

MEDICAL CARE AVAILABILITY AND REDUCTION OF ERROR (MCARE) ACT - OMNIBUS
AMENDMENTS

Act of Dec. 22, 2005, P.L. 458, No. 88

Cl. 40

Session of 2005

No. 2005-88

HB 2041

AN ACT

Amending the act of March 20, 2002 (P.L.154, No.13), entitled "An act reforming the law on medical professional liability; providing for patient safety and reporting; establishing the Patient Safety Authority and the Patient Safety Trust Fund; abrogating regulations; providing for medical professional liability informed consent, damages, expert qualifications, limitations of actions and medical records; establishing the Interbranch Commission on Venue; providing for medical professional liability insurance; establishing the Medical Care Availability and Reduction of Error Fund; providing for medical professional liability claims; establishing the Joint Underwriting Association; regulating medical professional liability insurance; providing for medical licensure regulation; providing for administration; imposing penalties; and making repeals," further providing for the Patient Safety Authority; reestablishing the Health Care Provider Retention Program and the Health Care Provider Retention Account; establishing the Commission on the Mcare Fund; and repealing provisions relating to the Health Care Provider Retention Program and the Health Care Provider Retention Account in the Public Welfare Code.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 303(a) of the act of March 20, 2002 (P.L.154, No.13), known as the Medical Care Availability and Reduction of Error (Mcare) Act, is amended and the section is amended by adding a subsection to read:

Section 303. Establishment of Patient Safety Authority.

(a) Establishment.--There is established a body corporate and politic to be known as the Patient Safety Authority , **which shall be an independent agency** . The powers and duties of the authority shall be vested in and exercised by a board of directors , **which shall have the sole power under section 304(a) to employ staff, including an executive director, legal counsel, consultants or any other staff deemed necessary by the authority. Individuals employed by the authority as staff shall be deemed employees of the Commonwealth for the purpose of participation in the Pennsylvania Employee Benefit Trust Fund** .

* * *

(h) For purposes of section 924 of the Public Health Service Act (58 Stat. 682, 42 U.S.C. § 299b-24), the authority is the

sole public entity eligible to be certified as a patient safety organization as defined in section 921(4) of the Public Health Service Act (42 U.S.C. § 299b-21(4)) when conducting patient safety activities, as defined in section 921(5) of the Public Health Service Act (42 U.S.C. § 299b-21(5)), which fall within the scope of the authority's responsibilities.

Section 2. The act is amended by adding a chapter to read:

CHAPTER 11

HEALTH CARE PROVIDER RETENTION PROGRAM

Section 1101. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Account." The Health Care Provider Retention Account established in section 1112.

"Applicant." A health care provider that is located in, resides in or practices in this Commonwealth and who applies for an abatement under section 1104.

"Assessment." The assessment imposed under section 712(d).

"Emergency physician." A physician who is certified by the American Board of Emergency Medicine or by the American Osteopathic Board of Emergency Medicine and who is either employed full time by a trauma center or is working under an exclusive contract with a trauma center.

"Health care provider." An individual who is all of the following:

(1) A physician, licensed podiatrist, certified nurse midwife or nursing home.

(2) A participating health care provider as defined in section 702.

"Licensing board." Any of the following, as appropriate to the licensee:

(1) State Board of Medicine.

(2) State Board of Osteopathic Medicine.

(3) State Board of Podiatry.

"Program." The Health Care Provider Retention Program established in section 1102.

"Trauma center." A hospital accredited by the Pennsylvania Trauma Systems Foundation as a Level I, Level II or Level III Trauma Center.

Section 1102. Abatement program.

There is hereby established within the Insurance Department a program to be known as the Health Care Provider Retention Program. The Insurance Department, in conjunction with the Department of Public Welfare, shall administer the program. The program shall provide assistance in the form of assessment abatements to health care providers for calendar years 2003, 2004, 2005 and 2006, except that licensed podiatrists shall not be eligible for calendar years 2003 and 2004, and nursing homes shall not be eligible for calendar years 2003, 2004 and 2005.

Section 1103. Eligibility.

A health care provider shall not be eligible for assessment abatement under the program if any of the following apply:

(1) The health care provider's license has been revoked in any state within the ten most recent years or a health

care provider has a license revoked during a year in which an abatement was received.

(2) The health care provider's ability, if any, to dispense or prescribe drugs or medication has been revoked in this Commonwealth or any other state within the ten most recent years.

(3) The health care provider has had three or more medical liability claims in the past five most recent years in which a judgment was entered against the health care provider or a settlement was paid on behalf of the health care provider, in an amount equal to or exceeding \$500,000 per claim.

(4) The health care provider has been convicted of or has entered a plea of guilty or no contest to an offense which is required to be reported under section 903(3) or (4) within the ten most recent years.

(5) The health care provider has an unpaid surcharge or assessment under this act.

Section 1104. Procedure.

(a) Application.--A health care provider may apply to the Insurance Department for an abatement of the assessment imposed for the previous calendar year specified on the application. The application must be submitted by the second Monday of February of the calendar year specified on the application and shall be on the form required by the Insurance Department. The department shall require that the application contain all of the following supporting information:

(1) A statement of the applicant's field of practice, including any specialty.

(2) Except for physicians enrolled in an approved residency or fellowship program, a signed certificate of retention.

(3) A signed certification that the health care provider is an eligible applicant under section 1103 for the program.

(4) Such other information as the Insurance Department may require.

(a.1) Electronically filed application.--A hospital may submit an electronic application on behalf of all health care providers when the hospital is responsible for payment of the health care provider's assessment under this act and the hospital has received prior written approval from the Insurance Department.

(b) Review.--Upon receipt of a completed application, the Insurance Department shall review the applicant's information and grant the applicable abatement of the assessment for the previous calendar year specified on the application in accordance with all of the following:

(1) The Insurance Department shall notify the Department of Public Welfare that the applicant has self-certified as eligible for a 100% abatement of the imposed assessment if the health care provider was assessed under section 712(d) as:

(i) a physician who is assessed as a member of one of the four highest rate classes of the prevailing primary premium;

- (ii) an emergency physician;
- (iii) a physician who routinely provides obstetrical services in rural areas as designated by the Insurance Department; or
- (iv) a certified nurse midwife.

(2) The Insurance Department shall notify the Department of Public Welfare that the applicant has self-certified as eligible for a 50% abatement of the imposed assessment if the health care provider was assessed under section 712(d) as:

- (i) a physician but is a physician who does not qualify for abatement under paragraph (1);
- (ii) a licensed podiatrist; or
- (iii) a nursing home.

(c) Refund.--If a health care provider paid the assessment for the calendar year prior to applying for an abatement under subsection (a), the health care provider may, in addition to the completed application required by subsection (a), submit a request for a refund. The request shall be submitted on the form required by the Insurance Department. If the Insurance Department grants the health care provider an abatement of the assessment for the calendar year in accordance with subsection (b), the Insurance Department shall either refund to the health care provider the portion of the assessment which was abated or issue a credit to the health care provider's professional liability insurer.

Section 1105. Certificate of retention.

(a) Certificate.--The Insurance Department shall prepare a certificate of retention form. The form shall require a health care provider seeking an abatement under the program to attest that the health care provider will continue to provide health care services in this Commonwealth for at least one full calendar year following the year for which an abatement was received pursuant to this chapter.

(a.1) Hospital responsibility.--When a hospital has submitted an application on behalf of a health care provider, the hospital shall be responsible for ensuring compliance with the certificate of retention and shall indemnify the health care provider retention account for each health care provider who fails to continue to provide medical services within this Commonwealth for the year following receipt of the abatement.

(b) Repayment.--

(1) Except as provided in paragraph (2), if a health care provider receives an abatement but, prior to the end of the retention period, ceases providing health care services in this Commonwealth, the health care provider shall repay to the Commonwealth 100% of the abatement received plus administrative and legal costs, if applicable. A health care provider subject to this paragraph shall provide written notice to the Insurance Department within 60 days of the date of cessation of health care services.

(2) Paragraph (1) shall not apply to a health care provider who is any of the following:

- (i) A health care provider who is enrolled in an approved residency or fellowship program.
- (ii) A health care provider who dies prior to the

end of the retention period.

(iii) A health care provider who is disabled and unable to practice prior to the end of the retention period.

(iv) A health care provider who is called to active military duty prior to the end of the retention period.

(v) A health care provider who retires and who is at least 70 years of age prior to the end of the retention period.

(c) Tax.--An amount owed the Commonwealth under subsection (b) shall be considered a tax under section 1401 of the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code. The Department of Revenue shall provide assistance to the Insurance Department in any collection effort. Any amount collected under this chapter, including administrative and legal costs, shall be deposited into the Health Care Provider Retention Account.

(d) Failure to pay.--The Insurance Department shall notify the appropriate licensing board of any failure to pay an amount required of a licensee under this section. Upon such notification, the licensing board shall suspend or revoke the license of the licensee.

Section 1106. Reporting.

(a) Report.--By May 15 of 2004 and 2006, the Insurance Department shall submit a report to the Governor, the chairperson and the minority chairperson of the Banking and Insurance Committee of the Senate and the chairperson and the minority chairperson of the Insurance Committee of the House of Representatives regarding the program. The report shall include all of the following:

(1) The number of health care providers who applied for abatement under the program.

(2) The number of health care providers granted 100% abatement under the program.

(3) The number of health care providers granted 50% abatement under the program.

(4) Based upon available information, the number of health care providers who have left this Commonwealth after receiving abatement under the program.

(5) The number of and reason for any unapproved applications.

(6) Any other information relevant to assessing the success of the program.

(b) Exception.--The report shall not release information which could reasonably be expected to reveal the individual identity of a health care provider.

Section 1107. Cooperation.

Notwithstanding any law to the contrary, all departments under the jurisdiction of the Governor shall cooperate with the Insurance Department in its administration of the program.

Section 1108. Confidentiality.

Any information submitted by an applicant to the Insurance Department under this chapter shall be confidential by law and privileged and shall not be deemed a public record under the act of June 21, 1957 (P.L.390, No.212), referred to as the Right-to-Know Law, except that the Insurance Department may release

information necessary and proper for administration and processing of specific applications or certificates of retention.

Section 1109. Violations.

The following shall apply:

(1) Any person who willfully submits false or fraudulent information under section 1104 commits a violation of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities) and shall, upon conviction, be subject to punishment as provided by law. Any penalty imposed for violating 18 Pa.C.S. § 4904 shall be in addition to any penalty imposed in accordance with this chapter.

(2) Any person who willfully divulges or makes known individual specific information submitted under this chapter, permits individual specific information to be seen or examined by any person or prints, publishes or makes known in any manner individual specific information commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine not exceeding \$2,500 and the costs of prosecution or to undergo imprisonment for not more than one year, or both.

Section 1110. Refunds or credits.

The Insurance Department shall either issue refunds or credits for moneys due health care providers under this chapter.

Section 1111. Practice clarification.

Notwithstanding any other act to the contrary, health care providers that conduct less than 50% of their health care business or practice within this Commonwealth shall insure their professional liability consistent with the limits established under section 711.

Section 1112. Health Care Provider Retention Account.

(a) Fund established.--There is established within the General Fund a special account to be known as the Health Care Provider Retention Account. Funds in the account shall be subject to an annual appropriation by the General Assembly to the Department of Public Welfare. The Department of Public Welfare shall administer funds appropriated under this section consistent with its duties under section 201(1) of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code.

(b) Transfers from Mcare Fund.--By December 31 of each year, the Secretary of the Budget may transfer from the Medical Care Availability and Reduction of Error (Mcare) Fund established in section 712(a) to the account an amount equal to the difference between the amount deposited under section 712(m) and the amount granted as discounts under section 712(e)(2) for that calendar year.

(c) Transfers from account.--The Secretary of the Budget may annually transfer from the account to the Medical Care Availability and Reduction of Error (MCARE) Fund an amount up to the aggregate amount of abatements granted by the Insurance Department under section 1104(b).

(d) Other deposits.--The Department of Public Welfare may deposit any other funds received by the department which it deems appropriate in the account.

(e) Administration assistance.--The Insurance Department

shall provide assistance to the Department of Public Welfare in administering the account.

Section 1113. Penalties.

The penalties imposed under this chapter or any other applicable act shall be cumulative.

Section 1114. Rules and regulations.

The Insurance Department shall promulgate rules and regulations as necessary to carry out the provisions of this chapter.

Section 1115. Expiration.

The Health Care Provider Retention Program established under this chapter shall expire December 31, 2007.

Section 2.1. The act is amended by adding a section to read:

Section 5103.1. Commission on the Mcare Fund.

(a) Declaration of policy.--The General Assembly recognizes that changes in the medical professional liability insurance market have necessitated the need for a plan to address the unfunded liabilities of the Medical Care Availability and Reduction of Error (Mcare) Fund.

(b) Establishment of Commission on the Mcare Fund.--There is established a Commission on the Mcare Fund for the purpose of reviewing and making recommendations regarding appropriate and effective methods to address any future unfunded liabilities of the Mcare Fund.

(1) The commission shall consist of the following members:

(i) The Insurance Commissioner or designee of the Insurance Commissioner, who shall serve as the chairperson of the commission.

(ii) The Secretary of the Budget or designee of the Office of the Budget.

(iii) The Secretary of Revenue or a designee of the Secretary of Revenue.

(iv) Two members appointed by the President pro tempore of the Senate and two members appointed by the Minority Leader of the Senate.

(v) Two members appointed by the Speaker of the House of Representatives and two members appointed by the Minority Leader of the House of Representatives.

(2) The commission shall establish an advisory committee composed of no more than 15 individuals with expertise in areas including: health care, medical professional liability insurance, the law, finance and actuarial analysis. The members of the advisory committee shall serve without compensation but shall be reimbursed for their actual and necessary expenses for attendance at meetings.

(3) The commission shall undertake a study of the future scope and obligations of the fund and shall submit its report to the Governor and General Assembly by November 15, 2006. The commission shall make recommendations concerning continuation of the Mcare abatement, the elimination or phaseout of the fund and other provisions for providing adequate medical professional liability insurance, including, at a minimum, an evaluation and actuarial analysis of the projected scope of the fund's future unfunded liability and

any reasonable and available financing options for retiring those unfunded liabilities.

(4) The commission is authorized to incur expenses deemed necessary to implement this section. Expenses incurred for this purpose shall be paid by the fund.

(5) The commission shall expire November 30, 2006.

Section 3. The addition of Chapter 11 of the act is a continuation of section 443.7 and Article XIII-A of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code. All activities initiated under section 443.7 or Article XIII-A of the Public Welfare Code shall continue and remain in full force and effect and may be completed under Chapter 11 of the act. Regulations, rules and decisions which were made under section 443.7 or Article XIII-A of the Public Welfare Code and which are in effect on the effective date of the addition of Chapter 11 of the act shall remain in full force and effect until revoked, vacated or modified under Chapter 11 of the act. Contracts and obligations entered into under section 443.7 or Article XIII-A of the Public Welfare Code are not affected nor impaired by the repeal of section 443.7 and Article XIII-A of the Public Welfare Code.

Section 4. (a) The General Assembly declares that the repeals under subsection (b) are necessary to effectuate the addition of Chapter 11 of the act.

(b) Section 443.7 and Article XIII-A of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code, are repealed.

Section 5. This act shall take effect immediately.

APPROVED--The 22nd day of December, A. D. 2005.

EDWARD G. RENDELL