

**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2005 ASSEMBLY BILL 993**

February 7, 2006 – Offered by Representative UNDERHEIM.

1 **AN ACT** *to repeal* 146.37; *to amend* 146.55 (7), 187.33 (3) (a) 5., 187.43 (3) (a)
2 5., 655.27 (1m) (b) and 655.27 (5) (a) 1. and 2.; and *to repeal and recreate*
3 146.38 of the statutes; **relating to:** confidentiality of health care review records
4 and immunity.

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

5 **SECTION 1.** 146.37 of the statutes is repealed.

6 **SECTION 2.** 146.38 of the statutes is repealed and recreated to read:

7 **146.38 Health care quality improvement activity. (1) DEFINITIONS.** In this
8 section:

9 (a) “Adverse action” means any action or recommendation to reduce, restrict,
10 suspend, deny, revoke, or fail to renew any of the following:

11 1. A health care entity’s clinical privileges or clinical practice authority at a
12 hospital or other health care entity.

1 2. A health care entity’s membership on a medical staff that is organized under
2 by–laws or in another health care entity.

3 3. A health care entity’s participation in a defined network plan, as defined in
4 s. 609.01 (1b).

5 4. The accreditation, licensure, or certification of a health care entity.

6 (b) “Health care entity” means any of the following:

7 1. A health care provider, as defined in s. 146.81 (1), an ambulatory surgery
8 center as defined in s. 153.01 (1), a home health agency, as defined in s. 50.49 (1) (a),
9 a home health aide, as defined in s. 146.40 (1) (bm), a hospice aide, as defined in s.
10 146.40 (1) (bp), a nurse’s assistant, as defined in s. 146.40 (1) (d), an ambulance
11 service provider, as defined in s. 146.50 (1) (c), an emergency medical technician, as
12 defined in s. 146.50 (1) (e), a first responder, as defined in s. 146.50 (1) (hm), or any
13 other person who is licensed, certified, or registered to provide health care services
14 including mental health services.

15 2. An individual who is enrolled in an education or training program that the
16 individual must complete in order to obtain credentials required of an individual
17 under subd. 1.

18 3. A person who is certified as a provider of medical assistance under s. 49.45
19 (2) (a) 11.

20 4. A parent organization, subsidiary, or affiliate of a person described under
21 subd. 1. or 3.

22 (d) “Quality improvement activity” means an evaluation, review, study,
23 assessment, investigation, recommendation, monitoring, corrective action, adverse
24 action, or any other action, which may include one–time, continuous, or periodic data
25 collection, relating to any of the following subjects:

1 1. The quality of care provided by a health care entity or the quality of services
2 provided by a health care entity that have an impact on care.

3 2. Morbidity or mortality related to a health care entity.

4 3. The qualification, competence, conduct, or performance of a health care
5 entity.

6 4. The cost or use of health care services and resources of a health care entity.

7 5. Compliance with applicable legal, ethical, or behavioral standards for a
8 health care entity.

9 6. Compliance with credentialing, accreditation, or regulatory standards for a
10 health care entity and performance of credentialing, accreditation, or regulatory
11 activities.

12 7. The approval or credentialing of a health care entity.

13 (e) “Records” includes minutes, files, notes, reports, statements, memoranda,
14 databases, findings, work products, and images, regardless of the type of
15 communications medium or form, including oral communications, and whether in
16 statistical form or otherwise.

17 (f) “State agency” means a department, board, examining board, affiliated
18 credentialing board, commission, independent agency, council, or office in the
19 executive branch of state government.

20 **(2) IMMUNITY FOR ACTS OR OMISSIONS.** (a) No person acting in good faith who
21 participates in a quality improvement activity described under sub. (3) (a) 1. is liable
22 for civil damages as a result of any act or omission by the person in the course of the
23 quality improvement activity.

24 (b) The good faith of any person participating in a quality improvement activity
25 described under sub. (3) (a) 1. shall be presumed in any civil action. Any person who

1 asserts that a person has not acted in good faith has the burden of proving that
2 assertion by clear and convincing evidence.

3 **(3) CONFIDENTIALITY AND PRIVILEGE.** (a) Except as provided in sub. (4), all of the
4 following are confidential and privileged; are not subject to discovery, subpoena, or
5 any other means of legal compulsion requiring release or permitting inspection,
6 including compulsion by a state agency; and are not admissible as evidence in any
7 civil, criminal, or other judicial or administrative proceeding:

8 1. Records and information contained in records that are created, collected,
9 reported, aggregated, or organized by any person as part of a quality improvement
10 activity that is conducted by any person, organization, department, governing body,
11 or committee, including a committee with representatives from multiple persons,
12 organizations, departments, or governing bodies, that is any of the following:

13 a. A person, other than a state agency, who is required or authorized by state
14 or federal law, as a condition of accreditation, or under a bylaw, resolution, or policy
15 to conduct the quality improvement activity, or another person who acts on that
16 person's behalf.

17 b. A person who is charged, authorized, or directed by a person described in
18 subd. 1. a. to conduct the quality improvement activity.

19 2. A request for records or information made as part of a quality improvement
20 activity described under subd. 1. by a person conducting the quality improvement
21 activity.

22 3. Notice to a health care entity that the entity is or will be the subject of a
23 quality improvement activity described under subd. 1.

1 (b) Except as provided in sub. (4) (c) and(g), the confidentiality and privilege
2 afforded to records and information under par. (a) is not waived by unauthorized or
3 authorized disclosure of records or information.

4 (c) Records relating to a quality improvement activity described under par. (a)
5 1. are not subject to inspection or copying under s. 19.35 (1).

6 **(4) EXCEPTIONS TO CONFIDENTIALITY AND PRIVILEGE.** (a) Subsection (3) does not
7 apply to records or information created apart from a quality improvement activity
8 that are maintained by or for a health care entity for the particular purpose of
9 diagnosing, treating, or documenting care provided to an individual patient.

10 (b) Subsection (3) does not prohibit disclosing that a reduction, restriction,
11 suspension, denial, revocation, or failure to renew any item under sub. (1) (a) 1. to
12 4. has occurred.

13 (c) A person mandated by Wisconsin or federal law to report may disclose a
14 record or information from a record that is confidential and privileged under sub. (3)
15 to make the mandated report. Subsection (3) does not apply to a record that has been
16 disclosed under this paragraph or to information in the record.

17 (d) If a person takes an adverse action against a health care entity as part of
18 a quality improvement activity described under sub. (3) (a) 1., or notifies the health
19 care entity of a proposed adverse action, the person shall, upon request by the health
20 care entity, disclose to the health care entity any records in the person's possession
21 relating to the adverse action or proposed adverse action. Records relating to the
22 adverse action are admissible in any criminal, civil, or other judicial or
23 administrative proceeding in which the health care entity contests the adverse
24 action. A person who has authority to take an adverse action against a health care
25 entity as part of a quality improvement activity described under sub. (3) (a) 1. may

1 at any time disclose to the health care entity records relating to a proposed adverse
2 action against the health care entity.

3 (e) A person conducting a quality improvement activity pursuant to sub. (3) (a)
4 1. a. may disclose the records and information that are confidential and privileged
5 pursuant to sub. (3).

6 (f) A person conducting a quality improvement activity pursuant to sub. (3) (a)
7 1. b. may disclose the records and information that are confidential and privileged
8 pursuant to sub. (3) if there is written authorization to make the disclosure from the
9 person that charged, authorized, or directed the person to conduct the quality
10 improvement activity.

11 (g) The confidentiality and privilege afforded to records and information under
12 sub. (3) is waived for records that are publicly disclosed under par. (e) or (f) to persons
13 that are not health care entities.

14 (h) A person planning an activity that would be a quality improvement activity
15 under sub. (3) (a) 1. may in advance of the activity designate in writing that sub. (3)
16 shall not apply to the records and information created, collected, reported,
17 aggregated, or organized by any person as part of the designated activity.

18 **(5)** Any person who discloses information or releases a record in violation of
19 sub. (3), other than through a good faith mistake, is civilly liable to any person
20 harmed by the disclosure or release.

21 **(6)** CONSTRUCTION. This section shall be liberally construed in favor of
22 identifying records and information as confidential, privileged, and inadmissible as
23 evidence.

24 **SECTION 3.** 146.55 (7) of the statutes is amended to read:

1 146.55 (7) INSURANCE. A physician who participates in an emergency medical
2 services program under this section or as required under s. 146.50 shall purchase
3 health care liability insurance in compliance with subch. III of ch. 655, except for
4 those acts or omissions of a physician who, as a medical director, ~~reviews as defined~~
5 in s. 146.50 (1) (j), conducts a quality improvement activity relating to the
6 performance of emergency medical technicians or ambulance service providers, as
7 specified under s. ~~146.37 (1g)~~ 146.38 (2).

8 **SECTION 4.** 187.33 (3) (a) 5. of the statutes is amended to read:

9 187.33 (3) (a) 5. Proceedings based upon a cause of action for which the
10 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
11 895.44, 895.48, 895.482, 895.51, or 895.52.

12 **SECTION 5.** 187.43 (3) (a) 5. of the statutes is amended to read:

13 187.43 (3) (a) 5. Proceedings based upon a cause of action for which the
14 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
15 895.44, 895.48, 895.482, 895.51, or 895.52.

16 **SECTION 6.** 655.27 (1m) (b) of the statutes is amended to read:

17 655.27 (1m) (b) A health care provider who engages in ~~the activities described~~
18 in s. 146.37 (1g) and (3) a quality improvement activity under 146.38 shall be liable
19 for not more than the limits expressed under s. 655.23 (4) or the maximum liability
20 limit for which the health care provider is insured, whichever limit is greater, if he
21 or she is found to be liable under s. ~~146.37~~ 146.38, and the fund shall pay the excess
22 amount, unless the health care provider is found not to have acted in good faith
23 during those activities and the failure to act in good faith is found by the trier of fact,
24 by clear and convincing evidence, to be both malicious and intentional.

25 **SECTION 7.** 655.27 (5) (a) 1. and 2. of the statutes are amended to read:

1 655.27 (5) (a) 1. Any person may file a claim for damages arising out of the
2 rendering of medical care or services or participation in ~~peer review activities~~ a
3 quality improvement activity under s. ~~146.37~~ 146.38 within this state against a
4 health care provider or an employee of a health care provider. A person filing a claim
5 may recover from the fund only if the health care provider or the employee of the
6 health care provider has coverage under the fund, the fund is named as a party in
7 the action, and the action against the fund is commenced within the same time
8 limitation within which the action against the health care provider or employee of
9 the health care provider must be commenced.

10 2. Any person may file an action for damages arising out of the rendering of
11 medical care or services or participation in ~~peer review activities~~ a quality review
12 activity under s. ~~146.37~~ 146.38 outside this state against a health care provider or
13 an employee of a health care provider. A person filing an action may recover from
14 the fund only if the health care provider or the employee of the health care provider
15 has coverage under the fund, the fund is named as a party in the action, and the
16 action against the fund is commenced within the same time limitation within which
17 the action against the health care provider or employee of the health care provider
18 must be commenced. If the rules of procedure of the jurisdiction in which the action
19 is brought do not permit naming the fund as a party, the person filing the action may
20 recover from the fund only if the health care provider or the employee of the health
21 care provider has coverage under the fund and the fund is notified of the action
22 within 60 days of service of process on the health care provider or the employee of the
23 health care provider. The board of governors may extend this time limit if it finds

