personnel with accurate, clear and consistent information authorizing the Office and its representatives to access long-term care facilities.

CCR section 8040(a)(1)(C) is adopted to specify that interference with Ombudsman representatives of the Office will not be deemed willful if the representative fails to comply with subsections (A) and (B). This regulation provides clarity as to when willful interference occurs.

CCR section 8040(b) is renumbered as 8040(a)(2), amended to delete the words “prevent or” to be consistent with law, and delete the phrase “the interviewing of” and replace it with “confidential communications with” to more accurately reflect the scope of an Ombudsman’s lawful responsibilities.

CCR section (8040)(c) is renumbered as 8040(a)(3), amended to delete the words “prevent or” to be consistent with law, and add the words “access to, and” to resident’s and patients’ medical and personal records, to be consistent with WIC section 9724 and more accurately reflect the scope an Ombudsman’s lawful responsibilities.

CCR section 8040(e) is renumbered as 8040(a)(4), amended to delete the words “prevent, impede or” to be consistent with law, add the word “lawful” and delete the phrase “in the investigation and resolution of complaints.” These amendments simplify the meaning of the regulation and reflect the total scope of an Ombudsman’s responsibilities.

CCR section 8040(d) is renumbered as 8040(a)(5), amended to delete the word “willfully” since “discriminate, discipline, and retaliate” are sufficiently descriptive of the actions the regulation prohibits, and delete the provision that the regulation does not apply to any communication made or information given or disclosed was done maliciously or without good faith. These amendments are consistent with the provisions of WIC section 9715(b).

CCR section 8040(b) is adopted to specify that interference is considered willful if it continues after the Ombudsman representative provides photographic identification issued by the Office and a copy of the laws and regulations that authorize access to long-term care facilities. This regulation clarifies and makes specific WIC sections 9730 and 9732.

CCR section 8040(b)(1) is adopted to specify that this subsection will not apply when the person interfering is doing so at the direction of a person authorized to recommend or take adverse action against them. This regulation clarifies and makes specific WIC sections 9730 and 9732.

CCR section 8040(b)(2) is adopted to specify that any representative of the licensee authorized to take or recommend adverse action against an employee of a long-term care facility, who authorizes the employee to interfere with the lawful actions of the Office, will be deemed to have committed a willful violation under this section. This regulation clarifies and makes specific WIC sections 9730 and 9732.

CCR section 8040(c) is adopted to require the Ombudsman representative interfered with to notify the appropriate licensing agency and the State Ombudsman within 24 hours of the occurrence. This regulation clarifies and makes specific WIC sections 9730 and 9732.

CCR section 8040(d) is adopted to specify that the Ombudsman representative may seek the assistance of local law enforcement as needed. This regulation clarifies and makes specific WIC section 9732(b).

CCR section 8040(e) is adopted to specify that the State Ombudsman may seek appropriate legal remedies against any person who continues to interfere with lawful actions of the Office. This regulation clarifies and makes specific WIC sections 9731 and 9732.

The reference citation to WIC section 9720.5 is deleted because it is an incorrect statutory reference to long-term care facilities.

Underlying Data

1. California Long-Term Care Ombudsman Program Annual Report, Federal Fiscal Year 2018.
2. Senate Bill 80, Committee on Budget and Fiscal Review, Human Services Omnibus, Chapter 27, Statutes of 2019.

Business Impact

The Department has made an initial determination that the proposed regulatory actions would have no significant adverse economic impact directly affecting businesses, including the ability of businesses to compete with businesses in other states. The proposed amendments to the regulations delete obsolete language, correct references, simplify language to be consistent with law, and identify the scope of services provided by long-term care Ombudsman representatives. The proposed regulations also identify what constitutes willful interference with lawful actions of the Office and the statutory remedies available.

Economic Impact Assessment

Based on the above "Business Impact":

The Department concludes that it is (1) unlikely that the proposal will eliminate any jobs, (2) likely that the proposal will create an unknown number of jobs, (3) likely that the proposal will create an unknown number of new businesses, (4) unlikely that the proposal will eliminate any existing businesses, and (5) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Benefits of the Analysis:

The Department has determined that the proposed regulations will benefit residents and patients in long-term care facilities by providing accurate contact information, and access to long-term care Ombudsman services without willful interference from facility personnel. Reducing the possibility of willful interference will help Ombudsman representatives meet their statutory obligation to advocate for the health, safety, welfare and rights of long-term care residents and patients.

The proposed regulations do not affect worker safety or the environment because they are not related to either in any way.

Specific Technologies and Equipment

These regulations do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternatives to the regulatory proposals would be either more effective in carrying out the purpose for which the actions are proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulations in a manner that ensures full compliance with the laws being implemented or made specific. No such alternatives have been proposed.