

## New Law Adds Extra Layer of Reporting Responsibility for Licensees

Individuals licensed by the Oregon State Board of Nursing (OSBN) have many mandatory reporting duties including reporting obligations under the Nurse Practice Act (OAR 851-045-0090) and:

- Child Abuse reporting (ORS 419B.010)
- Elder Abuse reporting (ORS 124.060)
- Abuse of mentally ill or developmentally disabled persons (ORS 430.765)
- Abuse of long term care facility residents (ORS 441.645)
- Reporting a driver provided medical care in a health care facility with suspected blood alcohol level above 0.08 percent (ORS 676.260(1)).
- Reporting a person provided medical care in a health care facility under the influence of intoxicants who intends to drive (ORS 676.300)
- Cognitive or functional impairment affecting a person's ability to safely operate a motor vehicle (ORS 807.710)

Unlike physicians, nurses **are not** required to report injuries that are suspected to have been inflicted by other than accidental means, to a medical examiner (ORS 146.750).

To add to this list, during the 2009 Legislative Session, the legislature passed House Bill (HB) 2059 that contains new mandatory reporting requirements for individuals licensed by the OSBN and other health care professionals. HB 2059 went into effect on January 1, 2010.

HB 2059 requires licensees to:

- Report a misdemeanor or felony conviction or a felony arrest to the OSBN within 10 days; and
- Report the prohibited or

unprofessional conduct of any licensed health care professional unless state or federal confidentiality laws prohibit the reporting, within 10 days to that licensee's board or agency.

**"Prohibited conduct"** is conduct by a licensee that: (1) Constitutes a criminal act against a patient or client; or (2) Constitutes a criminal act that creates a risk of harm to a patient or client.

**"Unprofessional conduct"** is conduct unbecoming a licensee or detrimental to the best interests of the public, including conduct contrary to recognized standards of ethics of the licensee's profession or conduct that endangers the health, safety or welfare of a patient or client.

A licensee must have reasonable cause to believe that another licensee has engaged in prohibited or unprofessional conduct before mandatory reporting is triggered. Having "reasonable cause to believe" is having knowledge or notice of facts and circumstances that would lead a person of ordinary care and prudence to have a strong suspicion. It is important to note this reporting duty applies to the conduct of *any individual* licensed by a health licensing board or agency, a list of which can be found at ORS 676.150(1)(a).

Licensees who fail to report in accordance with HB 2059 may be subject to discipline by the OSBN. ORS 676.150(5). Licensees that report in good faith are provided immunity. ORS 676.150(10).

**Federal** confidentiality laws that might prohibit reporting are HIPAA and 42 USC 2.11, a law that protects drug or

alcohol program records. **State** confidentiality laws that might prohibit reporting include laws protecting health information and laws that protect privileged communications between a psychotherapist and a patient. ORS 179.505, 192.520, 40.230.

**HIPAA:** If a licensee is a covered entity (or the licensee works for a covered entity) under HIPAA that licensee would generally be prohibited from disclosing information about a patient, without a patient's consent, unless the disclosure was for the purpose of treatment, payment, or health care operations. There are exceptions to this general rule, including a disclosure necessary to avert a serious and imminent threat to health or safety. If a licensee has a reasonable belief that use or disclosure of protected health information is necessary to prevent or lessen **a serious and imminent threat** to health or safety of an individual or the public, a disclosure may be made, without the patient's consent, to a person or entity that is reasonably able to prevent or lessen the threat.

**Federal Drug/Alcohol Confidentiality Law:** A licensee that works for a federally assisted drug or alcohol abuse program or has information from such a program may not disclose information about a patient without a court order.

When trying to determine whether you are required to report or can report under HB 2059 it may be helpful to go through the following thought process:

- Does the conduct in question fall within the definition of prohibited or unprofessional conduct?

- Is the individual engaging in the conduct a licensed health care professional?
- Is the individual engaging in the conduct my patient or being treated as a patient at my workplace? If yes, then ask yourself additional questions:
  - o Am I or is my employer a covered entity under HIPAA?
  - If yes, do I reasonably believe that disclosure is necessary to prevent or lessen a **serious and imminent** threat to an individual or the public?
  - If yes, can the OSBN do something to lessen or prevent that serious and imminent threat?
  - o Do I work for a federally assisted drug or alcohol abuse program to which 45 CFR 2.11 applies or do I have information from such a program? If yes, then a court order is needed for disclosures without a patient's consent and you cannot report.
  - o Am I a psychotherapist? If yes, then without the patient's consent to disclosure you may not report.
- Is the individual engaging in the conduct a co-worker, friend or acquaintance? If yes, then it is unlikely any federal or state confidentiality laws apply and you would be required to report.
- Do I have reasonable cause to believe the conduct has occurred - do I have knowledge of facts or circumstances that would lead a person of ordinary care and prudence to have a strong suspicion?
  - o Did I see the conduct occur?
  - o If not, how trustworthy is the information that I got?

The following Frequently Asked Questions may be of assistance to licensees in determining whether there is a duty to report under HB 2059. These scenarios do not analyze other reporting duties that may apply. Many of the answers to these scenarios would depend

on more detailed facts and the subjective manner in which those facts are viewed by the reporter.

**Q1: I am a family practice nurse practitioner (NP) and my patient is a nurse. She appears drunk at several clinic visits. I am referring her for alcohol treatment. Do I need to report this to the Board and if so, when?**

**A1:** If you have reasonable cause to believe that the patient/nurse has engaged in unprofessional conduct and assuming that you are not employed by a drug or alcohol abuse program as that is defined in federal law, the federal drug and alcohol law would not apply and would not be a barrier to reporting. If you are a covered entity under HIPAA, HIPAA generally prohibits the release of protected health information without patient authorization. However, HIPAA does permit disclosure if you believe, in good faith, that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and the disclosure is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat. 45 CFR 164.512(j).

**Q2: I am a Psychiatric Mental Health Nurse Practitioner and my patient is another NP. My patient confessed to me that he/she has been obtaining samples of ambien and using it regularly due to PTSD symptoms and difficulty sleeping. The other day he/she admitted having had several blackout episodes during the day. Do I need to report this to the Board?**

**A2:** No, you are prohibited from reporting this to the OSBN because the psychotherapist-patient privilege in ORS 40.230 prohibits the disclosure unless the patient consents to the disclosure.

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11-Apr	Cruising		
12-Apr	Willemstad, Curacao	8:00 AM	6:00 PM
13-Apr	Oranjestad, Aruba	8:00 AM	6:00 PM
14-Apr	Cruising		
15-Apr	Roseau, Dominica	8:00 AM	5:00 PM
16-Apr	Charlotte Amalie, St. Thomas	8:00 AM	6:00 PM
17-Apr	San Juan, Puerto Rico	6:00 AM	

**POE TRAVEL**

**Q3:** I work as a CRNA in a hospital. I attended a surgery on a trauma victim who is a nurse and who was admitted to the hospital due to injuries she received when she crashed her car as a result of driving while intoxicated. Do I report?

**A3:** Probably not. A hospital and its employees are covered entities under HIPAA so HIPAA would not permit reporting without patient authorization unless you believe that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. The fact that a licensee was drinking and driving is unlikely to rise to a level that would trigger the HIPAA emergency exception.

**Q4:** I am an NP and my RN patient forged a prescription of mine for narcotics. Do I report and to whom? DEA, Board of Pharmacy (BOP), Police, Board of Nursing, other?

**A4:** This is criminal conduct that must be reported to the OSBN and you may report to the police and DEA but are not required to. The OSBN also has a duty to report the conduct to law enforcement if it has reasonable cause to believe a licensee has engaged in prohibited conduct.

**Q5:** I am a family NP and my patient works as a nurse on a busy floor in med. surg. She has significant psychiatric diagnoses, including severe depression and suicidal intent. Yet I have no report that she has harmed a patient but I believe she has potential to do so. How sure do I have to be to report and what if she sues me?

**A5:** You must have reasonable cause to believe that a licensee has engaged in *prohibited or unprofessional conduct*. These facts do not appear to qualify as either prohibited or unprofessional conduct. If you decide the patient has engaged in unprofessional conduct, and



if you are a covered entity, in order for the exception under HIPAA to apply you would have to believe that reporting was necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. It is doubtful that these facts rise to that level. If you do report in good faith, you have immunity under state law. However, it is possible that you could be in violation of HIPAA and could face sanctions under federal law if it is determined that the facts did not rise to the level of a serious and imminent threat.

**Q6:** I am a RN on a psychiatric unit. One of our patients just got diagnosed with Bipolar disease and she happens to be a nurse. Am I supposed to report her?

**A6:** No. A licensee has to engage in certain kinds of conduct in order for the reporting duties to be triggered. Simply having a mental illness diagnoses is not reportable. It may be that the patient's hospitalization gives rise to a reporting duty and the HIPAA analysis discussed above would then apply.

**Q7:** I work as a staff nurse for an inpatient substance rehab program.

One of the admitted patients is an RN and has stated he wants to make sure his employer doesn't find out about his admission. He is taking vacation time to cover his time away from his job. His medical record admission notes reflect that he has been diverting narcotics from patients for the past six months. (This scenario assumes the admitted nurse is not in the monitoring program.)

**A7:** It is likely that this program is subject to the federal law that protects drug and alcohol records. If that is the case then federal law prohibits reporting unless a court order is obtained that authorizes disclosure.

**Q8:** I am a Certified Nursing Assistant working in a long-term care facility. A co-worker, also a CNA, told me she lost custody of her children due to neglect. Do I report this to the Board?

**A8:** In this scenario there are no confidentiality laws that would prohibit reporting, the issue is whether the report of the co-worker's statement constitutes a reasonable cause to believe and whether the neglect of a licensee's child falls within the definition of prohibited or unprofessional conduct. You may

not have enough knowledge, notice, or facts to determine whether the other licensee's conduct is unprofessional conduct. If you decide you do have reasonable cause to believe, you must review the definitions of prohibited and unprofessional conduct. In order for conduct to rise to the level of prohibited conduct, a licensee has to have engaged in criminal behavior against a patient or client, or engaged in criminal conduct that creates a risk of harm to a patient or client. The licensee's children are not her patients or clients so the licensee has not engaged in prohibited conduct. Unprofessional conduct is defined in part as conduct that is detrimental to the best interests of the public. The OSBN could view child neglect as conduct detrimental to the best interests of the public and therefore the licensee should err on the side of caution and report to the board.

**Q9: I am a Psychiatric Mental Health NP and a client told me he is having sex with his doctor and he wants to report the doctor but is afraid and wants me to do it. Can I report this?**

A9: If you are a psychotherapist as that is defined in ORS 40.230, the psychotherapist-patient privilege applies but it is the patient that holds the privilege and therefore you could report it as long as your patient wants you to. Since HIPAA also applies, you may need to have the patient sign a HIPAA compliant authorization.

**Q10: I am an emergency room nurse and I observed my dentist being treated for an attempted suicide. Do I have to report this?**

A10: No. Attempted suicide is not prohibited conduct and it is unclear whether it would constitute unprofessional conduct as that is defined in ORS 676.150. Even if it did constitute unpro-

fessional conduct, as an emergency room nurse you are covered by HIPAA. As stated above, HIPAA generally does not allow disclosures of protected health and mental health information unless an exception applies. The fact that a licensee has attempted to commit suicide does not mean that licensee poses any serious and imminent threat to the health or safety of others or the public generally. Therefore, it is unlikely that HIPAA's emergency exception would apply. The Board of Dentistry may require licensees to report hospitalization as the result of mental illness during relicensure.

**Q11: I am a nurse and a member of the clergy. Am I required to report prohibited and unprofessional conduct under HB 2059?**

A11: If a nurse is acting as a member of the clergy and receives information in that capacity, the nurse is not required to report because the clergy-penitent privilege protects that information. In order for the privilege to apply, communications must be in the furtherance of spiritual advice and the penitent must reasonably regard the individual as acting as a member of clergy. The privilege does not protect information learned in the capacity of a nurse. Therefore, a person who is both a nurse and member of clergy who learns of prohibited and unprofessional conduct in his or her capacity as a nurse is still required to report under ORS 678.135.

These scenarios are meant to assist licensees in making the best decision possible and are not intended as nor can the answers be used as legal advice. Ultimately, it is the licensee's decision whether to report an observation or incident in the interest of public safety. For more information on these requirements, see [links to NPA & HB 2059].

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