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District court decision at odds with NPDB guidance over length of action requirement for reporting clinical privileges actions — What’s a health facility to do?

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A recent rift between case law and regulatory guidance from the National Practitioner Databank (NPDB) has left hospitals and other health facilities in a precarious position—What adverse clinical privileges actions are reportable? The Health Care Quality Improvement Act itself seems clear enough— expressly requiring health care facilities to report “professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days.”¹ How one measures and evidences the 30-day period (the length of action requirement), however, is not clear.

For example, is the typical proctoring sanction requiring the completion of a certain number of proctored cases over an indefinite timeframe reportable to the NPDB if in fact it takes more than 30 days for the specified number of cases to be completed?

This very issue arose before the United States District Court for the Eastern District of Texas Marshall Division (the “Court”), when Dr. Walker sought an order requiring Memorial Health System of East Texas d/b/a CHI St. Luke’s Health Memorial Lufkin to void the report the hospital made to the NPDB regarding a five-surgery proctoring requirement. The court granted Dr. Walker’s request for preliminary injunction, ordering the hospital to void its report with the NPDB immediately. In reaching its decision the court held, “whether a proctoring sanction is reportable should be established by the terms of the sanction at the time it is delivered, not by whether, in fact, it takes more than 30 days to satisfy the requirement.”² The court reasoned that the five qualifying cases could be completed within a week, a year or longer, and completion was dependent upon the pace and schedule of the hospital, not on a temporal restriction embedded in the express terms of the written decision, and was thus not reportable. The court explained that reaching any other conclusion would create a reporting disparity and “would unfairly discriminate against

¹ 45 CFR § 60.12(a)(1)(i).

² *Walker v. Memorial Health System of East Texas*, No. 2:17-CV-00066-JRG, p.6 (E.D. Tex., Feb. 8, 2017).

practitioners in rural communities” who may not have the opportunity to complete the restriction within 30 days while doctors in busier hospitals would.³

In apparent response to the *Walker* case, the NPDB recently issued its own interpretation,⁴ of the length of action requirement for reporting clinical privileging actions, reaffirming that all adverse clinical privilege restrictions that last longer than 30 days must be reported. According to the NPDB, the crux of the reporting obligation is the number of actual days privileges are restricted and not the wording of the restriction: “The NPDB has consistently interpreted *adversely affects* to mean the impact of the restriction, and not the manner the restriction is written.”⁵ The restriction is deemed to commence once a provider is unable to practice the full scope of his or her privileges and is deemed to last until the restriction is lifted. The NPDB reporting obligations are triggered on the 31st day of the imposition of the restriction, regardless of whether the professional review decision contains an express temporal restriction. The NPDB explained that “[t]he number of cases required to be proctored at the time of imposition, or the expectation that a restriction be concluded in fewer than 31 days, is irrelevant for reporting purposes. The reportability of the action hinges on whether the restriction is in fact in effect for a period longer than 30 days.”⁶

While the Court’s decision may be persuasive, at this time it is not binding on any other district court or state and is also being appealed to the 5th Circuit. Whether other courts will follow the Court’s lead remains to be seen. Nixon Peabody attorneys are following developments as they unfold.

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³ *Id.*

⁴ The NPDB Guidance is available at <https://www.npdb.hrsa.gov/qa/policy8.jsp>.

⁵ *Id.*

⁶ *Id.*