



State of Wisconsin  
2011 – 2012 LEGISLATURE



LRB-2369/3  
PJH/TJD/TKK:jld&kjf:rs

## 2011 BILL

1     **AN ACT to repeal** 146.38 (2m), 893.555 and 904.16; **to renumber and amend**  
2           895.043 (6); **to amend** 146.38 (1m), 146.38 (2) and 146.38 (3t); and **to create**  
3           50.057, 146.38 (3) (em) and 895.043 (6) (b) of the statutes; **relating to:**  
4           arbitration agreements used by long-term care facilities, civil and criminal  
5           actions against health care providers and long-term care providers, use in civil  
6           and criminal actions and confidentiality of incident and occurrence reports, use  
7           as evidence of records given to a regulatory agency, use in criminal actions of  
8           records of reviews and evaluations of health care providers, limits on  
9           noneconomic damages, limits on punitive damages, and providing a penalty.

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### ***Analysis by the Legislative Reference Bureau***

This bill makes several changes to current law regarding contractual agreements between long-term care facilities and their clients, civil actions for negligence in long-term care facilities, punitive damages in civil actions, certain criminal actions against health care providers, and the confidentiality and use of reviews, incident reports, and evaluations of health care providers.

**BILL****ARBITRATION AGREEMENTS IN LONG–TERM CARE CONTRACTS**

Under current law, with few exceptions, contractual agreements that compel parties to litigation to submit to arbitration to resolve all or part of the dispute between the parties are enforceable.

This bill prohibits an adult family home, a residential care apartment complex, a community–based residential facility, a nursing home, a home health agency, or hospice (long–term care facility) from requiring a resident or client to sign an arbitration agreement as a condition of admission, retaliating against a resident or client for not signing an arbitration agreement, or charging more money to a resident or client for not signing an arbitration agreement. The bill includes specific penalties for retaliating against a resident or client for not signing an arbitration agreement. A long–term care facility that requests residents or clients to sign an arbitration agreement must provide the arbitration agreement as a separate document in another color and larger type size from any other admission agreement. The bill also requires a long–term care facility to allow a resident or client to cancel an arbitration agreement within 30 days after signing that provision and to include language about the right to cancel in the arbitration agreement.

**LIMITS ON NONECONOMIC DAMAGES**

Under current law, a person, or certain people related to the person, who is injured by the negligence of a long–term care provider, such as a nursing home, hospice, or assisted living facility, may sue for economic damages and for noneconomic damages. Noneconomic damages are intended to compensate for pain and suffering, loss of companionship, mental distress, and loss of enjoyment of life.

Current law limits noneconomic damages to \$750,000 per occurrence of negligence. Current law also limits damages for loss of society and companionship to certain relatives recoverable in a wrongful death action against a long–term care provider to \$500,000 in the case of a deceased minor and \$350,000 in the case of a deceased adult.

Under current law, a person, or certain people related to the person, who is injured by the long–term care provider may bring a civil action no later than three years from the date on which the injury occurred, or within one year that the injury was discovered or should have been discovered, except that, if a long–term care provider conceals an act or omission that results in an injury, within one year from the date on which the concealment was discovered or should have been discovered. If the injury or concealment is discovered after the three–year limit has expired, the person may still bring suit for up to five years after the long–term care provider’s act or omission.

The bill eliminates the limit on noneconomic damages and applies the general three–year statute of limitations for torts to actions for negligence against a long–term care provider.

**INCIDENT REPORTS AND HEALTH CARE PROVIDER REVIEWS**

Under current law, information acquired in connection with the review of evaluation of a health care provider and incident or occurrence reports (incident reports) must be kept confidential by a person who participates in the review of evaluation. An incident report is a written or oral statement that is made to notify

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a person, 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. The persons, organizations, or evaluators who review or evaluate the services of health care providers for certain reasons must keep a record of their investigations, inquiries, proceedings, and conclusions. Current law prohibits these records of a review or evaluation from being used in any civil or criminal action against the health care provider.

This bill allows the disclosure of incident or occurrence reports by a person who participates in the review or evaluation of the health care provider and removes the prohibition against using incident reports in a civil or criminal action. The bill also allows records of a review or evaluation to be used in criminal actions. A person who participates in the review or evaluation of the services or charges of a health care provider is required, under the bill, to disclose an incident report to a court with regard to a criminal matter, under certain conditions. The bill also requires information acquired in connection with the review and evaluation to be disclosed to a court in a criminal matter, under certain conditions.

**HEALTH CARE PROVIDER REGULATORY RECORDS**

Current law prohibits records given or disclosed to a regulatory agency and statements of, or records of interviews with, employees of a health care provider obtained by a regulatory agency (regulatory records) from being used as evidence in a civil or criminal action brought against a health care provider. A regulatory agency, in this instance, is either the Department of Regulation and Licensing (renamed the Department of Safety and Professional Services) or the division within the Department of Health Services that conducts quality assurance activities related to health care providers. The bill eliminates the prohibition against using regulatory records as evidence in a civil or criminal action.

**PUNITIVE DAMAGES**

Under current law, punitive damages may be assessed in a civil case if the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff. Current law limits punitive damages to the greater of twice the amount of compensatory damages recovered by the plaintiff or \$200,000 unless the defendant's actions included the operation of a vehicle while under the influence of an intoxicant to a degree that rendered the defendant incapable of the safe operation of that vehicle. The bill creates a new exception to the limitation on punitive damages sought from a nursing home, adult family home, residential care apartment complex, or community-based residential care facility when the defendant is an administrator, agent, director, employee, officer, or operator of a nursing home, adult family home, residential care apartment complex, or community-based residential care facility and the actions of the defendant take place in that facility.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a

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report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 50.057 of the statutes is created to read:

2           **50.057 Arbitration agreements. (1)** In this section:

3           (a) “Arbitration agreement” means any provision in a contract, covenant, or  
4 agreement between a resident or client, or a person acting on behalf of the resident  
5 or client, and a long–term care facility, which is made before the resident or client  
6 suffers injury or harm that compels arbitration between the parties, and which  
7 limits or waives the right of the resident to bring a civil action against the long–term  
8 care facility or limits the resident’s or client’s remedies in a civil action against the  
9 long–term care facility.

10           (b) “Long–term care facility” means an adult family home, a residential care  
11 apartment complex, a community–based residential facility, a nursing home, a home  
12 health agency, or a hospice, as defined in s. 50.90 (1).

13           **(2)** No long–term care facility may do any of the following:

14           (a) Require a prospective resident or client, or a person acting on behalf of the  
15 resident or client, to sign an arbitration agreement as a condition of admission to the  
16 long–term care facility.

17           (b) Retaliate against a resident or client or discharge a resident or client for  
18 failure to sign an arbitration agreement.

19           (c) Charge additional money to a resident or client for not signing an arbitration  
20 agreement.

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1           **(3)** A long-term care facility, if it requests a resident or client to sign an  
2 arbitration agreement, shall provide the arbitration agreement as a separate  
3 document from any other admission agreement and shall make the arbitration  
4 agreement document another color and a larger type size than the admission  
5 agreement.

6           **(4)** A long-term care facility that requests a resident or client to sign an  
7 arbitration agreement shall allow the resident or client, or a person acting on behalf  
8 of the resident or client, to cancel the arbitration agreement within 30 days of signing  
9 the arbitration agreement and shall include language in the arbitration agreement  
10 stating that a resident, client, or person acting on behalf of the resident or client has  
11 a right to cancel the arbitration agreement within 30 days of signing the arbitration  
12 agreement.

13           **(5)** (a) Any person who is retaliated against in violation of sub. (2) (b) may  
14 commence an action in circuit court for damages incurred as a result of the violation.

15           (b) Violators of sub. (2) (b) may be fined not more than \$1,000 or imprisoned for  
16 up to 6 months or both for each violation.

17           **SECTION 2.** 146.38 (1m) of the statutes, as affected by 2011 Wisconsin Act 2, is  
18 amended to read:

19           **146.38 (1m)** No person who participates in the review or evaluation of the  
20 services of health care providers or charges for such services may disclose an incident  
21 ~~or occurrence report~~ or any information acquired in connection with such review or  
22 evaluation except as provided in sub. (3) or (3m) and except that a person who  
23 participates in the review or evaluation shall disclose an incident or occurrence  
24 report to a court of record with regard to any criminal matter, in accordance with chs.  
25 885 to 895 and 995 and after issuance of a subpoena.

**BILL****SECTION 3**

1           **SECTION 3.** 146.38 (2) of the statutes, as affected by 2011 Wisconsin Act 2, is  
2 amended to read:

3           146.38 (2) All persons, organizations, or evaluators, whether from one or more  
4 entities, who review or evaluate the services of health care providers in order to help  
5 improve the quality of health care, to avoid improper utilization of the services of  
6 health care providers, or to determine the reasonable charges for such services shall  
7 keep a record of their investigations, inquiries, proceedings and conclusions. No such  
8 record may be released to any person under s. 804.10 (4) or otherwise except as  
9 provided in sub. (3) or (3m). No such record may be used in any civil or criminal action  
10 against the health care provider or any other health care provider; however, except  
11 for incident or occurrence reports or records from other persons, organizations, or  
12 evaluators reviewing or evaluating health care providers, information, documents,  
13 or records presented during the review or evaluation may not be construed as  
14 immune from discovery under s. 804.10 (4) or use in any civil or criminal action  
15 merely because they were so presented. Any person who testifies during or  
16 participates in the review or evaluation may testify in any civil or criminal action as  
17 to matters within his or her knowledge, but may not testify as to information  
18 obtained through his or her participation in the review or evaluation, nor as to any  
19 conclusion of such review or evaluation.

20           **SECTION 4.** 146.38 (2m) of the statutes, as created by 2011 Wisconsin Act 2, is  
21 repealed.

22           **SECTION 5.** 146.38 (3) (em) of the statutes is created to read:

23           146.38 (3) (em) With regard to any criminal matter, to a court of record, in  
24 accordance with chs. 885 to 895 and 995 and after issuance of a subpoena; and

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1           **SECTION 6.** 146.38 (3t) of the statutes, as created by 2011 Wisconsin Act 2, is  
2 amended to read:

3           146.38 (3t) A record described under sub. (2) ~~or an incident or occurrence report~~  
4 disclosed either under sub. (3) or (3m) or in violation of this section remains  
5 confidential and may not be used in any civil ~~or criminal~~ action against the health  
6 care provider or any other health care provider.

7           **SECTION 7.** 893.555 of the statutes, as created by 2011 Wisconsin Act 2, is  
8 repealed.

9           **SECTION 8.** 895.043 (6) of the statutes, as created by 2011 Wisconsin Act 2, is  
10 renumbered 895.043 (6) (intro.) and amended to read:

11           895.043 (6) **LIMITATION ON DAMAGES.** (intro.) Punitive damages received by the  
12 plaintiff may not exceed twice the amount of any compensatory damages recovered  
13 by the plaintiff or \$200,000, whichever is greater. This subsection does not apply to  
14 ~~a~~ any of the following:

15           (a) A plaintiff seeking punitive damages from a defendant whose actions under  
16 sub. (3) included the operation of a vehicle, including a motor vehicle as defined  
17 under s. 340.01 (35), a snowmobile as defined under s. 340.01 (58a), an all-terrain  
18 vehicle as defined under s. 340.01 (2g), and a boat as defined under s. 30.50 (2), while  
19 under the influence of an intoxicant to a degree that rendered the defendant  
20 incapable of safe operation of the vehicle. In this subsection, “intoxicant” has the  
21 meaning given in s. 30.50 (4e).

22           **SECTION 9.** 895.043 (6) (b) of the statutes is created to read:

23           895.043 (6) (b) A plaintiff seeking punitive damages from a faculty defined in  
24 s. 50.01 (1), (1d), (1g), or (3), 50.49 (1) (a), or 50.90 (1), for the actions of an

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1 administrator, agent, director, employee, officer, or operator of that facility whose  
2 actions under sub. (3) take place in that facility.

3 **SECTION 10.** 904.16 of the statutes, as created by 2011 Wisconsin Act 2, is  
4 repealed.

5 **SECTION 11. Initial applicability.**

6 (1) The renumbering and amendment of section 895.043 (6) of the statutes and  
7 the creation of section 895.043 (6) (b) of the statutes first apply to actions that are  
8 commenced on the effective date of this subsection.

9 (END)