Options are Limited for Avoiding a Reportable Licensure Action

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Recent changes to the National Practitioner Databank ("NPDB") and Michigan Department of Licensing and Regulatory Affairs' ("LARA") subsequent interpretation of those changes has made keeping any sort of disciplinary licensure action out of potential employers' or other licensing authorities' hands extremely difficult. In response, physicians and other healthcare providers must be vigilant and ready to challenge any investigation or allegations; otherwise, any final disciplinary finding or order will, almost without exception, be on a provider's "permanent record."

The NPDB was established by the Health Care Quality Improvement Act of 1986, and until recently contained reports of adverse licensure, clinical privilege, professional society membership, DEA, HHS, OIG actions and medical malpractice payments made only by doctors and dentists. Hospitals, health care entities that conduct peer review activities, professional societies that conduct peer review, and state medical and dental boards can query the NPDB for information on a practitioner, usually for employment, credentialing or licensure purposes.

In 2010, the government issued regulations authorized by section 1921 of the Social Security Act that made two very important changes to the NPDB. The first is that each state must report to the federal government certain adverse licensure actions taken against any licensed health care practitioner, not just doctors and dentists. Section 1921 also requires that states report any negative action or finding that a state has finalized against a health care practitioner. State licensure authorities must now report any "negative action or finding" taken as the result of a formal proceeding. A negative action or finding is any action taken by the state licensure board that is publicly available information, excluding administrative fines or citations and corrective action plans unless they are connected to the delivery of healthcare services or assessed along with other reportable action. This broad definition of what constitutes a negative action or finding makes it virtually impossible to avoid a NPDB report once a state licensing board makes an official determination that a physician has violated the public health code and is to be disciplined

The Michigan Bureau of Health Professions ("BHP") makes avoiding a reportable event even more difficult by broadly defining when an administrative fine is related to the delivery of healthcare. In discussions, the BHP Enforcement Section indicated that it will report to the NPDB for almost any public health code violation related to healthcare activity where the practitioner is fined—even a violation generally considered an administrative matter. The only time that an otherwise administrative fine will be considered unconnected to the delivery of healthcare services is if the fine is assessed because a practitioner violates the code in an extremely minor and technical way, like failing to comply with continuing education requirements in a timely manner. Indeed, the most egregious scenario the Enforcement Section could envision where a fine would be considered not related to the delivery of healthcare and thus non-reportable was where a physician failed to report to the BHP a sanction from another state.

So what does this mean for a physician or other practitioner contacted by the BHP, or otherwise notified that he or she is under investigation? Since once the BHP has handed down a disciplinary sanction, or entered into a consent agreement with a provider acknowledging a violation of the public health code, it is nearly impossible to avoid a NPDB report, a practitioners' best chance of success is to fight the allegations or charges early in the investigation process before BHP files a formal administrative complaint. If the provider cannot convince the investigator to recommend closing the investigation, the BHP will likely file complaint, which will require the practitioner to expend a large amount of time and resources to defend.

It is important to make a vigorous defense of any allegations. Many times a strong early defense of an investigation will be enough to convince an investigator to recommend closing a file. The investigator's file is the only record of the investigation at this stage and the provider's only chance to tell his or her side of the story before the investigator makes a recommendation to the BHP. Normally the investigator will ask for a statement or an interview of the provider.

Despite the best efforts of the provider and counsel, the investigator may recommend that the BHP pursue the case and file an administrative complaint. The complaint itself is not reportable, but any disciple imposed as a result of the case will most likely be. It is imperative that the provider and counsel defend at this stage—because of the new NPDB changes, almost anything short of a full dismissal will be reportable and thus on the provider's record for the rest of his or her career.

It is important to remember at this stage that even a settlement, or consent order, with the BHP could very likely result in a reportable event. In previous years when fines were mostly non-reportable events, physicians and their counsel would negotiate with the BHP to accept a monetary penalty and move on. This is no longer a tenable strategy. The BHP will likely only consider technical and minor violations of the health code that result in punishment like an administrative fine or corrective action plan as non-reportable events. Further, the violations must not be related in any way to the delivery of healthcare services, and must not even have the potential to affect patient care in order to be treated as non-reportable. This makes it extremely likely that any discipline the BHP imposes will be reported to the NPDB.

The difficulty of working with the BHP to structure a non-reportable licensure event makes it vital to "get out in front" of any investigation of which a provider is aware. It is more important than ever for providers to focus on the front-end of an investigation. Only with a strong defense up-front can a provider hope to avoid reporting to the NPDB.

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