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Alert

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Updates to the National Practitioner Data Bank

SUMMARY

In October 2018, the National Practitioner Databank ("*NPDB*") released a third edition of the NPDB Guidebook, a manual that provides guidance on the requirements established by the laws governing the NPDB. Although most of the 2018 revisions reflect minor changes, there are a number of new sections and clarifications that health care providers should be aware of.

Background

Established in 1986, pursuant to the Health Care Quality Improvement Act of 1986,[1] the NPDB is a repository for reports of medical malpractice payments and certain adverse actions related to health care practitioners, providers and suppliers.[2]

The NPDB was designed as an alert system to collect and disclose adverse information about physicians, dentists, and other healthcare practitioners to restrict their ability to move from state to state and continue their careers without anyone being aware of their previous incompetence or unprofessional actions.[3] Information collected and disclosed by the NPDB includes medical malpractice payments and certain licensure, clinical privileges, and professional society membership actions related to professional competence and conduct, as well as Drug Enforcement Administration certification actions and exclusions from participation in Medicare, Medicaid, and other federal healthcare programs.[4]

Under the NPDB, hospitals and other entities with peer review committees, health plans, and numerous others are required to report certain adverse actions to this centralized database. The NPDB Guidebook, originally published in 1990 and updated in 2001 and 2015, educates the healthcare community and others about the NPDB reporting requirements by providing guidance to users on topics such as eligibility, querying and reporting, and the dispute process through the use of explanations and examples.

Reporting to the NPDB (or failing to report) has serious consequences for both entities that are required to report and practitioners that are reported. Entities that report improperly may face lawsuits from reported practitioners. While there is no private of action under the NPDB, meaning that physician does not have a right to sue an entity for reporting, in one recent case (Walker v. Mem'l Health Sys. of E. Texas et al., 231 F.Supp. 3d 210, 217 (E.D. Tex 2017) a court not only entertained a physician's argument for an injunction requiring the reporting hospital to submit a retraction (i.e., to void the report), but ruled in favor of the physician. This decision was appealed by the hospital, but ultimately the physician voluntarily dismissed his underlying tort claim and the Court of Appeals dismissed the appeal. Technically this means that the District Court's order for the hospital to void the report was not overruled and physicians may want to cite *Walker* as support for their ability to sue to reverse adverse NPBD reports. Yet, as part of the appeal process, the US Department of Justice ("*DOJ*") did file an amicus curiae brief supporting the NPDB's position and addressed some of the issues that

lead to the case through the 2018 changes to the NPDB Guidebook. Thus, the existence of the DOJ's position, the revisions to the NPDB Guidebook published after the *Walker* decision, and the dismissal of the *Walker* appeal, could limit the applicability of the *Walker* opinion. Given the potential ramifications of NBDP reports – both the lasting career and reputational effects of such reports on providers and the potential of lawsuits by physicians against reporting entities, it is imperative to fully understand the NPDB's reporting requirements.

Changes to the NPDB Guidebook

While many of the October 2018 updates to the NPDB are editorial changes, there were also modifications that health care providers should be aware of. Below is a summary of some of the more significant changes and a full list changes, as identified by the US Department of Health and Human Resources ("*HHS*"), is available at https://www.npdb.hrsa.gov/guidebook/changeHistory.jsp.

Length of Restriction

One key revisions is the addition of a new section entitled "Length of Restriction." Whether or not a report to the NPDB is required depends, in part, on the length of time a restriction will be in place. This new section is aimed at assisting reporters with calculating the length of time that a restriction will be in place. Specifically, the revised NPDB Guidebook states that "a restriction begins at the time a physician cannot practice the full scope of his or her privileges." It also reaffirms that the "inability to practice the full scope of privileges without a proctor's presence or approval is a restriction." This update clarifies that, from the NPDB's perspective, the number of cases or the intended length is irrelevant in determining whether a report is required. Instead, the reportability of a proctoring restriction hinges on whether the restriction is in effect for a period longer than 30 days. This new section also explains that if an entity files a report regarding a summary suspension or restriction which ultimately does not last more than 30 days, the reporting entity must void such report. This change was a direct result of the Walker case. Specifically, the NPDB report at issue in *Walker* was that a hospital ordered a physician to have five surgery cases proctored, but did not specify a time limit. After a month, when the physician had not meet this five case requirement, the hospital filed an adverse action and the physician filed suit to request an injunction mandating that the report be voided. The court ruled that because the duration of the proctoring was not specified the action was not reportable. By adding this new section, the NPDB has effectively addressed the court's decision and potentially disarmed the *Walker* decision.

Voluntary Agreements

The new NPDB Guidebook adds several new questions and answers to Chapter E: Reports. One of these questions addresses the reportability of a voluntary agreement by the practitioner not to exercise privileges during an investigation. The new NPDB Guidebook states that "[a]n agreement not to exercise privileges is a restriction of privileges. Any restriction of privileges while under investigation, temporary or otherwise, is considered a resignation and must be reported." Thus, it is clear that under the new NPDB Guidebook a practitioner cannot voluntarily agree to restrict his or her own privileges to avoid reporting requirements. On the one hand, prior to resigning a physician should ensure that no current investigation exists against him/her, and, on the other hand, a reporting entity should ensure that it has documentation of all of its investigation activities to justify/document a report of physician's resignation during an investigation.

Proctors

The new NPDB Guidebook explains that a report is required if, for more than 30 days, a proctor is required in order for a physician or dentist "to proceed in freely exercising clinical privileges." According to the new NPDB Guidebook, "if a proctor is not required to be present for or approve procedures, the action should not be reported to the NPDB." This revision, similar to the changes in the "Length of Restriction" section, is an attempt to clarify the confusion that sometimes exists when attempting to calculate the length of a restriction in connection with reporting requirements. Again, through this clarification the NPDB has attempted to defuse the Walker decision.

Credentialing Committee

While the NPDB's position on voluntary agreements is a bright-line rule, its position on when the review process of an application for reappointment becomes an "investigation" is not so clear. According to the new NPDB Guidebook, this depends on whether "the reappointing hospital had specific concerns" about the applicant's competence. Specifically, while the Guidebook acknowledges that credentialing processes can include follow-up inquiries without creating an "investigation", it also notes that there are circumstances where a report could be triggered because such follow-up questions are in fact an investigation. Additionally, if an applicant resigns prior to a final action on such application, the reportability of that resignation would be dependent on the underlying facts. From a physician's perspective, one recommendation would be that any relinquishment of privileges should be contingent upon being assured that there is no investigation and therefore such relinquishment will not be reportable.

Court Ordered Changes

The 2018 NPDB Guidebook also added a Q&A regarding court orders to addressed situations that arise when adverse actions are reviewed by courts. Specifically, the new NPDB Guidebook states that if a court changes an adverse action, the reporting entity must file a Revision-to-Action Report. If, however, the court overturns the decision by the reporting entity, the Initial Report should be voided.

Impaired Practitioners

The 2018 NPDB Guidebook added a new section that relates to when licensing boards, as opposed to entities, must file an Adverse Action Report against an impaired physician. Specifically, the new NPDB Guidebook explains that "an enforceable agreement not to practice, signed by the board, is reportable." If the board takes an adverse action and the impaired practitioner enters into a treatment or rehabilitation program as a result, the adverse action is still reportable, however, the report should not include reference to the treatment program. Conversely, if a practitioner voluntarily enters a treatment or rehabilitation program and agrees with the program not to practice, and there is no separate agreement between the practitioner and the board, no report is required.

Dispute Resolution Limitations

The 2015 NPDB Guidebook stated that the NPDB's dispute resolution process does not include a review of the merits of the underlying reasons for the report or any consideration of due process challenges. Instead, the NPDB's dispute resolution abilities are limited solely to: (1) whether a report was submitted in accordance with NPDB's reporting requirements; and/or (2) the factual accuracy of the information. The 2018 NPDB Guidebook confirms this by adding a new paragraph that outlines the Secretary of HHS's jurisdiction for reviewing disputed reports which makes clear that NPDB's authority is limited to obtaining and publishing reports and it has no authority to examine the substance of a report, or the circumstances involving how the report was drafted.

Conclusion

Since a report to the NPDB can have a significant negative impact on a healthcare provider's reputation and career, they do merit some consideration. Thus, before resolving an investigation, surrendering privileges, withdrawing a renewal application, or settling a malpractice claim, a practitioner should consult knowledgeable health care counsel for guidance on how to minimize the potential damage. Similarly, failure to report or inaccurately reporting by those required to report can result in penalties and, perhaps more importantly, revocation of a reporting entity's reporting immunity for three years. As a result, individuals and entities involved in reporting to the NPDB should also become familiar with new reporting requirements and policy guidance found in the 2018 NPDB Guidebook to help understand when a report is required.

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[1] 42 U.S.C. § 11101 et seq.

[2] Although better known for its health privacy provisions, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), created the Healthcare Integrity and Protection Data Bank ("HIPDB") to combat health care fraud and abuse and capture convictions and exclusion actions. In 2013, the HIPDB was merged into the NPDB.

[3] Id. at §§ 11101(1)–(2).

[4] Id. at §§ 11131 – 11137.

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