



WISCONSIN LEGISLATIVE COUNCIL  
INFORMATION MEMORANDUM

2011 Wisconsin Act 2: Provisions Relating to  
Health Care Providers

Act 2 contains changes to civil actions and testimony of lay and expert witnesses, which are described in IM 2011-03, and changes relating to health care providers, as described in this Information Memorandum.

The changes relating to health care providers: (a) modify the statute governing confidentiality of health care services reviews and evaluations; (b) prohibit using certain health care provider reports to state agencies and statements made as part of state agency investigations in civil and criminal actions against health care providers; (c) allow the identification of individual hospitals in reports of hospital quality indicators; and (d) exempt health care providers acting within the scope of their employment from certain criminal offenses.

2011 Wisconsin Act 2 was enacted as part of the Special Session Governor Walker ordered on January 3, 2011. It took effect on February 1, 2011.

**HEALTH CARE SERVICES REVIEWS**

***CONFIDENTIALITY OF RECORDS***

Under current law, organizations or evaluators who review or evaluate the services of a health care provider must keep a confidential record of their investigations, inquiries, proceedings, and conclusions. The record may only be released upon the consent of a patient or the person who is the custodian of the record or as described below. The record may not be used in any civil action for personal injuries against the health care provider or facility. However, information, documents, or records presented during the review or evaluation are not immune from discovery or from use in a civil action simply because they were presented during the review or evaluation. A person who participates in a review or evaluation may not testify as to information obtained through his or her participation in the review or evaluation or as to any conclusions of the review or evaluation in a civil action.

Act 2 created provisions specific to “incident or occurrence reports.” Prior to Act 2, the treatment of this information was not addressed in the statutes. Under Act 2, incident or occurrence reports are confidential. They are immune from discovery and may not

be used in any civil or criminal action against a health care provider. "Incident or occurrence report" is defined in Act 2 as a written or oral statement that is made to notify a person, an organization, or an evaluator who reviews or evaluates the services of health care providers or charges for such services of an incident, practice, or other situation that becomes the subject of such a review or evaluation.

### ***SCOPE***

For purposes of health care services reviews, the definition of "health care provider" includes specified individual health care providers; facilities, organizations, and business entities that are health care providers; persons working under the supervision of or in collaboration with an individual health care provider; and parents, subsidiaries, or affiliate organizations of facilities, organizations, and business entities that are health care providers.

Act 2 specifies that the confidentiality provisions for reviews or evaluations of health care providers apply even if the reviewers or evaluators are from one entity or from more than one entity. These provisions only apply, however, to a review or evaluation conducted in order: (1) to help improve the quality of health care; (2) to avoid improper utilization of the services of health care providers; or (3) to determine the reasonable charges for such services.

### ***EXCEPTIONS TO CONFIDENTIALITY***

Information acquired in connection with the review and evaluation of health care services must be disclosed under specified circumstances. It should be noted that these disclosure requirements do not appear to apply to incident or occurrence reports.

The circumstances under which information acquired in connection with the review and evaluation of health care services must be disclosed are as follows:

1. To the health care provider or facility whose services are being reviewed or evaluated, upon the request of such provider or facility.
2. To any person with the consent of the health care provider.
3. To the person requesting the review or evaluation, for use solely for the purpose of improving the quality of health care, avoiding the improper utilization of the services of health care providers and facilities, and determining the reasonable charges for such services.
4. In an action relating to sexual exploitation by a therapist, to a court after issuance of a subpoena.
5. To the appropriate examining or licensing board or agency, when the organization or evaluator conducting the review or evaluation determines that such action is advisable.

Act 2 specifies that information acquired in connection with the review and evaluation of health care services may be disclosed, and records of such review and evaluation may be released, in statistical form with the consent of the person authorizing or with the authority to

authorize the review or evaluation. This information may not reveal the identity of any patient, however, unless permitted under current patient confidentiality law.

Also, under Act 2, information acquired in connection with the review or evaluation of health care services may be disclosed, and records of such review and evaluation may be released, to any of the following persons, with the consent of the person authorizing or with the authority to authorize the review or evaluation:

1. The employer of a health care provider.
2. The parent, subsidiary, or affiliate organization of a health care provider.
3. The parent, subsidiary, or affiliate organization of the employer of a health care provider.

#### ***INFORMATION REMAINS CONFIDENTIAL AFTER DISCLOSURE***

Act 2 specifies that a record of investigations, inquiries, proceedings, and conclusions of a review or evaluation of a health care provider or an incident or occurrence report disclosed as permitted under the bill or in violation of the provisions of the bill remains confidential and may not be used in any civil or criminal action against the health care provider or any other health care provider.

#### ***INFORMATION ACQUIRED BY AN ADMINISTRATIVE AGENCY***

Health care provider-specific information acquired by an administrative agency in order to help improve the quality of health care, to avoid the improper utilization of services of health care providers, or to determine reasonable charges for health care services is exempt from inspection, copying, or receipt under Wisconsin's Open Records Law. [s. 146.38, Stats.]

#### **USE OF HEALTH CARE REPORTS OR EMPLOYEE STATEMENTS**

Act 2 created a new provision under which the following may not be used as evidence in a civil or criminal action brought against a health care provider:

1. Reports that a regulatory agency requires a health care provider to give or disclose to that regulatory agency. Act 2 defines "regulatory agency" as the Department of Regulation and Licensing or the division within the Department of Health Services that conducts quality assurance activities related to health care providers.

2. Statements of, or records of interviews with, employees of a health care provider related to the regulation of the health care provider obtained by a regulatory agency.

This provision does not prohibit, however, the use of the reports, statements, and records described above, in any administrative proceeding conducted by a regulatory agency. The provisions also do not apply to reports protected under the health care worker whistle-blower protection statute under s. 146.997, Stats. [s. 904.16, Stats.]

## **REPORTING OF HOSPITAL QUALITY INDICATORS**

Current law requires the Department of Administration to contract with an entity to collect health care information from hospitals and ambulatory surgery centers. The entity must analyze and disseminate the information in language that is understandable to laypersons. Among other information, the entity must report hospital quality indicators. Act 2 newly allows the entity to identify individual hospitals when it reports quality indicators. [s. 153.05 (2m) and (3m), Stats.]

## **APPLICABILITY OF CERTAIN CRIMES TO HEALTH CARE PROVIDERS**

### ***NEGLIGENT OPERATION OR HANDLING OF A DANGEROUS WEAPON, EXPLOSIVES, OR FIRE***

Under current law, whoever causes the death of another by the negligent operation or handling of a dangerous weapon, explosives, or fire is guilty of a Class G felony. Whoever causes bodily harm to another under these circumstances is guilty of a Class I felony. [ss. 940.08 and 940.24, Stats.]

Under Act 2, these penalties do not apply to a health care provider acting within the scope of his or her practice or employment.

### ***ABUSE AND NEGLIGENCE OF PATIENTS AND RESIDENTS***

Under current law, a person in charge of or employed in any facility who abuses with negligence or neglects a patient or resident, or knowingly permits another person to do so, is guilty of a Class D, E, or I felony or a Class A or B misdemeanor, depending upon the circumstances. Higher penalties apply to intentional and reckless abuse or neglect. The offense applies to patients and residents of specified health care facilities and residential and treatment facilities for adults and children. [s. 940.295, Stats.]

Act 2 provides that the offense of abusing with negligence or neglecting a patient or resident, does not apply to a health care provider acting within the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anne Sappenfield, Senior Staff Attorney, on February 25, 2011.

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### WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: [leg.council@legis.state.wi.us](mailto:leg.council@legis.state.wi.us)

<http://www.legis.state.wi.us/lc>