HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

SEPTEMBER 19, 2017

DEPARTMENT OF JUSTICE AND NPDB WEIGH IN ON DATA BANK REPORTING REQUIREMENT

On February 8, 2017, the U.S. District Court for the Eastern District of Texas issued an order requiring a hospital "to immediately submit to the National Practitioners Data Bank a Void Report" regarding a physician whose clinical privileges were restricted by the hospital's medical executive committee ("MEC"), which resulted in a report to the National Practitioner Data Bank ("NPDB").[1] As discussed in a previous Hall Render article, the professional review action imposed by the MEC required the physician to have concurring proctoring for his next five bowel surgery cases. There was no specified time frame for which this professional review action was to be imposed. The court held that the hospital improperly reported to the NPDB because the proctoring requirement did not necessarily last "for a period longer than 30 days."

The hospital appealed the case to the United States Court of Appeals for the Fifth Circuit. On September 14, 2017, the U.S. Department of Justice filed an amicus curiae brief with the Fifth Circuit and the NPDB published guidance on its website opining on the "Length of Action Requirement for Reporting Clinical Privileges Actions." Both the amicus brief and the public guidance reject the District Court's holding that a NPDB report is only proper when the professional review action imposed includes a specific time frame longer than 30 days.

In its brief, the government articulates the congressional intent behind the NPDB reporting requirement as only requiring reporting of professional review actions that, in fact, last "for a period longer than 30 days." The brief argues that the plain language of the NPDB reporting requirement is exclusively focused on the real-world consequences of the peer review action and disregards a reporting entity's intentions as to how long a professional review action is planned to last. To illustrate this point, the brief states that even when a hospital may initially plan to suspend a doctor's privileges for longer than 30 days but ultimately implements a shorter suspension, "HHS has instructed hospitals not to report that adverse action and to void any such reports that have already been submitted."

The guidance posted on the NPDB website also disagrees with the District Court opinion. After restating the relevant statutory requirement, the guidance states that the NPDB is not concerned with whether a specific time frame has been associated with a professional review action. Instead, a health care entity may even choose to impose an action for an "indefinite" length of time. The NPDB reportability of these "indefinite" actions, like all other professional review actions, depends on whether the action is actually in effect for more than 30 days. It is now clear that from the government's perspective, health care entities must report professional review actions only after such actions have been in effect for more than 30 days regardless of whether a time frame is specifically assigned when the action is taken.

As an aside, the NPDB guidance perpetuates a particular point of confusion by stating that summary suspensions must be reported by health care entities "if ***imposed or*** in effect for longer than 30 days." This phraseology suggests that a restriction that is initially imposed for more than 30 days must be reported regardless of how long the restriction actually lasts. That statement conflicts with the NPDB guidance's overarching point that "a restriction begins at the time a physician cannot practice the full scope of his or her privileges and is reportable to the NPDB once that restriction has been in place for 31 days."

As hospital medical staffs and other health care entities conducting peer review grapple with the question of when a privileges restriction is reportable to the NPDB, the federal government's most recent guidance should be taken into account.

If you have any questions, or if you would like additional information on this topic, please contact:

- Eric Crowder at (443) 951-7047 or ecrowder@hallrender.com;
- Timothy Adelman at (443) 951-7044 or tadelman@hallrender.com;
- Al Adelman at (443) 951-7046 or aadelman@hallrender.com; or
- Your regular Hall Render attorney.

[1] Walker v. Mem'l Health Sys. of E. Texas et al., 231 F.Supp. 3d 210, 217 (E.D. Tex 2017).