

**ASSEMBLY SUBSTITUTE AMENDMENT 2,
TO 2005 ASSEMBLY BILL 993**

February 21, 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5 **SECTION 1.** 146.37 of the statutes is repealed.

6 **SECTION 2.** 146.38 of the statutes is repealed and recreated to read: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 credentialing, accreditation, licensure, registration, approval, or
6 certification of a health care entity.

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

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

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

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

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

23 (d) “Quality improvement activity” means an evaluation, review, study,
24 assessment, investigation, recommendation, monitoring, corrective action, adverse

1 action, or any other action, which may include one-time, continuous, or periodic data
2 collection, relating to any of the following subjects:

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

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

6 3. The qualification, competence, conduct, or performance of a health care
7 entity.

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

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

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

14 7. The accreditation, licensure, registration, certification, approval, or
15 credentialing of a health care entity.

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

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

23 **(2) IMMUNITY FOR ACTS OR OMISSIONS.** (a) No person acting in good faith who
24 participates in a quality improvement activity to which sub. (3) applies is liable for

1 civil damages as a result of any act or omission by the person in the course of the
2 quality improvement activity.

3 (b) The good faith of any person participating in a quality improvement activity
4 to which sub. (3) applies shall be presumed in any civil action. Any person who
5 asserts that a person has not acted in good faith has the burden of proving that
6 assertion by clear and convincing evidence.

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

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

17 a. A person that conducts a quality improvement activity as required or
18 authorized by state or federal law, as a condition of accreditation, or under a bylaw,
19 resolution, or policy; or another person who acts on that person's behalf. This subd.
20 1. a. does not apply to a state agency.

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

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

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

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

5 (c) Records described under par. (a) 1. are not subject to inspection or copying
6 under s. 19.35 (1).

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

11 (am) Subsection (3) does not apply to the release to a state agency of records
12 or information created apart from a quality improvement activity that are
13 maintained by or for a health care entity for a purpose other than as specified under
14 par. (a), upon a showing by clear and convincing evidence that the records or
15 information are otherwise unavailable.

16 (ar) Any person who testifies during or participates in a quality improvement
17 activity to which sub. (3) applies may testify in any civil, criminal, or other judicial
18 or administrative proceeding as to information within his or her knowledge, but may
19 not testify as to information obtained solely through his or her participation in the
20 quality improvement activity and may not testify as to any conclusion of the quality
21 improvement activity.

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

1 (c) A person required by state or federal law to report may disclose a record or
2 information from a record that is confidential and privileged under sub. (3), in order
3 to make the required report. Subsection (3) does not apply to a record that is
4 disclosed under this paragraph or to information in the record.

5 (d) If a person takes an adverse action against a health care entity or notifies
6 a health care entity of a proposed adverse action against the health care entity as
7 part of a quality improvement activity to which sub. (3) applies, the person shall,
8 upon request by the health care entity, disclose to the health care entity any records
9 in the person's possession relating to the adverse action or proposed adverse action.
10 Records relating to the adverse action are admissible in any criminal, civil, or other
11 judicial or administrative proceeding in which the health care entity contests the
12 adverse action. A person who has authority to take an adverse action against a
13 health care entity as part of a quality improvement activity to which sub. (3) applies
14 may at any time disclose to the health care entity records relating to a proposed
15 adverse action against the health care entity.

16 (e) A person under sub. (3) (a) 1. a. conducting a quality improvement activity
17 may disclose the records and information that are confidential and privileged under
18 sub. (3).

19 (f) A person under sub. (3) (a) 1. b. conducting a quality improvement activity
20 may disclose the records and information that are confidential and privileged under
21 sub. (3) if there is written authorization to make the disclosure from whoever
22 charged, authorized, or directed the person to conduct the quality improvement
23 activity.

24 (g) The confidentiality and privilege afforded to records under sub. (3) does not
25 apply to records that are disclosed to the general public under par. (e) or (f).

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

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

8 (6) CONSTRUCTION. This section shall be liberally construed in favor of
9 identifying records and information as confidential, privileged, and inadmissible as
10 evidence.

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

12 146.55 (7) INSURANCE. A physician who participates in an emergency medical
13 services program under this section or as required under s. 146.50 shall purchase
14 health care liability insurance in compliance with subch. III of ch. 655, except for
15 those acts or omissions of a physician who, as a medical director, reviews as defined
16 in s. 146.50 (1) (j), conducts a quality improvement activity relating to the
17 performance of emergency medical technicians or ambulance service providers, as
18 specified under s. ~~146.37 (1g)~~ 146.38 (2).

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

20 187.33 (3) (a) 5. Proceedings based upon a cause of action for which the
21 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
22 895.44, 895.48, 895.482, 895.51, or 895.52.

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

1 187.43 **(3)** (a) 5. Proceedings based upon a cause of action for which the
2 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),
3 895.44, 895.48, 895.482, 895.51, or 895.52.

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

5 655.27 **(1m)** (b) A health care provider who engages in ~~the activities described~~
6 ~~in s. 146.37 (1g) and (3)~~ a quality improvement activity under 146.38 shall be liable
7 for not more than the limits expressed under s. 655.23 (4) or the maximum liability
8 limit for which the health care provider is insured, whichever limit is greater, if he
9 or she is found to be liable under s. ~~146.37~~ 146.38, and the fund shall pay the excess
10 amount, unless the health care provider is found not to have acted in good faith
11 during those activities and the failure to act in good faith is found by the trier of fact,
12 by clear and convincing evidence, to be both malicious and intentional.

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

14 655.27 **(5)** (a) 1. Any person may file a claim for damages arising out of the
15 rendering of medical care or services or participation in ~~peer review activities~~ a
16 quality improvement activity under s. ~~146.37~~ 146.38 within this state against a
17 health care provider or an employee of a health care provider. A person filing a claim
18 may recover from the fund only if the health care provider or the employee of the
19 health care provider has coverage under the fund, the fund is named as a party in
20 the action, and the action against the fund is commenced within the same time
21 limitation within which the action against the health care provider or employee of
22 the health care provider must be commenced.

23 2. Any person may file an action for damages arising out of the rendering of
24 medical care or services or participation in ~~peer review activities~~ a quality review
25 activity under s. ~~146.37~~ 146.38 outside this state against a health care provider or

1 an employee of a health care provider. A person filing an action may recover from
2 the fund only if the health care provider or the employee of the health care provider
3 has coverage under the fund, the fund is named as a party in the action, and the
4 action against the fund is commenced within the same time limitation within which
5 the action against the health care provider or employee of the health care provider
6 must be commenced. If the rules of procedure of the jurisdiction in which the action
7 is brought do not permit naming the fund as a party, the person filing the action may
8 recover from the fund only if the health care provider or the employee of the health
9 care provider has coverage under the fund and the fund is notified of the action
10 within 60 days of service of process on the health care provider or the employee of the
11 health care provider. The board of governors may extend this time limit if it finds
12 that enforcement of the time limit would be prejudicial to the purposes of the fund
13 and would benefit neither insureds nor claimants.

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(END)