

ACT 363

S.B. NO. 1476

A Bill for an Act Relating to Peer Review.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to elect to opt out of subsection (a) of the federal Health Care Quality Improvement Act of 1986, Public Law 99-660, 42 U.S.C. sections 11101-15, and to enact instead the Hawaii Health Care Quality Improvement Act of 1989, which follows below in section 3, except that

the immunity from federal laws found in 42 U.S.C. section 11111(a) shall be retained.

SECTION 2. The State of Hawaii by this enactment formally elects to opt out of subsection (a) of the federal Health Care Quality Improvement Act of 1986, Public Law 99-660, 42 U.S.C. sections 11101-15, pursuant to section 411(c)(2)(B), 42 U.S.C. section 11111(c)(2)(B), of that Act, except that the State of Hawaii elects to retain the immunity from federal laws provided in 42 U.S.C. section 11111(a).

SECTION 3. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

“CHAPTER HEALTH CARE PEER REVIEW

PART I. GENERAL PROVISIONS

§ **-1 Short title.** This chapter may be cited as the “Hawaii Health Care Quality Improvement Act of 1989.”

§ **-2 Purpose.** The purpose of this chapter is to provide incentives and protection for physicians engaging in effective professional peer review.

§ **-3 Findings.** The legislature finds the following:

- (1) There is an overriding need to provide incentive and protection for physicians engaging in effective professional peer review;
- (2) The occurrence of medical malpractice actions has become a problem in Hawaii which can be addressed in part by promoting more effective peer review; and
- (3) The threat of private money damage liability under state laws unreasonably discourages physicians from participating in effective professional peer review.

§ **-4 Definitions.** For purposes of this chapter the following words have the following meanings:

“Adversely affecting” includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

“Clinical privileges” includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

“Director” means the director of the department of commerce and consumer affairs.

“Health care entity” means:

- (1) A hospital that is licensed by the State to provide health care services;
- (2) An entity, including a health maintenance organization or group medical practice, that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care as may be determined under rules or guidelines which may be adopted under section -13 of this chapter;

- (3) A professional society or committee thereof of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care as may be determined under rules or guidelines which may be adopted under section -13 of this chapter;

provided that "health care entity" shall not include a professional society or committee thereof if, within the previous five years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

"Hospital" means an entity described in paragraphs (1) and (7) of section 1861(e) of the Social Security Act.

"Licensed health care practitioner" and "practitioner" mean an individual, other than a physician, who is licensed or otherwise authorized by the State to provide health care services.

"Physician" means an individual licensed under chapter 453 or 460, or both, or 463E-1, to practice medicine or surgery or osteopathy or podiatric medicine; an individual licensed under chapter 448 to practice dentistry or dental surgery; or any individual who, without authority, holds oneself out to be so authorized.

"Professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician which conduct affects or could affect adversely the health or welfare of a patient or patients, and adversely affects the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. For purposes of this chapter an action shall not be considered to be based on the competence or professional conduct of a physician if the action is primarily based on any of the following:

- (1) The physician's association, or lack of association, with a professional society or association;
- (2) The physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business;
- (3) The physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis;
- (4) A physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional; or
- (5) Any other matter that does not relate to the competence or professional conduct of a physician.

"Professional review activity" means an activity of a health care entity with respect to an individual physician to do any of the following:

- (1) To determine whether the physician may have clinical privileges with respect to, or membership in, the entity;
- (2) To determine the scope or conditions of such privileges or membership; or
- (3) To change or modify such privileges or membership.

"Professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

PART II. PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

§ -10 **Limitation of damages for professional review actions.** (a) If a professional review action of a professional review body meets all the standards specified in section -11(a) except as provided in section -11(b):

- (1) The professional review body;
- (2) Any person acting as a member or staff to the body;
- (3) Any person under a contract or other formal agreement with the body; and
- (4) Any person who participates with or assists the body with respect to the action;

shall not be liable in damages under any law of the state with respect to the action except laws relating to the civil rights of any person or persons, including chapter 378, part I. Nothing in this subsection shall prevent the State from bringing an action, including an anti-trust action under chapter 480, where such an action is otherwise authorized.

(b) Notwithstanding any other provision of law to the contrary, no person, whether as a witness or otherwise, providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the state unless such information is false and the person providing it knew that such information was false.

§ -11 **Standards for professional review actions.** (a) For purposes of the protection set forth in section -10, a professional review action must be taken:

- (1) In the reasonable belief that the action was in the furtherance of quality health care;
- (2) After a reasonable effort to obtain the facts of the matter;
- (3) After adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
- (4) In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the standards necessary for the protection set out in section -10 unless the presumption is rebutted by a preponderance of the evidence.

(b) A health care entity shall be deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met or are waived voluntarily by the physician:

- (1) The physician has been given notice stating:
 - (A) That a professional review action has been proposed to be taken against the physician and the reasons for the proposed action;
 - (B) That the physician has the right to request timely hearings on the proposed action, and any time limit of not less than thirty days within which to request such a hearing; and
 - (C) A summary of the hearing procedures as set forth in paragraph (3) of this subsection.
- (2) If a hearing is requested on a timely basis under subsection (b)(1)(B), the physician involved must be given notice stating:
 - (A) The place, time, and date of the hearing, which date shall not be less than thirty days after the date of the notice; and

- (B) A list of the witnesses, if any, expected to testify at the hearing on behalf of the professional review body.
- (3) If a hearing is requested on a timely basis under subsection (b)(1)(B), the health care entity shall determine that the peer review hearing shall be held according to one of the following options, and the hearing shall be so held, subject to the provisions of subsection (b)(4), before:
 - (A) An arbitrator mutually acceptable to the physician and the health care entity; or
 - (B) A hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved; or
 - (C) A panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.
- (4) The right to the peer review hearing may be forfeited if the physician has failed, without good cause to appear.
- (5) In any peer review hearing held under this chapter, the physician involved has the right to:
 - (A) Be represented by an attorney or other person of the physician's choice;
 - (B) Have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with their preparation;
 - (C) Call, examine, and cross-examine witnesses;
 - (D) Present evidence determined to be relevant by the hearing officer, arbitrator, or panel, regardless of its admissibility in a court of law; and
 - (E) Submit a written statement at the close of the hearing.
- (6) Upon completion of any peer review hearing held under this chapter, the physician involved has the right to receive:
 - (A) The written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations; and
 - (B) A written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3).

(c) For purposes of section -10, nothing in this section shall be construed as:

- (1) Requiring the procedures referred to in subsection (a)(3):
 - (A) Where there is no adverse professional review action taken;
 - (B) In the case of a suspension or restriction of clinical privileges, for a period of not longer than fourteen days, during which an investigation is being conducted to determine the need for a professional review action; or
- (2) Precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

§ -12 Attorney's fees. (a) In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section -11(a) and the defendant substantially prevails, the court, at the conclusion of the action, shall award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the

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claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

(b) For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages, or permanent injunctive or declaratory relief.

§ -13 **Guidelines of the director.** The director, in consultation with the director of the department of health, may adopt pursuant to chapter 91, such rules and voluntary guidelines as may assist the professional review bodies in meeting the standards described in section -11(a).

§ -14 **Construction.** (a) Except as specifically provided in this part, nothing in this part shall be construed as changing the liabilities or immunities under law.

(b) Nothing in this part shall be construed as requiring health care entities to provide clinical privileges to any or all classes or types of physicians or other licensed health care practitioners.

(c) Nothing in this part shall be construed as affecting or modifying any provision of state law with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of state law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity."

SECTION 4. This Act shall not affect any rights or duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 19, 1989.)