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Recent Court Decision Provides Reminder That Resignation Does Not Terminate Investigation nor Reporting Obligations

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LaTawnda Moore, Dinsmore & Shohl LLP | **Joseph Wheeler**, Dinsmore & Shohl LLP

On August 29, 2022, the U.S. District Court for the District of Oregon declined to grant a physician's request for a mandatory injunction.^[1] In doing so, it upheld that health care entities, including hospitals, are legally mandated to report to the National Practitioner Data Bank (NPDB) where a practitioner surrenders their clinical privileges while under investigation, even if, in theory, the physician did not know he was under investigation.^[2]

The NPDB Mandate

Congress authorized the creation of the NPDB when it passed the Health Care Quality Improvement Act of 1986 (HCQIA). Title IV of HCQIA was intended to limit the ability of physicians, dentists, and other health care practitioners from moving from state to state without disclosure of previous malpractice payments or previous adverse actions.^[3] Together with Section 1921 and Section 1128E of the Social Security Act, Title IV requires select entities with pertinent information to report such information to the NPDB. At issue here is a hospital's requirement to report adverse clinical privilege actions where a physician resigns while under investigation even if the physician believes she was never formally notified of this investigation.

Health entities with an obligation to report are required to do so within 30 days. A hospital or other health care entity that has substantially failed to report can lose the immunity protections provided under Title IV for professional review actions for three years.

Owens v. The Oregon Clinic, P.C.

Michael M. Owens, M.D. is a gastroenterologist who previously worked for The Oregon Clinic (TOC) and had privileges at Providence St. Vincent Medical Center (PSVMC). He was accused of "pre-charting" certain notes about patients before providing services to them, including notes related to obtaining the patient's informed consent. On at least two occasions, he finalized notes for patients whom he had not seen, which then could be seen (and relied upon) by other providers.

Two providers reported these incidents to PSVMC. The Chief of Medicine and others met with members of the Medical Executive Committee (MEC) and agreed to commence an investigation under hospital professional staff policies and procedures due to concerns of possible improper conduct and/or clinical incompetence.

The Chief of Medicine sent Dr. Owens an email stating that his Medical Staff Coordinator would set up a meeting to discuss "some recent concerns." Dr. Owens deferred. Eventually, Dr. Owens stated that he could not meet for nearly a month due to his schedule. Unbeknownst to Dr. Owens, PSVMC's peer review decided that the matter would be referred to the MEC.

Two days later, Dr. Owens and TOC signed a separation agreement stating that Dr. Owens would not provide services to PSVMC for two years. As Dr. Owens was no longer employed by TOC, he was given two options as it related to his privileges at PSVMC: (1) take inactive status, which would pause privileges indefinitely but continue the investigation and require Dr. Owens' cooperation with the MEC, or (2) surrender privileges with PSVMC and resign from the Medical Staff. Dr. Owens elected to resign.

Before accepting his resignation, PSVMC informed him that he was under investigation and, if accepted, his resignation would trigger a report to the NPDB. Dr. Owens rejected PSVMC's contention that he was under investigation and instead argued that he resigned his privileges to satisfy a non-compete clause in his separation agreement with TOC.

The court held that, under HCQIA, PSVMC was required to report Dr. Owen's resignation to the NPDB. In doing so, the court determined that the case was exactly the type of situation that Congress intended to make reportable to prevent a loophole where physicians under investigation and health care entities enter "plea bargains" trading a surrender of privileges/employment in return for the health care entity's promise not to inform others about the circumstances of the surrender.

The court emphasized (i) that HCQIA does not define "investigation," but that term is interpreted broadly, without deference to any individual health care entity's policies; (ii) that the health care entity is not required to notify the physician that an investigation has begun; and (iii) that there is a distinction between a "professional review action" and "professional review activities"—the former of which requires "adequate notice and hearing procedures."

While reviewing the NPDB Guidebook, the court concluded that an "investigation" "run[s] from the start of an inquiry until a final decision on a clinical privileges action is reached." Or, in other words, it "begins as soon as the health care entity begins an inquiry and does not end until the health care entity's decision-making authority takes a final action." Department of Health and Human Services, Health Resources and Services Administration, NPDB Guidebook, at E-36 and 37 (2018) (Guidebook).^[4] There is no requirement that the health care practitioner be notified or even aware of the investigation.

In response to Dr. Owen's arguments that he had been deprived of a right to a hearing and other due process rights, the court ruled that a "professional review action" could not be conflated with an "investigation." While a professional review action required due process, an investigation is a professional review activity that could lead to a professional review action but is not itself a professional review action. No due process rights attach to an investigation under 45 C.F.R. § 6012(a)(1) or 42 U.S.C. § 11133(a)(1).

Ultimately, the court ruled that the Guidebook is clear and unambiguous. "A surrender of clinical privileges or failure to renew clinical privileges while under investigation or to avoid investigation must be reported." Guidebook, at E-36. Correspondingly, it ruled Dr. Owens had not met his burden of proving his entitlement to an injunction. In doing so, it

noted that while, PSVMC had a legal duty to report Dr. Owens to the NPDB, Dr. Owens could dispute its report or add his own “Subject Statement” to the report, which then becomes part of the report.

Conclusion

This case holds clear reminders for both hospitals and physicians. Hospitals and other health care entities are reminded of their obligations to report physicians who surrender their privileges while under investigation. Failing to do so can result in a loss of peer review immunity for three years. Physicians should understand that resigning will not preclude the adverse effects of an investigation. In addition to the NPDB, hospitals and other entities that employ physicians may be required to submit a report to the state licensing boards, law enforcement, Medicaid, or Medicare. Physicians may therefore wish to cooperate with the investigation or may wish to file a separate subject statement with the NPDB. As a physician, opting to ignore an investigation is no option at all.

[1] A “mandatory” injunction is one that requires a defendant to perform some action, as opposed to merely refraining from taking some action. Therefore, the already high standard of granting a preliminary injunction is “doubly demanding.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

[2] *Owens v. The Oregon Clinic, P.C.*, No: 3:22-cv-488-SI. (D. Or. Aug. 29, 2022).

[3] NPDB Guidebook can be found at www.npdb.hrsa.gov/guidebook.

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Medical Staff Credentialing and Peer Review Practice Group

Medical Staff, Credentialing, and Peer Review

1099 14th Street NW, Suite 925, Washington, DC 20005 | P. 202-833-1100

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