

Regulating and Reporting: Duties of the Cabinet and the Health-Care Employee

Kentucky law creates duties for both the state regulatory agency, the Cabinet for Health and Family Services, to act affirmatively toward improving, enhancing or maintaining quality patient care.

An employee of a health care facility or service must report any circumstances that appear to **jeopardize a patient's quality of care or safety**. State law prohibits retaliation in any form against an employee making such a good-faith report. The statutory scheme created by the legislature seeks to encourage an employee to speak up and advocate for patients.

The statutory scheme regarding the Cabinet's regulation of health care facilities and services is much more mixed. On one hand, the Cabinet has been charged to promulgate regulations establishing minimum standards and procedures that must be met or followed. However, on the other hand, the legislature has essentially suspended the Cabinet's regulatory authority by KRS 216B.185(1), which provides that accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) demonstrates full compliance with any and all licensure requirements.

I. KRS 216B.165: The Employee's Mandate to Report

(1) Reporting Is Required

KRS 216B.165 imposes a mandate on employees of any licensed health care facility or service to **act affirmatively and report where it appears that a patient's quality of care or safety or the safety of the facility or service is jeopardized**.

(2) Making the Report: How and to Who

A report, either oral or written, "shall" be made to "the health care facility or service" and "may" be made to "any appropriate private, public, state or federal agency."

(3) The Duty to Investigate A Report and Report Back

An administrator or supervisor receiving a report “shall investigate the problem, take appropriate action, and provide a response to the individual reporting the problem” within seven (7) working days.

(4) Protecting Patient Confidentiality

Maintaining patient confidentiality remains of paramount importance in both the report and investigation process. It is therefore required that reports, investigations and actions “be conducted in a manner that protects and maintains the confidentiality of patients and personnel and preserves the integrity of data, information, and medical records.”

(5) Retaliation Against A Reporting Employee is Prohibited

The law prohibits retaliation against an employee in very broad terms:

No health care facility or service licensed under this chapter shall by policy, contract, procedure, or other formal or informal means subject to reprisal, or directly or indirectly use, or threaten to use, any authority or influence, in any manner whatsoever, which tends to discourage, restrain, suppress, dissuade, deter, prevent, interfere with, coerce, or discriminate against any agent or employee who in good faith reports, discloses, divulges, or otherwise brings to the attention of the health care facility or service the circumstances or facts to form the basis of a report[.]

(6) Other Considerations: Consequences of A Failure to Report

The mandate to report established by KRS 216B.165 appears to establish an additional element to the standard of practice applicable to the health care workers on whom the mandate is imposed .

Consider that KRS 314.091(1)(d) authorizes the Board of Nursing to take disciplinary action against a nurse who has “negligently or willfully acted in a manner inconsistent with the practice of nursing[.]” It is at least debatable that a nurse who fails to make a required report is subject to disciplinary action against his or her license.

(7) Remedies for Retaliation

While KRS 216B.165 does not provide any specific remedy or even mode of remedy for an employee unlawfully retaliated against, Kentucky law would allow an aggrieved employee to file a lawsuit, which if successful would allow for reinstatement to employment, recovery of lost pay, and recovery of compensatory and punitive damages.

II. The Mixed Regulatory Responsibility

(1) The Cabinet's Charge

KRS 216B.042(1)(c) is the broadest charge in Kentucky law for the Cabinet of Health and Family Services to exercise its regulatory authority toward improvement of patient care, stating, in pertinent part, as follows:

(1) The cabinet shall:

(c) Establish licensure standards and procedures to ensure safe, adequate, and efficient abortion facilities, health facilities and health services. These regulations, under KRS Chapter 13A, shall include, but need not be limited to:

1. Patient care standards and safety standards, minimum operating standards, minimum standards for training, required licenses for medical staff personnel, and minimum standards for maintaining patient records[.]

(2) The Regulations

902 KAR 20:016 is the Cabinet's regulation directed by KRS 216B.042. The regulation is lengthy and includes sections substantively addressing the provision of services, administration and operations, medical staff services, nursing service, dietary services, laboratory services, pharmaceutical services, radiology services, physical rehabilitation services, emergency services, outpatient services, surgery services, anesthesia services, obstetrics services, pediatric services, psychiatric services, substance abuse and dependency services, medical library maintenance, and long-term acute inpatient hospital services.

This regulation purports to establish the minimum standards a health care facility or service must meet to maintain licensure.

(3) Vesting Regulatory Authority in the JCAHO

KRS 216B.185(1) vests the Cabinet's regulatory authority in the JCAHO, stating in pertinent part

as follows:

(1) The Office of the Inspector General shall accept accreditation by the Joint Commission on Accreditation of Healthcare Organizations or another nationally recognized accrediting organization with comparable standards and survey processes, that has been approved by the United States Centers on Medicare and Medicaid Services, as evidence that a hospital demonstrates compliance with all licensure requirements under this chapter. An annual on-site licensing inspection of a hospital shall not be conducted if the Office of the Inspector General receives from the hospital:

(a) A copy of the accreditation report within thirty (30) days of the initial accreditation and all subsequent reports; or

(b) Documentation from a hospital that holds full accreditation from an approved accrediting organization on or before July 15, 2002.

(4) Variances In JCAHO Standards and the Cabinet's Regulation

There exist some variances between JCAHO standards and those set out in the Cabinet's regulation. One variance regards nurse staffing requirements. The Cabinet's regulation requires as follows:

There shall be registered nurse supervision and staff nursing personnel for each service or nursing unit to insure the immediate availability of a registered nurse for all patients on a twenty-four (24) hour basis.

This requirement is, in all material respects, identical to the federal regulation found at 42 C.F.R. 482.23, which states in pertinent part:

(b) Standard: Staffing and delivery of care. The nursing service must have adequate numbers of licensed registered nurses, licensed practical (vocational) nurses, and other personnel to provide nursing care to all patients as needed. There must be supervisory and staff personnel for each department or nursing unit to ensure, when needed, the immediate availability of a registered nurse for bedside care of any patient.

The JCAHO nursing standards, unlike the Kentucky and federal regulations quoted above, are devoid, as the American Nursing Association has pointed out in its lawsuit pending in the District of Columbia, of standards or requirements concerning the immediate availability of a registered nurse to render bedside care to the patients.