

House Bill 2217

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of Governor John A. Kitzhaber, M.D.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes procedure and requirements for filing notice of adverse health care incident with Oregon Patient Safety Commission.

Requires health care facilities, health care providers and patients to engage in discussion and mediation related to adverse health care incidents. Requires court to stay civil action for negligence commenced before requirements completed. Makes provisions requiring discussion and mediation operative on July 1, 2014.

Directs commission to use information received from notices of adverse health care incident to prevent future adverse health care incidents and to report to Legislative Assembly.

Prohibits insurers from taking certain actions based on notice of adverse health care incident.

Sunsets December 31, 2023.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to resolution of matters related to health care; creating new provisions; amending ORS 31.250 and 743.056; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Definitions. As used in sections 1 to 10 of this 2013 Act:

(1) "Adverse health care incident" means an objective, definable and unanticipated consequence of patient care that is usually preventable and results in the death of or physical injury to the patient.

(2) "Health care facility" has the meaning given that term in ORS 442.015.

(3) "Health care provider" means a person practicing within the scope of the person's license, registration or certification to practice as:

(a) A psychologist under ORS 675.030 to 675.070, 675.085 and 675.090;

(b) An occupational therapist under ORS 675.230 to 675.300;

(c) A physician under ORS 677.100 to 677.228;

(d) An emergency medical services provider under ORS chapter 682;

(e) A podiatric physician and surgeon under ORS 677.820 to 677.840;

(f) A nurse under ORS 678.040 to 678.101;

(g) A nurse practitioner under ORS 678.375 to 678.390;

(h) A dentist under ORS 679.060 to 679.180;

(i) A dental hygienist under ORS 680.040 to 680.100;

(j) A denturist under ORS 680.515 to 680.535;

(k) An audiologist or speech-language pathologist under ORS 681.250 to 681.350;

(l) An optometrist under ORS 683.040 to 683.155 and 683.170 to 683.220;

(m) A chiropractor under ORS 684.040 to 684.105;

(n) A naturopath under ORS 685.060 to 685.110, 685.125 and 685.135;

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (o) A massage therapist under ORS 687.011 to 687.250;
 2 (p) A direct entry midwife under ORS 687.405 to 687.495;
 3 (q) A physical therapist under ORS 688.040 to 688.145;
 4 (r) A medical imaging licensee under ORS 688.445 to 688.525;
 5 (s) A pharmacist under ORS 689.151 and 689.225 to 689.285;
 6 (t) A physician assistant under ORS 677.505 to 677.525; or
 7 (u) A professional counselor or marriage and family therapist under ORS 675.715 to
 8 675.835.

9 (4) "Patient" means the patient, or if the patient is a minor, incapacitated or deceased,
 10 the patient's representative as provided in section 8 of this 2013 Act.

11 **SECTION 2. Notice of adverse health care incident.** (1)(a) When an adverse health care
 12 incident occurs in a health care facility, the health care facility shall:

13 (A) File a notice of adverse health care incident with the Oregon Patient Safety Com-
 14 mission in the form and manner provided by the commission by rule; and

15 (B) Provide a copy of the notice to the patient.

16 (b) A notice filed under this subsection may not include the name of a health care pro-
 17 vider, but the health care facility filing the notice shall notify any health care providers in-
 18 volved in the adverse health care incident of the notice.

19 (2) When an adverse health care incident occurs outside of a health care facility, the
 20 health care provider treating the patient shall:

21 (a) File a notice of adverse health care incident with the commission in the form and
 22 manner provided by the commission by rule; and

23 (b) Provide a copy of the notice to the patient.

24 (3) A patient may file a notice of adverse health care incident with:

25 (a) The health care facility where the incident occurred, if the incident occurred in a
 26 health care facility; or

27 (b) The commission, if the incident did not occur in a health care facility.

28 (4) A health care facility shall establish procedures for accepting notices of adverse
 29 health care incidents filed under this section.

30 (5) If the commission receives a notice of adverse health care incident from a patient
 31 under subsection (3) of this section, the commission shall notify the health care provider
 32 named in the notice within seven days after receiving the notice.

33 (6) A notice of adverse health care incident filed under this section is not:

34 (a) A written claim or demand for payment.

35 (b) A claim for purposes of ORS 742.400.

36 (7) The filing of a notice of adverse health care incident as provided in this section sat-
 37 isfies the notice requirements of ORS 30.275.

38 **SECTION 3. Discussion of adverse health care incident.** (1) A health care facility or
 39 health care provider who files or is named in a notice of adverse health care incident filed
 40 under section 2 of this 2013 Act shall engage in a discussion regarding the adverse health
 41 care incident with the patient within the time established by the Oregon Patient Safety
 42 Commission by rule.

43 (2) The patient and the health care facility or health care provider named in the notice
 44 may include other persons in the discussion.

45 (3) Within the time established by the commission by rule, the health care facility or

1 health care provider named in the notice shall:

2 (a) Communicate to the patient the steps the health care facility or health care provider
3 will take to prevent future occurrences of the adverse health care incident; and

4 (b)(A) Determine that no offer of compensation for the adverse health care incident is
5 warranted and communicate that determination to the patient orally or in writing; or

6 (B) Determine that an offer of compensation for the adverse health care incident is
7 warranted and extend that offer in writing to the patient.

8 (4) If a health care facility or health care provider makes an offer of compensation under
9 subsection (3) of this section, the facility or provider shall advise the patient to seek legal
10 advice before accepting the offer.

11 (5) Discussions between the health care facility or health care provider and the patient
12 about the amount of compensation offered under subsection (3) of this section must remain
13 oral.

14 (6) The patient shall accept or reject an offer of compensation made under subsection (3)
15 of this section within the time established by the commission by rule.

16 (7) The health care facility or health care provider and the patient may agree to extend
17 time limitations established by the commission under this section, but a time limitation may
18 not be extended to more than 180 days after the notice of adverse health care incident is filed
19 under section 2 of this 2013 Act unless the health care facility or health care provider and
20 the patient also agree to extend the statute of limitations.

21 (8) If the patient accepts an offer made under subsection (3) of this section, the health
22 care facility or health care provider named in the notice shall notify the commission.

23 (9) The person who filed the notice of adverse health care incident under section 2 of this
24 2013 Act shall file a report with the commission within 180 days after the date the notice
25 was filed indicating the status of the matter.

26 **SECTION 4. Discussion communications.** (1) As used in this section, “discussion com-
27 munications” means:

28 (a) All communications that are made in the course of a discussion under section 3 of
29 this 2013 Act; and

30 (b) All memoranda, work products, documents and other materials that are prepared for
31 or submitted in the course of or in connection with a discussion under section 3 of this 2013
32 Act.

33 (2) Discussion communications and offers of compensation made under section 3 of this
34 2013 Act:

35 (a) Do not constitute an admission of liability.

36 (b) Are confidential and may not be disclosed to any other person.

37 (c) Are not admissible as evidence in any subsequent adjudicatory proceeding, and may
38 not be disclosed by the parties in any subsequent adjudicatory proceeding.

39 (3) Statements, memoranda, work products, documents and other materials, otherwise
40 subject to discovery, that were not prepared specifically for use in a discussion under section
41 3 of this 2013 Act, are not confidential.

42 (4) Any document that, before its use in a discussion under section 3 of this 2013 Act,
43 was a public record as defined in ORS 192.410 remains subject to disclosure to the extent
44 provided by ORS 192.410 to 192.505.

45 (5) The limitations on admissibility and disclosure in subsequent adjudicatory proceedings

imposed by this section apply to any subsequent judicial proceeding, administrative proceeding or arbitration proceeding. The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and a person who is prohibited from disclosing information under the provisions of this section may not be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding.

SECTION 5. Mediation. (1) If the discussion under section 3 of this 2013 Act does not result in a resolution of an adverse health care incident, the patient and health care facility or health care provider named in the notice of adverse health care incident filed under section 2 of this 2013 Act shall enter into mediation unless:

(a) No offer of compensation is extended under section 3 of this 2013 Act and the health care facility or health care provider named in the notice filed under section 2 of this 2013 Act or the patient objects to mediation; or

(b) An offer of compensation is extended under section 3 of this 2013 Act and the offer is rejected by the patient and both parties waive mediation.

(2) The Oregon Patient Safety Commission shall develop and maintain a panel of qualified individuals to serve as mediators. The parties may choose any mediator from the panel or outside the panel by mutual agreement.

(3) The parties shall bear the cost of mediation equally unless otherwise mutually agreed.

(4) Other parties may participate in the mediation, including but not limited to:

(a) The patient's family, at the discretion of the patient;

(b) Attorneys for the patient and the health care facility or health care provider;

(c) Malpractice insurance carriers;

(d) Risk management personnel; and

(e) Any lien holder with an interest in the dispute.

(5) If a health care facility or health care provider makes an offer of compensation as part of a mediation under this section, the facility or provider shall advise the patient to seek legal advice before accepting the offer.

(6) Mediations under this section are subject to ORS 36.210, 36.220, 36.222, 36.224, 36.226, 36.232, 36.234, 36.236 and 36.238.

SECTION 6. Payment and resolution. (1) A payment made to a patient under section 3 of this 2013 Act or as a result of a mediation under section 5 of this 2013 Act is not a payment resulting from a written claim or demand for payment.

(2) A health care facility or health care provider may require the patient to execute all documents and obtain any necessary court approval to resolve an adverse health care incident and the parties shall negotiate the form of such documents or court approval as necessary.

SECTION 7. Statute of limitations; stay of civil actions; evidence of offers and payments.

(1) The discussion and mediation requirements of sections 3 and 5 of this 2013 Act do not prevent a patient from bringing a civil action for negligence if the discussion and mediation do not result in full resolution of the adverse health care incident, unless the patient signed a release of the claim.

(2) The statute of limitations applicable to a negligence claim is tolled for 180 days, or another period agreed upon by the patient and the health care facility or health care provider named in the notice of adverse health incident filed under section 2 of this 2013 Act, from

the date the notice is filed under section 2 of this 2013 Act.

(3) If a civil action is commenced, the court shall stay the action until the parties have completed the requirements of sections 3 and 5 of this 2013 Act.

(4) Evidence of an offer, the amount, payment or acceptance of any compensation offered under section 3 or 5 of this 2013 Act is inadmissible in any adjudicatory proceeding. However, any judgment in favor of the patient must be reduced by the amount of any compensation paid under sections 3 and 5 of this 2013 Act.

SECTION 8. Patient representatives. A patient who is a minor, incapacitated or deceased may be represented for purposes of sections 1 to 10 of this 2013 Act by:

(1) The spouse, parent, adult sibling or adult child of the patient.

(2) An adult relative or adult friend of the patient who is familiar with the desires of the patient.

(3) The guardian of the patient.

(4) The conservator of the patient.

SECTION 9. Duties of Oregon Patient Safety Commission. (1) The Oregon Patient Safety Commission shall make rules establishing requirements and procedures as necessary to implement sections 1 to 10 of this 2013 Act, including but not limited to:

(a) Time limitations for filing a notice of adverse health care incident under section 2 of this 2013 Act and for conducting a discussion and mediation under sections 3 and 5 of this 2013 Act.

(b) The form of the notice of adverse health care incident under section 2 of this 2013 Act.

(c) Requirements for the annual report required under subsection (4) of this section.

(d) Criteria for when the commission will initiate an investigation of an adverse health care incident.

(2) The commission shall use notices of adverse health care incidents filed under section 2 of this 2013 Act to:

(a) Establish quality improvement techniques to reduce system errors contributing to adverse health care incidents.

(b) Disseminate evidence-based prevention practices to improve patient outcomes.

(c) Upon the request of a health care facility or health care provider, assist the health care facility or health care provider in reducing the incidence of a particular adverse health care incident, including but not limited to determining the underlying cause of the incident and providing advice regarding preventing reoccurrence of the incident.

(3) The commission may initiate investigations of adverse health care incidents reported to the commission under section 2 of this 2013 Act. Investigations under this subsection and any documents produced during the investigation are confidential.

(4) Before December 31 of each year, the commission shall report to an appropriate committee or interim committee of the Legislative Assembly on the implementation and effects of sections 1 to 10 of this 2013 Act.

SECTION 10. Use of information by Oregon Patient Safety Commission. The Oregon Patient Safety Commission may disseminate information provided pursuant to a discussion under section 3 of this 2013 Act as follows:

(1) To the public and to other health care facilities or health care providers not involved in the adverse health care incident, as necessary to meet the goals described in section 9 of

1 **this 2013 Act. Information disclosed under this subsection may not identify a health care**
 2 **facility, health care provider or patient involved in the adverse health care incident.**

3 **(2) The commission may not disclose any information provided pursuant to a discussion**
 4 **under section 3 of this 2013 Act to a regulatory agency or licensing board.**

5 **(3) The commission may use and disclose information provided pursuant to a discussion**
 6 **under section 3 of this 2013 Act as necessary to assist individual health care facilities or**
 7 **health care providers involved in an adverse health care incident in determining the cause**
 8 **of and potential mitigation of the incident. If the commission discloses information to a**
 9 **party not involved in the incident under this subsection, the information may not identify a**
 10 **health care facility, health care provider or patient involved in the incident.**

11 **(4) A regulatory agency, licensing board, health care facility, health insurer or creden-**
 12 **tialing entity may not ask a health care facility, health care provider or other person or**
 13 **entity if a facility or provider has filed a notice of adverse health care incident or use the**
 14 **fact that a notice of adverse health care incident was filed as the basis of disciplinary, reg-**
 15 **ulatory, licensure or credentialing action. This subsection does not prevent a person or en-**
 16 **tity from using information that would be otherwise available to engage in quality review of**
 17 **patient care or from using information otherwise available as the basis of imposing a re-**
 18 **striction, limitation, loss or denial of privileges of a health care provider or other action**
 19 **against a health care provider based on a finding of medical incompetence, unprofessional**
 20 **conduct, physical incapacity or impairment.**

21 **SECTION 11.** ORS 31.250 is amended to read:

22 31.250. (1) In any action described in subsection [(5)] **(6)** of this section, all parties to the action
 23 and their attorneys must participate in some form of dispute resolution within 270 days after the
 24 action is filed unless:

25 (a) The action is settled or otherwise resolved within 270 days after the action is filed; or

26 (b) All parties to the action agree in writing to waive dispute resolution under this section.

27 (2) Dispute resolution under this section may consist of arbitration, mediation or a judicial
 28 settlement conference.

29 (3) Within 270 days after filing an action described in subsection [(5)] **(6)** of this section, the
 30 parties or their attorneys must file a certificate indicating that the parties and attorneys have
 31 complied with the requirements of this section.

32 (4) The court may impose appropriate sanctions against any party or attorney who:

33 (a) Fails to attend an arbitration hearing, mediation session or judicial settlement conference
 34 conducted for the purposes of the requirements of this section;

35 (b) Fails to act in good faith in any arbitration, mediation or judicial settlement conference
 36 conducted for the purposes of the requirements of this section;

37 (c) Fails to timely submit any documents required for an arbitration, mediation or judicial
 38 settlement conference conducted for the purposes of the requirements of this section; or

39 (d) Fails to have a person with authority to approve a resolution of the action available at the
 40 time of any arbitration hearing, mediation session or judicial settlement conference conducted for
 41 the purposes of the requirements of this section, unless the party or attorney receives from the
 42 court, before the hearing, session or conference commences, an exemption from the requirements of
 43 this paragraph.

44 **(5) This section does not apply to parties to the action who have met the requirements**
 45 **of sections 3 and 5 of this 2013 Act.**

1 [(5)] (6) The provisions of this section apply to any action in which a claim for damages is made
 2 against a health practitioner, as described in ORS 31.740, or against a health care facility, as defined
 3 in ORS 442.015, based on negligence, unauthorized rendering of health care or product liability un-
 4 der ORS 30.900 to 30.920.

5 **SECTION 12.** ORS 31.250, as amended by section 11 of this 2013 Act, is amended to read:

6 31.250. (1) In any action described in subsection [(6)] (5) of this section, all parties to the action
 7 and their attorneys must participate in some form of dispute resolution within 270 days after the
 8 action is filed unless:

9 (a) The action is settled or otherwise resolved within 270 days after the action is filed; or

10 (b) All parties to the action agree in writing to waive dispute resolution under this section.

11 (2) Dispute resolution under this section may consist of arbitration, mediation or a judicial
 12 settlement conference.

13 (3) Within 270 days after filing an action described in subsection [(6)] (5) of this section, the
 14 parties or their attorneys must file a certificate indicating that the parties and attorneys have
 15 complied with the requirements of this section.

16 (4) The court may impose appropriate sanctions against any party or attorney who:

17 (a) Fails to attend an arbitration hearing, mediation session or judicial settlement conference
 18 conducted for the purposes of the requirements of this section;

19 (b) Fails to act in good faith in any arbitration, mediation or judicial settlement conference
 20 conducted for the purposes of the requirements of this section;

21 (c) Fails to timely submit any documents required for an arbitration, mediation or judicial
 22 settlement conference conducted for the purposes of the requirements of this section; or

23 (d) Fails to have a person with authority to approve a resolution of the action available at the
 24 time of any arbitration hearing, mediation session or judicial settlement conference conducted for
 25 the purposes of the requirements of this section, unless the party or attorney receives from the
 26 court, before the hearing, session or conference commences, an exemption from the requirements of
 27 this paragraph.

28 [(5) This section does not apply to parties to the action who have met the requirements of sections
 29 3 and 5 of this 2013 Act.]

30 [(6)] (5) The provisions of this section apply to any action in which a claim for damages is made
 31 against a health practitioner, as described in ORS 31.740, or against a health care facility, as defined
 32 in ORS 442.015, based on negligence, unauthorized rendering of health care or product liability un-
 33 der ORS 30.900 to 30.920.

34 **SECTION 13.** ORS 743.056 is amended to read:

35 743.056. (1) As used in this section:

36 (a) "Adverse event" means a negative consequence of patient care that is unanticipated, is
 37 usually preventable and results in or presents a significant risk of patient injury.

38 (b) "Claim" means a written demand for restitution for an injury alleged to have been caused
 39 by the medical negligence of a health practitioner or licensed health care facility.

40 (c) "Health practitioner" means a person described in ORS 31.740 (1).

41 (d) "Patient's family" includes:

42 (A) A parent, sibling or child by marriage, blood, adoption or domestic partnership.

43 (B) A foster parent or foster child.

44 (2) An insurer may not decline or refuse to defend or indemnify a health practitioner or a health
 45 care facility with respect to a claim, for any reason that is based on:

(a) The disclosure to the patient or the patient's family by the health practitioner or facility of an adverse event or information relating to the cause of an adverse event;

(b) A notice filed under section 2 of this 2013 Act; or

(c) Participation in a discussion or mediation under section 3 or 5 of this 2013 Act.

(3) A policy or contract of insurance or indemnity may not include a provision or term excluding or limiting coverage based on:

(a) The disclosure to a patient or the patient's family by a health practitioner or facility of an adverse event or information relating to the cause of an adverse event;

(b) A notice filed under section 2 of this 2013 Act; or

(c) Participation in a discussion or mediation under section 3 or 5 of this 2013 Act.

(4) An insurer may establish requirements for coverage of offers of compensation made in a discussion or mediation under section 3 or 5 of this 2013 Act. Requirements established under this subsection may not be intended to or have the effect of preventing meaningful participation in discussions and mediations under sections 3 and 5 of this 2013 Act.

(5) An insurer may not provide or be required to provide information related to an adverse health care incident as defined in section 1 of this 2013 Act for credentialing purposes.

SECTION 14. ORS 743.056, as amended by section 13 of this 2013 Act, is amended to read:

743.056. (1) As used in this section:

(a) "Adverse event" means a negative consequence of patient care that is unanticipated, is usually preventable and results in or presents a significant risk of patient injury.

(b) "Claim" means a written demand for restitution for an injury alleged to have been caused by the medical negligence of a health practitioner or licensed health care facility.

(c) "Health practitioner" means a person described in ORS 31.740 (1).

(d) "Patient's family" includes:

(A) A parent, sibling or child by marriage, blood, adoption or domestic partnership.

(B) A foster parent or foster child.

(2) An insurer may not decline or refuse to defend or indemnify a health practitioner or a health care facility with respect to a claim, for any reason that is based on[.]

[(a)] the disclosure to the patient or the patient's family by the health practitioner or facility of an adverse event or information relating to the cause of an adverse event[.];

[(b)] A notice filed under section 2 of this 2013 Act; or]

[(c)] Participation in a discussion or mediation under section 3 or 5 of this 2013 Act].

(3) A policy or contract of insurance or indemnity may not include a provision or term excluding or limiting coverage based on[.];

[(a)] the disclosure to a patient or the patient's family by a health practitioner or facility of an adverse event or information relating to the cause of an adverse event[.];

[(b)] A notice filed under section 2 of this 2013 Act; or]

[(c)] Participation in a discussion or mediation under section 3 or 5 of this 2013 Act].

[(4)] An insurer may establish requirements for coverage of offers of compensation made in a discussion or mediation under section 3 or 5 of this 2013 Act. Requirements established under this subsection may not be intended to or have the effect of preventing meaningful participation in discussions and mediations under sections 3 and 5 of this 2013 Act.]

[(5)] An insurer may not provide or be required to provide information related to an adverse health care incident as defined in section 1 of this 2013 Act for credentialing purposes.]

SECTION 15. Report of Oregon Patient Safety Commission. On or before March 31, 2016,

1 the Oregon Patient Safety Commission shall report to an appropriate committee of the Leg-
2 islative Assembly on the implementation and effects of sections 1 to 10 of this 2013 Act.

3 **SECTION 16.** (1) Sections 1 to 10 of this 2013 Act are repealed on December 31, 2023.

4 (2) Section 15 of this 2013 Act is repealed on December 31, 2016.

5 **SECTION 17.** (1) Sections 1 to 10 of this 2013 Act and the amendments to ORS 31.250 and
6 743.056 by sections 11 and 13 of this 2013 Act become operative on July 1, 2014.

7 (2) The Oregon Patient Safety Commission may take any action before the operative date
8 specified in subsection (1) of this section to enable the commission to exercise, on and after
9 the operative date specified in subsection (1) of this section, all the duties, functions and
10 powers conferred on the commission by sections 1 to 10 of this 2013 Act.

11 **SECTION 18.** The amendments to ORS 31.250 and 743.056 by sections 12 and 14 of this 2013
12 Act become operative on December 31, 2023.

13 **SECTION 19.** Sections 1 to 10 of this 2013 Act and the amendments to ORS 31.250 and
14 743.056 by sections 11 and 13 of this 2013 Act apply only to adverse health care incidents that
15 occur on or after the operative date specified in section 17 of this 2013 Act.

16 **SECTION 20.** The section captions used in this 2013 Act are provided only for the con-
17 venience of the reader and do not become part of the statutory law of this state or express
18 any legislative intent in the enactment of this 2013 Act.

19 **SECTION 21.** This 2013 Act being necessary for the immediate preservation of the public
20 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect
21 on its passage.
22
