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SENATE BILL NO. 120

Offered January 8, 2020

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A BILL to amend and reenact §§ 8.01-581.16, 8.01-581.17, and 54.1-2909 of the Code of Virginia and to repeal § 54.1-2923.1 of the Code of Virginia, programs to address career fatigue in certain health care providers; civil immunity.

Patrons—Barker and Dunnavant

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-581.16, 8.01-581.17, and 54.1-2909 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-581.16. Civil immunity for members of or consultants to certain boards or committees.

Every member of, or health care professional consultant to, any committee, board, group, commission or other entity shall be immune from civil liability for any act, decision, omission, or utterance done or made in performance of his duties while serving as a member of or consultant to such committee, board, group, commission or other entity~~,~~ ~~which~~ *that* functions primarily to review, evaluate, or make recommendations on (i) the duration of patient stays in health care facilities~~,~~*;* (ii) the professional services furnished with respect to the medical, dental, psychological, podiatric, chiropractic, veterinary, or optometric necessity for such services~~,~~*;* (iii) the purpose of promoting the most efficient use or monitoring the quality of care of available health care facilities and services, or of emergency medical services agencies and services~~,~~*;* (iv) the adequacy or quality of professional services~~,~~*;* (v) the competency and qualifications for professional staff privileges~~,~~*;* (vi) the reasonableness or appropriateness of charges made by or on behalf of health care facilities ~~or~~*;* (vii) patient safety, including entering into contracts with patient safety organizations, provided that such committee, board, group, commission, or other entity has been established pursuant to federal or state law or regulation, the requirements of a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to assure compliance with Medicare conditions of participation pursuant to § 1865 of Title XVIII of the Social Security Act (42 U.S.C. § 1395bb), or guidelines approved or adopted by a statewide or local association representing health care providers licensed in the Commonwealth pursuant to clause ~~(iii)(f)~~ *(iii) (f)* of subsection B of § 8.01-581.17, or established and duly constituted by one or more public or licensed private hospitals, health systems, community services boards, or behavioral health authorities, or with a governmental agency, and provided further that such act, decision, omission, or utterance is not done or made in bad faith or with malicious intent*; or (viii) a professional program to address issues related to career fatigue and wellness in health care professionals licensed to practice medicine or osteopathic medicine or licensed as a physician assistant that is established or contracted for by a statewide association, that is exempt under 26 U.S.C. § 501(c)(6) of the Internal Revenue Code, and that primarily represents health care professionals licensed to practice medicine or osteopathic medicine in multiple specialties. No active participant in a professional program described in clause (viii) shall be employed or engaged by the professional program or have a financial ownership interest in the professional program.*

§ 8.01-581.17. Privileged communications of certain committees and entities.

A. For the purposes of this section:

"Centralized credentialing service" means (i) gathering information relating to applications for professional staff privileges at any public or licensed private hospital or for participation as a provider in any health maintenance organization, preferred provider organization, or any similar organization and (ii) providing such information to those hospitals and organizations that utilize the service.

"Patient safety data" means reports made to patient safety organizations together with all health care data, interviews, memoranda, analyses, root cause analyses, products of quality assurance or quality improvement processes, corrective action plans, or information collected or created by a health care provider as a result of an occurrence related to the provision of health care services.

"Patient safety organization" means any organization, group, or other entity that collects and analyzes patient safety data for the purpose of improving patient safety and health care outcomes and that is independent and not under the control of the entity that reports patient safety data.

B. The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, *professional program,* or other committee, board, group, commission, or other entity as specified in § 8.01-581.16; (ii) nonprofit entity that provides a centralized credentialing service; or

(iii) quality assurance, quality of care, or peer review committee established pursuant to guidelines approved or adopted by (a) a national or state physician peer review entity, (b) a national or state physician accreditation entity, (c) a national professional association of health care providers or Virginia chapter of a national professional association of health care providers, (d) a licensee of a managed care health insurance plan (MCHIP) as defined in § 38.2-5800, (e) the Office of Emergency Medical Services or any regional emergency medical services council, or (f) a statewide or local association representing health care providers licensed in the Commonwealth, together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications. Additionally, for the purposes of this section, accreditation and peer review records of the American College of Radiology and the Medical Society of Virginia are considered privileged communications. Oral communications regarding a specific medical incident involving patient care, made to a quality assurance, quality of care, or peer review committee established pursuant to clause (iii), shall be privileged only to the extent made more than 24 hours after the occurrence of the medical incident. Nothing in this section shall be construed as providing any privilege to any health care provider, emergency medical services agency, community services board, or behavioral health authority with respect to any factual information regarding specific patient health care or treatment, including patient health care incidents, whether oral, electronic, or written. However, the analysis, findings, conclusions, recommendations, and the deliberative process of any medical staff committee, utilization review committee, or other committee, board, group, commission, or other entity specified in § 8.01-581.16, as well as the proceedings, minutes, records, and reports, including the opinions and reports of experts, of such entities shall be privileged in their entirety under this section. Information known by a witness with knowledge of the facts or treating health care provider is not privileged or protected from discovery merely because it is provided to a committee, board, group, commission, or other entity specified in § 8.01-581.16, and may be discovered by deposition or otherwise in the course of discovery. A person involved in the work of the entities referenced in this subsection shall not be made a witness with knowledge of the facts by virtue of his involvement in the quality assurance, peer review, *professional program,* or credentialing process.

C. Nothing in this section shall be construed as providing any privilege to health care provider, emergency medical services agency, community services board, or behavioral health authority medical records kept with respect to a patient, whose treatment is at issue, in the ordinary course of business of operating a hospital, emergency medical services agency, community services board, or behavioral health authority nor to any facts or information contained in medical records, nor shall this section preclude or affect discovery of or production of evidence relating to hospitalization or treatment of such patient in the ordinary course of the patient's hospitalization or treatment. However, the proceedings, minutes, records, reports, analysis, findings, conclusions, recommendations, and the deliberative process, including opinions and reports of experts, of any medical staff committee, utilization review committee, *professional program,* or other committee, board, group, commission, or other entity specified in § 8.01-581.16 shall not constitute medical records, are privileged in their entirety, and are not discoverable.

D. Notwithstanding any other provision of this section, reports or patient safety data in possession of a patient safety organization, together with the identity of the reporter and all related correspondence, documentation, analysis, results, or recommendations, shall be privileged and confidential and shall not be subject to a civil, criminal, or administrative subpoena or admitted as evidence in any civil, criminal, or administrative proceeding. Nothing in this subsection shall affect the discoverability or admissibility of facts, information, or records referenced in subsection C as related to patient care from a source other than a patient safety organization.

E. Any patient safety organization shall promptly remove all patient-identifying information after receipt of a complete patient safety data report unless such organization is otherwise permitted by state or federal law to maintain such information. Patient safety organizations shall maintain the confidentiality of all patient-identifying information and shall not disseminate such information except as permitted by state or federal law.

F. Exchange of (i) patient safety data among health care providers or patient safety organizations that does not identify any patient or (ii) information privileged pursuant to subsection B between *professional programs,* committees, boards, groups, commissions, or other entities specified in § 8.01-581.16 shall not constitute a waiver of any privilege established in this section.

G. Reports of patient safety data to patient safety organizations shall not abrogate obligations to make reports to health regulatory boards or other agencies as required by state or federal law.

H. No employer shall take retaliatory action against an employee who in good faith makes a report of patient safety data to a patient safety organization.

I. Reports produced solely for purposes of self-assessment of compliance with requirements or standards of a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services to ensure compliance with Medicare conditions of participation pursuant to § 1865 of Title XVIII of the Social Security Act (42 U.S.C. § 1395bb) shall be privileged and confidential and shall not be subject to subpoena or admitted as evidence in a civil or administrative proceeding. Nothing in this subsection shall affect the discoverability or admissibility of facts, information, or records referenced in subsection C as related to patient care from a source other than such accreditation body. A health care provider's release of such reports to such accreditation body shall not constitute a waiver of any privilege provided under this section.

§ 54.1-2909. Further reporting requirements; civil penalty; disciplinary action.

A. The following matters shall be reported within 30 days of their occurrence to the Board:

1. Any disciplinary action taken against a person licensed under this chapter in another state or in a federal health institution or voluntary surrender of a license in another state while under investigation;

2. Any malpractice judgment against a person licensed under this chapter;

3. Any settlement of a malpractice claim against a person licensed under this chapter; and

4. Any evidence that indicates a reasonable probability that a person licensed under this chapter is or may be professionally incompetent~~;~~, has engaged in intentional or negligent conduct that causes or is likely to cause injury to a patient or patients~~;~~, has engaged in unprofessional conduct~~;~~, or may be mentally or physically unable to engage safely in the practice of his profession.

~~The reporting requirements set forth in this section shall be met if these matters are reported to the National Practitioner Data Bank under the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., and notice that such a report has been submitted is provided to the Board.~~

B. The following persons and entities are subject to the reporting requirements set forth in this section:

1. Any person licensed under this chapter who is the subject of a disciplinary action, *a* settlement, *a* judgment, or evidence for which reporting is required pursuant to this section;

2. Any other person licensed under this chapter, except as provided ~~in the protocol agreement entered into by the Medical Society of Virginia and the Board for the Operation of the Impaired Physicians Program~~ *by a contract agreement with the Health Practitioners' Monitoring Program*;

3. ~~The presidents of all professional societies in the Commonwealth, and their component societies whose members are regulated by the Board, except as provided for in the protocol agreement entered into by the Medical Society of Virginia and the Board for the Operation of the Impaired Physicians Program;~~

~~4.~~ All health care institutions licensed by the Commonwealth;

~~5.~~ *4.* The malpractice insurance carrier of any person who is the subject of a judgment or settlement; and

~~6.~~ *5.* Any health maintenance organization licensed by the Commonwealth.

C. No person or entity shall be obligated to report any matter to the Board if the person or entity has actual notice that the matter has already been reported to the Board. *The reporting requirements set forth in this section shall be met if these matters are reported to the National Practitioner Data Bank under the Health Care Quality Improvement Act, 42 U.S.C. § 11101 et seq., and notice that such report has been submitted is provided to the Board.*

D. *No person or entity shall be obligated to report information regarding a health care provider licensed to practice medicine or osteopathic medicine or licensed as a physician assistant who is a participant in a professional program to address issues related to career fatigue and wellness that is organized or contracted for by a statewide association exempt under 26 U.S.C. § 501(c)(6) of the Internal Revenue Code and that primarily represents health care professionals licensed to practice medicine or osteopathic medicine in multiple specialties to the Board unless the person or entity has determined that there is reasonable probability that the participant is not competent to continue in practice or is a danger to himself or to the health and welfare of his patients or the public.*

E. Any report required by this section shall be in writing directed to the Board, shall give the name and address of the person who is the subject of the report, and shall describe the circumstances surrounding the facts required to be reported. Under no circumstances shall compliance with this section be construed to waive or limit the privilege provided in § 8.01-581.17.

~~E.~~ *F.* Any person making a report required by this section, providing information pursuant to an investigation, or testifying in a judicial or administrative proceeding as a result of such report shall be immune from any civil liability or criminal prosecution resulting therefrom unless such person acted in bad faith or with malicious intent.

~~F.~~ *G.* The clerk of any circuit court or any district court in the Commonwealth shall report to the Board the conviction of any person known by such clerk to be licensed under this chapter of any (i) misdemeanor involving a controlled substance, marijuana, or substance abuse or involving an act of

moral turpitude or (ii) felony.

~~G.~~ *H.* Any person who fails to make a report to the Board as required by this section shall be subject to a civil penalty not to exceed $5,000. The Director shall report the assessment of such civil penalty to the Commissioner of the Department of Health or the Commissioner of Insurance at the State Corporation Commission. Any person assessed a civil penalty pursuant to this section shall not receive a license, registration, or certification or renewal of such unless such penalty has been paid.

~~H.~~ *I.* Disciplinary action against any person licensed, registered, or certified under this chapter shall be based upon the underlying conduct of the person and not upon the report of a settlement or judgment submitted under this section.

2. That § 54.1-2923.1 of the Code of Virginia is repealed.

3. That an emergency exists and this act is in force from its passage.