

The National Practitioner Data Bank and a U.S. District Court Disagree on Mandatory Reporting Criterion

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A Federal statute requires that any health care entity that "takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days" file a report with the National Practitioner Data Bank ("NPDB"). See 42 U.S. Code § 11133. The statute has broadly been understood to mean that a restriction of privileges is reportable once it has been in place for 31 days. The U.S. District Court for the Eastern District of Texas recently challenged that understanding. See *Walker v. Mem'l Health Sys.*, 231 F. Supp. 3d 210 (E.D. Tex. 2017).

In *Walker*, the court determined a hospital erred by reporting a privilege restriction that spanned more than 30 days because the sanction that stipulated the terms of the restriction failed to specify duration. The court concluded "whether a proctoring sanction is reportable should be established by the terms of the sanction at the time it is delivered, and not by whether, in fact, it takes more than 30 days to satisfy the requirement." After *Walker*, the NPDB appeared to take aim at the court's interpretation by releasing a policy statement explaining that it is the *impact* of a sanction that makes it reportable, not the way in which the sanction was written. In the NPDB's view, a restriction is reportable once it has been in place for 31 days, regardless of the expected length of the restriction when issued.

Background on the *Walker* Case

Dr. Walker, a general surgeon holding medical staff privileges at St. Luke's Health-Memorial in Lufkin, Texas, was issued a corrective action plan by the Hospital following a peer reviewed evaluation of his care of patients. The corrective action plan mandated that Dr. Walker's surgical privileges would be restricted until he completed five bowel surgeries under the supervision of a surgical proctor. The corrective action plan did not specify a timeframe for Dr. Walker to meet the requirement. After 30 days had passed without Dr. Walker completing five proctored bowel surgeries, the Hospital reported the restriction of Dr. Walker's privileges to the NPDB.

Dr. Walker sued, challenging the fairness of the process that led to the restriction of his privileges and asking the court to issue a preliminary injunction against the Hospital. The court granted the injunction and directed the Hospital to withdraw its report to the NPDB based on its conclusion that the Hospital had erred in its interpretation of the statutory directive. The Hospital has appealed the decision to the Court of Appeals for the Fifth Circuit, where the issue is currently under consideration.

NPDB's Policy

The NPDB's policy statement, released shortly after the district court's decision, essentially rejects the court's interpretation and instead supports the position taken by the Hospital. The statement reiterates the NPDB's consistent interpretation that a restriction is reportable once it has been in place for 31 days, regardless of the expected length of the restriction when issued. Likewise, if a restriction is written to last more than 30 days but is lifted prior to 30 days, it is not reportable. The NPDB explained that if a restriction is reported and is ultimately lifted prior to the 30 days, it must be withdrawn by issuing a "Void Report" to the NPDB.

U.S. Attorney General Supports NPDB's Policy

The U.S. Attorney General, on behalf of the U.S., has weighed in on the debate. In an amicus brief filed by the Office of the U.S. Attorney General with the Fifth Circuit, the U.S. argues that relevant case law, HHS guidance and a straightforward reading of the statute all contradict the interpretation reached by the district court.

The amicus brief also asserts that the district court's interpretation of the reporting statute is contrary to Congress's purpose of enacting the Health Care Quality Improvement Act ("HCQIA"), which led to the establishment of the NPDB. Congress' enactment of HCQIA sought to improve the quality of medical care by restricting the ability of incompetent physicians to move between states without discovery of prior performance issues. The U.S. Attorney General points out that nearly half of the reports of clinical restrictions on file with the NPDB are reported as indefinite in length. Under the district court's interpretation of the statute, clinical restrictions of indefinite length would not be reportable and, therefore, such an interpretation could seriously impair the NPDB by suppressing reporting. Furthermore, restrictions of indefinite length arguably protect patients by preventing a poor performing physician from returning to practice until the hospital deems them competent, no matter how long that may take.

Questions for the Fifth Circuit Court of Appeals

While it would be helpful if the Fifth Circuit would provide clarity on the proper interpretation of the NPDB reporting statute, the appeals court has also been asked to decide several procedural issues. It is possible that the Fifth Circuit will determine the outcome of the appeal based on the procedural questions and, therefore, not reach the question of how the reporting statute should be interpreted.

Implications for Hospitals

Hospitals outside of the Eastern District of Texas would be well-advised to continue to report professional review actions that adversely affect the clinical privileges of physicians in accordance with the NPDB policy statement. However, all hospitals should continue to monitor the *Walker* appeal because a decision by the Fifth Circuit Court of Appeals may have a more widespread impact.

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