

Consideration of Proposed Amendments to 22 Tex. Admin. Code §217.20, relating to *Safe Harbor Peer Review for Nurses and Whistleblower Protections*

Background: During the 85th Legislative Session, the Texas Legislature enacted House Bill (HB) 3296, which became effective September 1, 2017. HB 3296 amended the Occupations Code §303.0015(a) to require a nursing peer review committee to be established for vocational nurses, if a person regularly employs, hires, or contracts for the services of eight (8) or more nurses, and for professional nurses, if the person regularly employs, hires, or contracts for the services of eight (8) or more nurses, at least four (4) of whom are registered nurses. The proposed amendments, attached hereto as Attachment "A", are necessary to conform to these statutory changes.

The remainder of the changes are necessary for consistency in terminology throughout the rule text and are non-substantive in nature.

Board Action: Move to approve the proposed amendments to 22 Texas Administrative Code §217.20, relating to *Safe Harbor Peer Review for Nurses and Whistleblower Protections*, with authority for the General Counsel to make editorial changes as necessary to clarify rule and Board intent and to comply with the formatting requirements of the *Texas Register*. If no negative comments and no request for a public hearing are received, move to adopt the amendments to 22 Texas Administrative Code §217.20, relating to *Safe Harbor Peer Review for Nurses and Whistleblower Protections*, as proposed.

Attachment "A"

§217.20. Safe Harbor Nursing Peer Review [for Nurses] and Whistleblower Protections.

(a) Definitions.

(1) - (6) (No change).

(7) Incident-Based Nursing Peer Review--Incident-based nursing peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (5) minor incidents by the same nurse within a year's period of time) should be reported to the Board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) - (13) (No change).

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or nursing care, and a determination or recommendation regarding a complaint. The term also includes the provision of information, advice, and assistance to nurses and other persons relating to the rights and obligations of and protections for nurses who raise care concerns, report under Chapter 301, request nursing peer review, and the resolution of workplace and practice questions relating to nursing and patient care. The nursing peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Nursing peer [Peer] review conducted

by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor nursing peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation, suspension, termination, discipline, discrimination, and licensure sanction when a nurse makes a good faith request for nursing peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe harbor [Harbor] must be invoked prior to engaging in the conduct or assignment for which nursing peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) (No change).

(17) Whistleblower Protections--Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for safe harbor nursing peer review [Safe Harbor Nursing Peer Review] under TOC §303.005(c) and this section; or

(B) refused to engage in an act or omission relating to patient care that would constitute a violation of the NPA or Board rules as permitted by TOC §301.352 (NPA) (Protection for Refusal to Engage in Certain Conduct). A nurse invoking safe harbor [Safe Harbor] under this section must comply with subsection (g) of this section if the nurse refuses to engage in the conduct or assignment; or

(C) (No change).

(b) Purpose. The purpose of this rule is to:

(1) define the process for invoking safe harbor [Safe Harbor];

(2) define minimum due process to which a nurse is entitled under safe

harbor nursing peer review;

(3) provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of nursing peer review plans;

(4) assure that nurses have knowledge of the plan as well as their right to invoke safe harbor [Safe Harbor]; and

(5) provide guidance to the nursing peer review committee in making its determination of the nurse's duty to the patient.

(c) Applicability of Safe Harbor Nursing Peer Review.

(1) TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of eight (8) [ten (10)] or more nurses (for nursing peer review of an RN, at least four (4) [5] of the 8 [10] must be RNs) to permit a nurse to request safe harbor nursing peer review [Safe Harbor Peer Review] when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient.

(2) Any person or entity that conducts safe harbor nursing peer review [Safe Harbor Peer Review] is required to comply with the requirements of this rule.

(d) Invoking Safe Harbor.

(1) Safe harbor [Harbor] must be invoked prior to engaging in the conduct or assignment and at any of the following times:

(A) - (C) (No change).

(2) The nurse must notify the supervisor requesting the conduct or assignment in writing that the nurse is invoking safe harbor [Safe Harbor]. The content of

this notification must meet the requirements for a Quick Request Form described in paragraph (3) of this subsection. A detailed written account of the safe harbor [Safe Harbor] request that meets the minimum requirements for the Comprehensive Written Request for Safe Harbor Nursing Peer Review described in paragraph (4) of this subsection must be completed before leaving the work setting at the end of the work period.

(3) Safe Harbor Quick Request [Form].

(A) A nurse wishing to invoke safe harbor [Safe Harbor] must make an initial request in writing that at a minimum includes the following:

(i) - (v) (No change).

(B) The BON Safe Harbor Quick Request Form may be used to invoke the initial request for safe harbor [Safe Harbor], but use of the form is not required. The initial [written] request may be in any written format provided the above minimum information is provided.

(4) Comprehensive Written Request for Safe Harbor Nursing Peer Review.

(A) A nurse who invokes safe harbor [Safe Harbor] must supplement the initial written request under paragraph (3)(A) of this subsection by submitting a comprehensive request in writing before leaving the work setting at the end of the work period. This comprehensive written request must include a minimum of the following information:

(i) - (iii) (No change).

(iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications

described in subsection (g)(2) of this section for not engaging in the conduct or assignment awaiting a nursing peer review determination.

(v) (No change).

(B) The BON Comprehensive Written Request for Safe Harbor Nursing Peer Review Form [Comprehensive Request for Safe Harbor Form] may be used when submitting the detailed request for safe harbor [Safe Harbor], but use of the form is not required. The [comprehensive written] request may be in any written format provided the above minimum information is included.

(5) The nurse invoking safe harbor [Safe Harbor] is responsible for keeping a copy of the request for safe harbor [Safe Harbor].

(6) A nurse may invoke safe harbor [Safe Harbor] to question the medical reasonableness of a physician's order in accordance with TOC §303.005(e) (NPR Law). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections.

(1) To activate protections outlined in TOC §303.005(c) and paragraph (2) of this subsection, the nurse shall:

(A) invoke safe harbor [Safe Harbor] in good faith;

(B) notify the supervisor in writing that he/she intends to invoke safe harbor [Safe Harbor] in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at any of the following times:

(i) - (iii) (No change).

(2) TOC §303.005(c) and (h) (NPR Law) and §301.352 provide the following protections:

(A) A nurse may not be suspended, terminated, or otherwise disciplined, retaliated, or discriminated against for requesting safe harbor [Safe Harbor] in good faith.

(B) (No change).

(C) A nurse is not subject to being reported to the Board and may not be disciplined by the Board for engaging in the conduct awaiting the determination of the nursing peer review committee as permitted by subsection (g) of this section. A nurse's protections from disciplinary action by the Board for engaging in the conduct or assignment awaiting nursing peer review determination remain in place for 48 hours after the nurse is advised of the nursing peer review committee's determination. This time limitation does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h)(NPR Law) for requesting safe harbor [Safe Harbor].

(3) (No change).

(4) Safe harbor [Harbor] protections do not apply to any civil action for patient injury that may result from the nurse's practice.

(f) Exclusions to Safe Harbor Protections.

(1) A nurse's protections from disciplinary action by the Board under subsection (e)(2) of this section do not apply to:

(A) the nurse who invokes safe harbor [Safe Harbor] in bad faith;

(B) conduct the nurse engages in prior to the request for safe harbor [Safe Harbor]; or

(C) conduct unrelated to the reason for which the nurse requested safe harbor [Safe Harbor].

(2) If the nursing peer review committee determines that a nurse has engaged in conduct subject to reporting that is not related to the request for safe harbor [Safe Harbor], the committee must comply with the requirements of §217.19 of this title.

(g) Nurse's Right to Refuse to Engage in Certain Conduct Pending Nursing Safe Harbor Nursing Peer Review Determination.

(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting nursing peer review determination unless the conduct or assignment is one in which:

(A) - (B) (No change).

(2) If a nurse refuses to engage in the conduct or assignment because it is beyond the nurse's scope as described under paragraph (1)(A) of this subsection:

(A) (No change).

(B) the results of this collaborative effort must be documented in writing and maintained in nursing peer review records by the chair of the nursing peer review committee.

(h) Minimum Due Process.

(1) A person or entity required by TOC §303.005(i) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (safe harbor nursing peer review [Safe Harbor Nursing Peer Review]) and the procedure for making a request.

(2) In order to meet the minimum due process required by TOC Chapter 303,

the nursing peer review committee shall:

(A) - (B) (No change).

(B) exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse;

(C) limit attendance at the safe harbor nursing peer review [Safe Harbor Nursing Peer Review] hearing by a CNO, nurse administrator, or other individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, to appearing before the safe harbor nursing peer review committee to speak as a fact witness; and

(D) (No change).

(i) Safe Harbor Timelines.

(1) The safe harbor nursing peer review [Safe Harbor Nursing Peer Review] committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested safe harbor [Safe Harbor].

(2) (No change).

(3) The nurse's protection from disciplinary action by the Board for engaging in the conduct or assignment awaiting nursing peer review determination expires 48 hours after the nurse is advised of the nursing peer review committee's determination. The expiration of this protection does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h) for requesting safe harbor [Safe Harbor].

(j) General Provisions.

(1) The Chief Nursing Officer (CNO) or nurse administrator of a facility,

association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that nursing peer review is implemented and conducted in compliance with the NPA and the NPR law.

(2) Safe harbor nursing peer review [Harbor Nursing Peer Review] must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board.

(3) The nursing peer review committee and participants shall comply with the confidentiality requirement of TOC §303.006 and §303.007 relating to confidentiality and limited disclosure of nursing peer review information.

(4) If a nurse requests a safe harbor nursing peer review [Safe Harbor Peer Review] determination under TOC §303.005(b) and refuses to engage in the requested conduct or assignment pending the safe harbor nursing peer review, the determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the committee has incorrectly determined a nurse's duty.

(A) In accordance with TOC §303.005(d), the determination of the safe harbor nursing peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct.

(B) If the CNO or nurse administrator in good faith disagrees with the committee's determination, the rationale for disagreeing must be recorded and retained with the nursing peer review records.

(C) If the CNO or nurse administrator believes the nursing peer review was conducted in bad faith, she/he has a duty to report the nurses involved under TOC

§301.402 (NPA) and §217.11(1)(K) of this title.

(D) This section does not affect the protections under TOC §303.005(c)(1) and §301.352 relating to a nurse's protection from disciplinary action or discrimination for making a request for safe harbor nursing peer review [Safe Harbor Peer Review].

(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require:

(1) the nurse to:

(A) be informed how the informal workgroup will function and that the nurse does not waive any right to nursing peer review by accepting or rejecting the use of an informal workgroup; and

(B) (No change).

(2) - (4) (No change).

(5) ratification by the safe harbor nursing peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full nursing peer review committee to review the conduct in question; and

(6) the nursing peer review chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(l) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections.

(1) This subsection does not expand the authority of any safe harbor nursing peer review committee or the Board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing Board or accrediting body, and in accordance with TOC §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) - (B) (No change).

(3) -(4) (No change).