No. S205568

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK T. FAHLEN
Plaintiff and Respondent,

v.

SUTTER CENTRAL VALLEY HOSPITALS, STEVE MITCHELL, et al.
Defendants and Appellants.

After a Published Decision by the Court of Appeal,
Fifth Appellate District
Case No. F063023

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF ON THE MERITS; SUPPORTING MEMORANDUM; SUPPORTING DECLARATION OF GLENDA M. ZARBOCK

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SUTTER CENTRAL VALLEY HOSPITALS
and STEVE MITCHELL

REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459, Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell hereby request that this Court take judicial notice of the following:

1. The Assembly Committee on Health's Analysis of Senate Bill No. 97 (1999-2000 Reg. Sess.) as amended June 8, 1999 (attached as Exhibit 1).

2. The Assembly Committee on Health's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as introduced February 21, 2007 (attached as Exhibit 2).

3. The Senate Judiciary Committee's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007 (attached as Exhibit 3).

4. The Senate Health Committee's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007 (attached as Exhibit 4).

5. The Senate's Amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) on July 17, 2007 (attached as Exhibit 5).

6. California Hospital Association's Floor Alert to the State Senate on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated August 21, 2007 (attached as Exhibit 6).

7. The Assembly Floor Bill Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended September 5, 2007 (attached as Exhibit 7).

8. The Senate's Amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) on September 5, 2007 (attached as Exhibit 8).

9. California Hospital Association's Floor Alert to the State Assembly on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated September 10, 2007 (attached as Exhibit 9).

10. California Medical Association's Floor Alert to the State Assembly on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated September 11, 2007 (attached as Exhibit 10).

The accompanying Memorandum states the grounds for this Request and the accompanying Declaration of Glenda M. Zarbock authenticates the documents.

DATED: February 4, 2013 HANSON BRIDGETT LLP

By: Glenda M. Zarbock
Glenda M. Zarbock
Defendants and Appellants
SUTTER CENTRAL
VALLEY HOSPITALS and
STEVE MITCHELL

MEMORANDUM

I. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ASSEMBLY COMMITTEE ON HEALTH'S ANALYSIS OF SENATE BILL NO. 97

As a Legislative Committee analysis, the Assembly Committee on Health's analysis of Senate Bill No. 97, attached as Exhibit 1, the bill that became Health and Safety Code section 1278.5 (Section 1278.5), is judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32, 39; *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1025*; Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal App.4th 32, 50.)

The Analysis is material because, by describing the purpose of the original legislation, it provides context for the 2007 amendment to Section 1278.5, the construction of which is at issue in this appeal. Accordingly, good cause exists to take notice of the Assembly Committee on Health's analysis of SB 97.

While neither the parties nor amici formally sought judicial notice of this document in the lower courts, amicus curiae California Hospital Association ("CHA") discussed the legislative history of AB 632 extensively in its brief. Furthermore, the Fifth District made reference to the 1999 enactment of Section 1278.5 and the statute's initial purpose in its discussion of the legislative history of AB 632. (*Fahlen v. Sutter Central Valley Hosps.* (Aug 14, 2012, F063023) (Slip Op.), at p. 24.)

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ASSEMBLY COMMITTEE ON HEALTH'S ANALYSIS OF ASSEMBLY BILL NO. 632

Similarly, the Assembly Committee on Health's Analysis of Assembly Bill No. 632 (AB 632), attached as Exhibit 2, is judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, Inc.*, *supra*, 133 Cal.App.4th at pp. 31-32, 39; *Kaiser Foundation Health Plan, supra*, 99 Cal.App.4th at p. 1025; *Khajavi*, *supra*, 84 Cal App.4th at p. 50.)

The Analysis of AB 632 is material to this appeal because it bears on the issue of whether in enacting the 2007 amendment to Health and Safety Code section 1278.5 (AB 632), the Legislature intended to abrogate the *Westlake* judicial exhaustion rule. The Analysis sets forth commentary about the purpose of AB 632 and the forms of retaliation the bill was designed to prevent. That the analysis fails to mention peer review actions as one such form of retaliation is strong evidence that the Legislature had no intention of interfering with medical peer review activities being conducted under existing state law, let alone abrogating long-standing judicial exhaustion requirements applicable to such peer review actions. Accordingly, good cause exists to take notice of the Assembly Committee on Health's analysis of AB 632.

Here again, while neither the parties nor amici formally sought judicial notice of this document in the lower courts, amicus curiae CHA discussed the legislative history of AB 632 extensively in its brief and the Fifth District considered the

legislative history of AB 632 in connection with its opinion. (Slip Op. at pp. 24-26.)

III. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ANALYSIS OF AB 632 BY THE SENATE HEALTH COMMITTEE AND SENATE JUDICIARY COMMITTEE

The analysis of AB 632 by the Senate Judiciary Committee and Senate Health Committee, attached as Exhibits 3 and 4 respectively, are legislative committees' analyses that are judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at p. 31, 34; *In re Raymond E.* (2002) 97 Cal.App.4th 613, 617 n.27 [Senate Committee on Health and Human Services]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 146 [Senate Judiciary Committee].)

The Senate Judiciary Committee's analysis is material because it bears on the issue of whether in enacting AB 632, the Legislature intended to abrogate the *Westlake* judicial exhaustion rule. The Committee's analysis acknowledges concerns raised during the legislative process about possible "unintended consequences" that the legislation might have on medical peer review. These concerns then led the Senate to amend the bill by adding a provision stating, "Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code." (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, p. 2, attached as Exhibit 5.) The Committee's analysis and

the Senate's subsequent amendments to AB 632 support the conclusion that the Legislature did not intend to interfere with peer review activities under existing state law.

The Senate Health Committee's analysis is material because it too bears on the issue of whether in enacting AB 632, the Legislature intended to abrogate the *Westlake* judicial exhaustion rule. The Committee's analysis acknowledges concerns raised by CHA during the legislative process about ensuring that hospitals retain the ability to take disciplinary action in response to disruptive behavior by physicians, "regardless of their protected activity." (Sen. Health Com. Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007, p. 5, attached as Exhibit 4.) Thereafter, the Senate amended the bill to add a provision enabling hospitals to seek an injunction to protect pending peer review hearings from interference by discovery demands in Section 1278.5 civil actions. (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) July 17, 2007, p. 2, attached as Exhibit 5.) The Committee's analysis and the Senate's subsequent amendments to AB 632 support the conclusion that the Legislature did not intend to interfere with peer review activities under existing state law. Accordingly, good cause exists to take judicial notice of these legislative committees' analyses of AB 632.

Here again, while neither the parties nor amici formally sought judicial notice of these document from the Fifth District, amicus curiae CHA discussed the legislative history of AB 632 in

its brief and the Fifth District considered the legislative history in reaching its holding. (Slip Op. at pp. 24-26.)

IV. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE SENATE AMENDMENTS TO AB 632 ON JULY 17, 2007 AND SEPTEMBER 5, 2007

As official acts of a legislative body, the Senate amendments to AB 632 that were made on July 17, 2007 and on September 5, 2007, attached as Exhibits 5 and 8 respectively, are judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at p. 31; *San Rafael Elem. Sch. Dist. v. State Bd. of Educ.* (1999) 73 Cal.App.4th 1018, 1026, n.8.)

The Senate's July 17, 2007 and September 5, 2007 amendments to AB 632 are material to this appeal because they evidence the Legislature's intent, in amending AB 632, to protect medical peer review activities, not to interfere with them or abrogate the long-standing judicial exhaustion rule. One aspect of the September 5, 2007 Senate amendments was to add subdivision (l) to Section 1278.5, which provides that Section 1278.5 "shall [not] be construed to limit the ability of the medical staff to carry out its legitimate peer review activities. . . ." (Sen. Amend. to Assem. Bill No. 632 (2007-2008 Reg. Sess.) Sept. 5, 2007, p. 5 (attached as Exhibit 8.) Another added language to subdivision (h) to provide further grounds for enjoining a Section 1278.5 claim "for the duration of the peer review process." *(Ibid.)* These amendments support the conclusion that the Legislature had no intention of abrogating the well-established judicial

exhaustion rule in enacting AB 632. Because these amendments are material to the proper construction of Section 1278.5 and were quoted in the Fifth District's published decision, good cause exists to take judicial notice of them.

Here again, neither the parties nor amici formally sought judicial notice of this document in the lower courts; but, the Fifth District quoted from the Senate's July 17, 2007 and September 5, 2007 amendments to AB 632 in its decision. (Slip Op. at pp. 24-26.)

V. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ASSEMBLY FLOOR BILL ANALYSIS OF AB 632 AS AMENDED SEPTEMBER 5, 2007

The Assembly Floor Bill Analysis of AB 632 following the Senate's September 5, 2007 amendments, attached as Exhibit 7, is judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at p. 31, 37; *People v. Patterson* (1999) 72 Cal.App.4th 438, 443.)

The Assembly Floor Bill Analysis is material to this appeal because it sets forth the basis for the Assembly's concurrence with the Senate amendments to AB 632 and specifically makes reference to the Senate Judiciary Committee's rationale for the Senate's amendments, which was "to ensure that the health facility peer review committee continues to operate as it has under current law." (Assem. Floor Bill Analysis of Assem. Bill No. 632 (2007-2008 Reg. Sess.) as amended Sept. 5, 2007, pp. 3-4 (attached as Exhibit 7). This document evidences the

Legislature's intent, in enacting AB 632, to protect the existing peer review process, not to interfere with the process or abrogate the long-standing judicial exhaustion rule. Because this document is material to the proper construction of the 2007 amendment to Section 1278.5, good cause exists to take judicial notice of it.

While neither the parties nor amici formally sought judicial notice of this document from the lower courts, amicus curiae CHA discussed the legislative history of AB 632 in its brief and the Fifth District considered it in connection with its holding. (Slip Op. at pp. 24-26.)

VI. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE FLOOR ALERTS TO THE STATE ASSEMBLY AND STATE SENATE ON AB 632 BY THE CALIFORNIA HOSPITAL ASSOCIATION AND CALIFORNIA MEDICAL ASSOCIATION

As communications to the Members of the State Assembly and Senate by CMA, the bill's sponsor, and by CHA, the bill's principal opponent, the CMA's and CHA's Floor Alerts, attached as Exhibits 10, 6, and 9, are judicially noticeable under Evidence Code section 452, subdivision (c). (*Kaufman & Broad Communities, supra,* 133 Cal.App.4th at p. 36; *In re Marriage of Siller*, 187 Cal.App.3d 36, 46, n.6; *People v. Drennan* (2000) 84 Cal.App.4th 1349, 1357-1358.)

CHA's August 21, 2007 Floor Alert addressed to Members of the State Senate is material to this appeal. The communication documents CHA's concern that AB 632, even after the Senate's July 17, 2007 amendments, would interfere

with the current system of peer review and "obfuscate []" existing "avenues of redress" for physicians to challenge peer review actions. (Cal. Hosp. Ass'n, Floor Alert to State Senate on Assem. Bill No. 632 (2007-2008 Reg. Sess.) Aug. 21, 2007, p. 2., attached as Exhibit 6.) The Floor Alert also attached CHA's proposed amendments to the bill, designed to clarify and resolve these concerns. CHA's statements were before the Senate on September 5, 2007, when it made further amendments to AB 632 by adding subdivision (l), described above. This communication and the Senate's September 5, 2007 amendments support the conclusion that the Legislature had no intention of abrogating the well-established judicial exhaustion rule in enacting AB 632.

CHA's September 10, 2007 Floor Alert addressed to Members of the State Assembly is also material to this appeal. That communication reflects CHA's concern that the Senate's September 5, 2007 amendments were inadequate because by forcing a hospital to defend against a retaliation claim before the hospital has taken action, the court would be in the position of having to assess the validity of peer review outside the context of an action and independent of administrative mandamus standards. With this communication before it, the Assembly concurred with the September 5, 2007 Senate amendments, without expressing any intent to abrogate the judicial exhaustion requirement.

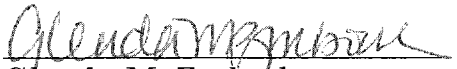
Finally, the CMA's September 11, 2007 Floor Alert addressed to Members of the State Assembly is material to this appeal because it reflects the pronouncement by the bill's sponsor

that the bill "is not to interfere with legitimate peer review activities." This confirmation came after the Senate's July 17, 2007 amendments to AB 632, which are referenced above, and on the day that these amendments were before the Assembly for concurrence. Moreover, because the CMA's statements were before the Assembly when it concurred with the Senate's amendments that sought to protect peer review actions from interference by Section 1278.5 claims, this supports the conclusion that the Legislature had no intention of abrogating the well-established judicial exhaustion rule in enacting AB 632.

Accordingly, because the CHA's and CMA's Floor Alerts bear on the proper construction of Section 1278.5 and whether the Legislature intended to abrogate the judicial exhaustion rule when it enacted AB 632, good cause exists to take notice of these documents.

Here again, neither the parties nor amici formally sought judicial notice of these floor alerts in the lower courts. However, as stated above, the legislative history of AB 632 was discussed in CHA's amicus brief and the Fifth District's published decision. (Slip Op. at pp. 24-26.)

DATED: February 4, 2013 HANSON BRIDGETT LLP

By: 
Glenda M. Zarbock
Defendants and Appellants
SUTTER CENTRAL
VALLEY HOSPITALS and
STEVE MITCHELL

DECLARATION OF GLENDA M. ZARBOCK

I, Glenda M. Zarbock, declare:

1. I am an attorney at law duly licensed to practice before the courts of the State of California. I am a partner at the law firm of Hanson Bridgett LLP, counsel for Defendants and Appellants Sutter Central Valley Hospitals and Steve Mitchell in this action. I have personal knowledge of the following facts, and if called upon as a witness, I could and would testify competently to the contents of this declaration.

2. All documents attached hereto are true and correct copies of the documents described below. I am informed and believe, and on that basis declare, that on or about September 17, 2012, Hanson Bridgett LLP librarian Catherine Hardy, acting at my direction, obtained from Legislative Intent Service, Inc. a file containing the compiled Legislative History on Assembly Bill No. 632 ("AB 632 Legislative History") from Legislative Intent Service, Inc.'s website. Each document attached hereto is included within the AB 632 Legislative History.

3. Attached as Exhibit 1 is a copy of the Assembly Committee on Health's Analysis of Senate Bill No. 97 (1999-2000 Reg. Sess.) as amended June 8, 1999.

4. Attached as Exhibit 2 is a copy of the Assembly Committee on Health's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as introduced February 21, 2007.

5. Attached as Exhibit 3 is a copy of the Senate Judiciary Committee's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007.

6. Attached as Exhibit 4 is a copy of the Senate Health Committee's Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended June 6, 2007.

7. Attached as Exhibit 5 is a copy of the Senate Amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) made on July 17, 2007.

8. Attached as Exhibit 6 is a copy of the California Hospital Association's Floor Alert addressed to the State Senate on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated August 21, 2007.

9. Attached as Exhibit 7 is a copy of the Assembly Floor Bill Analysis of Assembly Bill No. 632 (2007-2008 Reg. Sess.) as amended September 5, 2007.

10. Attached as Exhibit 8 is a copy of the Senate Amendments to Assembly Bill No. 632 (2007-2008 Reg. Sess.) made on September 5, 2007.

11. Attached as Exhibit 9 is a copy of the California Hospital Association's Floor Alert addressed to the State Assembly on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated September 10, 2007.

12. Attached as Exhibit 10 is a copy of the California Medical Association's Floor Alert addressed to the State Assembly on Assembly Bill No. 632 (2007-2008 Reg. Sess.) dated September 11, 2007.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed at San Francisco, California, on February 4, 2013.

By: Glenda M. Zarbock
Glenda M. Zarbock

Date of Hearing: June 15, 1999

ASSEMBLY COMMITTEE ON HEALTH
Martin Gallegos, Chair
SB 97 (Burton) - As Amended: June 8, 1999

SENATE VOTE : 24-14

SUBJECT : Health facilities: protection of whistle blowers.

SUMMARY : Prohibits a health facility from discriminating against a patient or employee who presents a grievance or cooperates in any investigation against that facility. Specifically, this bill :

1) Makes findings and declarations to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.

2) Prohibits any health facility from retaliating or discriminating against an employee or patient who has filed a grievance or provided information to a governmental entity relating to the care, services, or conditions at that facility.

3) Requires a health facility that violates this provision to be subject to a civil penalty of not more than $25,000.

4) Establishes a "rebuttable presumption" that any discriminatory treatment taken by a health facility is retaliatory if it occurs against a patient within 180 days of his/her filing a grievance or complaint or an employee within 120 days of his/her filing a grievance or complaint.

5) Defines "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in employment, or the threat of these actions.

6) Establishes a misdemeanor penalty of up to $20,000 for any person who willfully violates the provisions in this bill.

7) Requires that an employee who has been discriminated against, pursuant to this bill, is entitled to reinstatement, reimbursement for lost wages and benefits, and legal costs associated with pursuing the case.

8) Exempts an inmate of a correctional facility of the Department of the Youth Authority or the Department of Corrections, or an inmate housed in a local detention facility, as specified, from the provisions of this bill.

9) Exempts a long-term health care facility, whose employees and patients are subject to similar protections, from the provisions of this bill.

10) Provides that nothing in this bill abrogates or limits any other theory of liability or remedy otherwise available in law.

EXISTING LAW :

1) Prohibits an employer from retaliating against an employee who provides information to a government or law enforcement agency about the employer's violation of law or regulation. A violation is considered a misdemeanor and is punishable by imprisonment in the county jail not to exceed one year, a fine not to exceed $1,000, or both. A corporation may be fined up to $5,000.

2) Prohibits a long-term health care facility from retaliating or discriminating against an employee or patient who has filed a grievance, or provided information to a governmental entity, relating to care, services, or conditions at that facility. A violation is subject to a civil penalty of not more than $10,000.

FISCAL EFFECT : According to the Senate Appropriations Committee analysis, both state hospitals and University of California (UC) hospitals, owned and operated by the state, would be responsible for paying any fines if health facility personnel violate these provisions and a civil action succeeds against the state.

COMMENTS :

1) PURPOSE OF THIS BILL . The Nurses Association (CNA) is the sponsor of this bill. According to materials submitted by the author and sponsor, this bill would extend the same protections in place for retaliatory actions by long-term health care facilities to the employees and patients of acute

care facilities. Current law has been in effect for over 20 years and the number of complaints has been very small. Employees and patients blow the whistle on unsafe practices and issues relating to patient endangerment after they have pursued their complaints with hospital administrators. Without protection, employees must weigh whether or not they should sacrifice their jobs and patients worry that they will

be denied health care services. Further, nurses are required by statute to serve as patient advocates. If a nurse believes that a hospital practice, an unsafe doctor or other conditions jeopardize patients, the nurse is required to act to protect patients. In some cases, nurses are required to choose between losing their job or losing their license.

2) BACKGROUND . The Department of Health Services (DHS) reports an annual average of 11,000 complaints against all types of health facilities, including long-term care facilities and hospitals. An estimated 7,000 complaints per year are against long-term care facilities. In fiscal year 1997-98, DHS issued 1,258 citations against long-term care facilities. One of these citations was against a long-term care facility for retaliation and discrimination against an employee. DHS staff indicates that they receive a number of retaliation complaints against health care facilities, other than long-term care facilities, but without statutory authority DHS cannot follow-up on these types of complaints.

3) SUPPORT . The American Association of Retired Persons (AARP) supports this bill stating that health plans should be prohibited from retaliating against providers or health care workers if they, reasonably and in good faith, report quality concerns to appropriate governmental agencies or the appropriate management official. Health Access California writes that this bill provides important consumer protections by allowing whistle-blowers in hospitals to speak out about conditions without fear of retribution. Today, patients, their families and workers rightly fear that hospital managers may act against them if they reveal serious problems concerning hospital care.

4) OPPOSITION . The California Healthcare Association (CHA) opposes this bill. CHA states that retaliation against a whistle-blower is already a crime under the Labor Code and that existing protections are already very broad. CHA additionally states that by creating the legal presumption

that a hospital is guilty of retaliation unless it can prove itself innocent, this bill tilts the process in favor of one of the parties in the dispute and as such this bill will encourage incompetent employees to file frivolous complaints. Kaiser Permanente also opposes this bill, stating that it will significantly increase the number of legal actions against health benefit providers such as Kaiser, resulting in a dramatic increase in the cost of legal defense. Kaiser also states that the Labor Code prohibits employers from retaliating against employees and that DHS is required, under existing law, to keep confidential the identities of employees who file complaints against hospitals.

5) PREVIOUS LEGISLATION . This bill is similar to AB 3309

(Burton) of 1996, which failed passage in the Legislature and SB 253 (Burton) of 1997, which was vetoed by Governor Wilson. In his veto message, Governor Wilson stated "[t]here is no empirical data to indicate that health facilities workers require a higher level of protection than other employees."

REGISTERED SUPPORT / OPPOSITION :

Support

California Nurses Association (sponsor)
American Association of Retired Persons
American Federation of State, County and Municipal Employees, AFL-CIO
American Nurses Association/California
California Association of Medical Laboratory Technology
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
California Resources for Independent Living
California School Employees Association
Congress of California Seniors
Consumer Attorneys of California
Emergency Nurses Association of California
Engineers and Scientists of California
Health Access California
Hotel Employees, Restaurant Employees International Union
Little Hoover Commission
Older Women's League of California
Region 8 States Council of the United Food and Commercial Workers

Resources for Independent Living, Inc.
Service Employees International Union
1 Registered Nurse

Opposition

California Association of Catholic Hospitals
California Chamber of Commerce
California Dialyses Council
California Healthcare Association
Kaiser Permanente Medical Care Program
United Hospital Association

Analysis Prepared by : Ellen McCormick / HEALTH / (916) 319-2097

Date of Hearing: April 10, 2007

ASSEMBLY COMMITTEE ON HEALTH
Mervyn Dymally, Chair
AB 632 (Salas) – As Introduced: February 21, 2007

SUBJECT: Health care facilities: whistleblower protections.

SUMMARY: Provides whistleblower protections to physicians and surgeons that currently apply to patients and employees of health facilities. Specifically, this bill:

1) Prohibits a health facility or its affiliate from discriminating or retaliating in any manner against a physician and surgeon on the medical staff of the health facility or its affiliate because the physician and surgeon has presented a grievance or complaint, or has initiated, participated, or cooperated in an investigation or proceeding of any governmental entity, relating to the care, services, or conditions of the facility or its affiliate.

2) Subjects an affiliate of a health facility that violates existing whistleblower law to a civil penalty of not more than $25,000.

3) Requires that any discriminatory treatment of a physician and surgeon within 120 days of the filing of the grievance or complaint raises a rebuttable presumption that the action was taken by the health facility in retaliation, if the health facility had knowledge of the physician or surgeon's initiation, participation, or cooperation. Requires "discriminatory treatment of a physician or surgeon" to include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of the privileges of the physician and surgeon at the health facility or its affiliate, or the threat of any of these actions.

4) Entitles a physician and surgeon who has been discriminated against pursuant to this bill to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or its affiliate, and the legal costs associated with pursuing the case.

5) Defines "affiliate" as a health facility that is directly or indirectly, through one or more intermediaries, controlled by another health facility.

EXISTING LAW:

1) Prohibits a health facility from discriminating or retaliating in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility. Health facility does not include long-term care facility for these purposes.

2) Subjects a health facility that violates #1) above to a civil penalty of not more than $25,000, and requires the penalty to be assessed and recovered through a specified administrative process established for long-term health care facilities.

3) Requires that any discriminatory treatment against a patient within 180 days of the filing of a grievance or complaint to raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint. (Places the burden on the facility to provide that the treatment is not retaliation against a patient based on the complaint.)

4) Requires that any discriminatory treatment of an employee within 120 days of the filing of the grievance or complaint raises a rebuttable presumption that the action was taken by the health facility in retaliation, if the health facility had knowledge of the employee's initiation, participation, or cooperation. Requires "discriminatory treatment of an employee" to include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions.

5) Specifies that the presumptions in #3) and #4) above affects the burden of producing evidence, as specified.

6) Makes any person who willfully violates #1)-4) above guilty of a misdemeanor punishable by a fine of not more than $20,000.

7) Requires an employee who has been discriminated against in employment pursuant to #4) above to be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.

8) States that it is the public policy of the State of California that a physician and surgeon be encouraged to advocate for medically appropriate health care for his or her patients. Defines, "to advocate for medically appropriate health care" to mean to appeal a payor's decision to deny payment for a service pursuant to the reasonable grievance or appeal procedure established by a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff and governing body, ~~or~~ payer, or to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

9) Prohibits a person from terminating, retaliating against, or otherwise penalizing a physician and surgeon for advocacy specified in #8) above, or from prohibiting, restricting, or in any way discouraging a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care.

10) Requires medically appropriate health care in a health facility that is a hospital to be defined by the hospital medical staff and approved by the governing body, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care.

11) States that #8), #9), and #10) above should not be construed to prohibit the governing body of a hospital from taking disciplinary actions against a physician and surgeon as authorized in the Medical Practice Act, as specified.

12) States that it is in public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through the abuse of the judicial process (this "abuse of judicial process" refers to lawsuits that are commonly called Strategic Lawsuit Against Public Participation or SLAPP suits. The law provides for a special motion which a defendant can file at the outset of a SLAPP lawsuit to strike a complaint where the complaint arises from conduct that falls within the rights of petition or free speech).

FISCAL EFFECT: Unknown

COMMENTS:

1) PURPOSE OF THIS BILL. According to the author, existing whistleblower protections in the Health and Safety Code grant protections from retaliation after a grievance is filed by hospital employees and patients but not physicians. By extending the protections to physicians and surgeons this bill would clarify an ambiguity in existing law. This bill also tailors the prohibited type of discrimination or discipline relevant to physicians and surgeons into this code section.

2) PATIENT SAFETY AND MEDICAL ERRORS. The landmark Institute of Medicine Study To Err is Human focused the nation's attention to errors in hospitals by revealing that at least between 44,000 and 98,000 individuals may die each year in United States hospitals as a result of medical errors. In California, between 1978 and 1999, there were more than 210,000 preventable patient deaths.

3) FRAUD AND FALSE CLAIMS. According to a United States Department of Justice 2006 press release, the United States recovered a record amount of more than $3.1 billion in settlements and judgments in cases involving allegations of fraud against the government. Seventy-two percent of the recoveries were in health care. Health care fraud accounted for $2.2 billion in settlements and judgments, including a $920 million settlement with Tenet Healthcare Corporation, the nation's second largest hospital chain. Although Medicare and Medicaid, under the jurisdiction of the federal Department of Health and Human Services, bear the brunt of health care fraud, other programs that were affected include the Federal Employees Health Benefits Program run by the Office of Personnel Management, the TRICARE military health insurance program run by the Department of Defense, and health care programs run by the Department of Veterans Affairs, the Department of Labor and the Railroad Retirement Board.

4) RETALIATION. According to this bill's sponsor, the California Medical Association (CMA), the issue of retaliation appears in several ways. One way is a direct retaliation for a statement made by a physician regarding concerns of quality of care. According to CMA, the most recent example occurred at Western Medical Center Santa Ana, when the new owners Integrated Healthcare Holdings Inc. (IHHI) sued Michael Fitzgibbons, M.D. a past chief of staff when Dr. Fitzgibbons expressed concerns about the financial viability of the hospital. Dr. Fitzgibbons expressed his concern that a hospital's survival (it was a trauma center) has direct implications on the ability of physicians to provide quality of care for their patients. IHHI sued Fitzgibbons, who ultimately won this SLAPP suit at the appellate level with the help of CMA and the American Medical Association. According to CMA, while this suit was going on, physicians on the medical staff at Western Medical Center Santa Ana, and the other three hospitals owned by IHHI were silenced for the fear of the hospital suing them.

CMA provided the committee with a list of methods hospitals can use to suppress whistleblowers. Some of the examples include:

1. Underwriting the salary and/or practice expense of a competing physician;
2. Recruiting competing physicians to the community in the absence of a community deficit for that specialty;
3. Establishing a medical care foundation and supporting its physicians with hospital funds;
4. Establishing a medical practice administrative service company for selected physicians and charging below market rates so that the doctor keeps a higher percentage of collections and gains a competitive advantage;
5. Buying the medical building with a physician's office and refusing to renew the physician's lease;
6. Inducing primary care physicians to refer patients to the hospital outpatient facility for tests bypassing specialists' office based testing (e.g. imaging and cardiac tests);
7. Providing special scheduling priorities for hospital facilities;
8. Underwriting certain physicians and empowering them with control or influence over the peer review process;
9. Developing investment partnerships with selected physicians (surgery center, MRI) that provide lucrative annual returns on investment (e.g. 50% return of investment or ROI annually); and,
10. Providing special equipment leasing arrangements for selected physicians with above market ROI.

3) SUPPORT. According to CMA, this bill clarifies existing law by extending hospital whistleblower protections to physicians and surgeons. Currently the law provides protections to employees and patients and "any other person" who makes complaints about a health facility. CMA states that some attorneys have used this same section to deny protections to a physician who raised concerns by claiming that the physician was not an employee or patient. CMA believes this bill will prevent the argument from happening again, since most physicians are not employees of a hospital. In addition, the California Alliance for Retired Americans believes it is important that physicians in hospital settings feel free to report conditions which may be unsafe for patient care. One physician who wrote in support of this bill, indicates that the Redding Medical Center (Tenet) disaster is a good example of what intimidation can do to patients because hundreds of patients were damaged or killed by doctors at the financial benefit of Tenet.

4) SUGGESTED AMENDMENTS.
   a) The definition of and reference to "affiliate" is vague and may not be necessary. The author may wish to consider deleting it.
   b) On page 3, line 11, before the comma add "to the health facility."

REGISTERED SUPPORT / OPPOSITION:

Support

California Medical Association (sponsor)
American Federation of State, County and Municipal Employees, AFL-CIO
California Academy of Ophthalmology
California Alliance for Retired Americans

California Society of Anesthesiologists
Citizens Commission on Human Rights
San Bernardino Public Employees Association
One physician

Opposition

None on file.

Analysis Prepared by: Teri Boughton / HEALTH / (916) 319-2097

HS

SENATE JUDICIARY COMMITTEE
Senator Ellen M. Corbett, Chair
2007-2008 Regular Session

AB 632	A
Assemblymember Salas	B
As Amended June 6, 2007	
Hearing Date: July 10, 2007	6
Health and Safety Code	3
GMO:jd	2

SUBJECT

Health Care Facilities: Whistleblower Protection
for Doctors and Other Health Care Workers

DESCRIPTION

The bill would revise and recast portions of the whistleblower statute that protects patients and employees of a health facility from discrimination or retaliation for complaining about the health facility or cooperating in the investigation of the health facility by a government entity. These revisions would:

(1) expand coverage of the whistleblower protections to members of the medical staff (physicians) and other health care workers who are not employees of the health facility;
(2) extend the whistleblower protections to complaints or grievances made to an entity or agency responsible for accrediting or evaluating the health facility (in addition to those made to a government entity under existing law) or its medical staff;
(3) extend the whistleblower protections to participation or cooperation in an investigation or administrative proceeding carried out by an entity or agency responsible for accrediting or evaluating the health facility (in addition to those carried out by a governmental entity under existing law) or its medical staff; and
(4) extend the prohibition against discrimination or retaliation to any entity that owns or operates a health facility.

The bill would make conforming changes to provide appropriate whistleblower protections and remedies to physicians similar to those provided to employees of the health facility.

(more)

BACKGROUND

Physicians and surgeons are provided protection against retaliation when they advocate for medically appropriate health care for their patients. (Business & Professions Code § 2056.) The statute defines "to advocate for medically appropriate health care" as appealing a payor's decision to deny payment for a service pursuant to established rules, or protesting a decision, policy, or practice that the physician reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

To preserve the highest standards of medical practice in the state, the Legislature enacted the peer review process by which a committee comprised of licensed medical personnel at a hospital evaluates physicians applying for privileges, establishes standards and procedures for patient care, assesses the performance of physicians currently on staff, and reviews other matters critical to the hospital's functioning and duty to ensure quality care. (Business & Professions Code §§ 809, 809.5.)

Additionally, to protect patients and in order to assist those government entities charged with ensuring that health care is safe, patients and employees of a health facility are protected from discrimination or retaliation when they notify governmental entities of suspected unsafe patient care and conditions at the facility and when they cooperate in the investigation of the care, services, and conditions of the health facility by a governmental entity. (Health & Safety Code § 1278.5.) The legislative findings and declarations contained in the statute specify that these whistleblower protections are not intended to conflict with existing provisions in state and federal law relating to employer-employee relations.

According to the California Medical Association (CMA), sponsor of AB 632, because physicians are generally not "employees" of a health facility, they do not benefit from the whistleblower protections afforded by Health & Safety Code § 1278.5. Thus, when they see problems with patient care beyond their own patients they may actually do nothing about it, for fear of retaliation or discrimination.

AB 632 is intended to cure this gap in coverage for whistleblowing in the health care context, and would extend the whistleblower protection further by making an entity that owns or operates a health facility liable for the unlawful acts of the health facility.

CHANGES TO EXISTING LAW

Existing law prohibits an employer from preventing an employee from disclosing information to a government or law enforcement agency when that

employee has reasonable cause to believe that the information discloses employer's violation of or noncompliance with state or federal law. It also prohibits an employer from retaliating against an employee for that disclosure, or for refusing to participate in an activity that will result in a violation of or noncompliance with state or federal law. A violation subjects an employer to civil penalties of up to $10,000 in addition to actual damages. (Labor Code § 1102.5.)

Existing law, the federal Sarbanes-Oxley Act, protects whistleblowers from retaliatory action by employers and provides for both injunctive relief and damages for violations.

Existing law prohibits a health facility from discriminating or retaliating against a patient, employee, or any other person who presents a grievance or complaint, or who has initiated or cooperated with a government agency in an investigation or proceeding about the care, services, or conditions of the facility. (Health & Safety Code § 1278.5(b).) (All references are to the Health and Safety Code unless otherwise indicated.)

Existing law establishes a rebuttable presumption that the discriminatory action was taken in retaliation against an employee if the discriminatory action was taken within 120 days of the presentation of a complaint or grievance or cooperation with an investigation, if the health facility had knowledge of the employee's action. (§ 1278.5(d).)

This bill would extend the prohibition against discrimination or retaliation under § 1278.5(b) to an entity that owns or operates a health facility.

This bill would additionally protect members of the medical staff or any other health care worker of the health facility from discrimination or retaliation. This bill would also extend to the facility's medical staff and other health care workers the rebuttable presumption that a discriminatory act was in retaliation for an employee's whistleblowing action, when the discriminatory act occurs within 120 days of the employee's action.

This bill would expand the scope of activities for which the whistleblower protections would apply, to include (1) presentation of a complaint or grievance or report to an entity or agency responsible for accrediting or evaluating the facility or its medical staff, and (2) initiation, participation, or cooperation in an investigation or administrative proceeding related to the quality of care, services, or conditions that is carried out by an entity or agency accrediting or evaluating the facility or its medical staff.

This bill would define a "health facility" subject to the whistleblower prohibitions against discrimination or retaliation to include the facility's

administrative personnel, employees, boards and committees of the board, and medical staff.

COMMENT

1. Stated need for the bill

According to the CMA, sponsor of AB 632, "[Health & Safety Code § 1278.5] provides protections to employees and patients and the nebulous term 'or any other person.' Unfortunately, enterprising attorneys have used this section to deny protections for a physician who raised concerns of poor patient care by correctly stating that the physician was not an employee or patient. This bill will prevent that argument from happening again. ...Health and Safety Code § 1278.5 is the only section of law that grants protection to members of the medical staff when they see problems with patient care beyond their own patients. As such this section must be clarified and strengthened. ...Often physicians are faced with having to decide if they should report allegations of poor patient care or conditions knowing their practice and livelihood may be harmed. Unfortunately, too often the physician decides not to report sub-standard or questionable care. When a physician observes retaliation or discrimination against another physician who speaks out, it is less likely that any more will come forward."

The CMA claims that in the case of Integrated Health Care Holdings, Inc. v. Fitzgibbons (2006) 140 Cal.App.4th 515, the health facility owner (IHHI) of Western Medical Center in Santa Ana sued Dr. Fitzgibbons after he expressed concerns that the hospital's financial troubles threatened the ability of physicians to provide quality care for their patients. Dr. Fitzgibbons invoked and received the protection of the anti-SLAPP statute in that case. However, according to CMA, during the lawsuit, IHHI threatened to retaliate against the medical staff at Western Medical Center and the staff at three other IHHI-owned hospitals if they participated in the investigation. CMA also cites a similar case that occurred when Tenet, one of the largest for-profit hospital chains, silenced physicians at a Redding, California hospital who knew about unnecessary open-heart surgeries and Medicare billing fraud occurring at the hospital.

In response to CMA's arguments, however, the California Hospital Association (CHA) proposes to amend Business and Professions Code § 2056 instead, to clarify that among the activities of a physician that are protected against retaliation (outside of the peer review process) are the filing of a complaint or the initiation or participation in an investigation or proceeding. (See Comment 3.)

2. Extending whistleblower protection to medical staff and to other health care workers

The goal of Health & Safety Code § 1278.5 is to protect patients from unsafe care and conditions at a health facility. Thus, reports or grievances about the care, services, and conditions of the facility that are made by either patients or employees are protected. A rebuttable presumption arises if a retaliatory action occurs against a patient within 180 days of making a complaint or if a retaliatory action occurs against an employee within 120 days of making a complaint. The protection extends to initiation of or participation in an investigation or proceeding by a government entity.

A violation of this prohibition subjects a health facility to a civil penalty of not more than $25,000. A willful violation by a person is a misdemeanor punishable by a fine of $20,000. An employee who has been discriminated against is entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and legal costs associated with pursuing the case.

a. Physicians are not employees; who are "other health workers" covered by the bill?

SB 97 (Burton), Chapter 155, Statutes of 1999, extended the whistleblower protections then available to patients and employees of a long-term health care facility to patients and employees of health facilities (hospitals) for filing a grievance or providing information to a governmental entity regarding care, services, or conditions at the facility. That bill was introduced at the behest of nurses who complained that various forms of discrimination or retaliation were the normal response they received when they reported problems regarding quality of care at their places of employment.

The legislative findings and declarations contained in SB 97 referred to the state's policy of encouraging "patients, nurses, and other health care workers" to notify government entities of suspected unsafe patient care and conditions. However, the operative part of the statute that was enacted referred only to whistleblower protections for "any patient or employee of the health facility" when "the patient, employee, or any other person has presented a grievance" or complaint about the facility.

This bill would insert "members of the medical staff" into the legislative findings and declarations relating to state policy. It would then prohibit a health facility from discriminating or retaliating against "any patient, employee, member of the medical staff, or any other health care worker of the health facility," thus expanding the whistleblower protections of

§ 1278.5 to all health care workers at the facility, including physicians.

"Medical staff" as used in Business & Professions Code § 2282 refers to a group of five or more physicians permitted to practice in the hospital. Both CMA and the CHA agree that physicians are generally not employees of a hospital. Instead, they enjoy privileges at the hospital and have a relationship with the hospital that is governed by Medical Staff By-Laws, a peer review process, the protections of Business and Professions Code § 809, and other protective measures. (See Comment 3.)

According to the CMA, even though there is no definition of "other health care workers" used in the legislative findings, it could be interpreted to include persons such as blood, organ, and tissue transporters, emergency medical technicians or paramedics, and physical therapists. By adding the phrase "other health care workers" in the protected class, therefore, these persons would enjoy the whistleblower protections now enjoyed only by patients and employees of the health facility.

b. Retaliation: what conduct is prohibited vis a vis doctor whistleblowers? What remedies do they have?

All of the state's whistleblower statutes apply to employees who disclose information about their employer's activities or proposed activities that violate or will violate the law in some manner. Thus, these statutes provide for various remedies that only employees could be entitled to, that are ascertainable and easily enforced.

Current § 1278.5 in fact enumerates various remedies for an employee who has been discriminated or retaliated against: reinstatement, reimbursement for lost wages and work benefits caused by the employer's actions, and legal costs associated with pursuing the whistleblower's case under the statute. Because the physician and medical staff are most likely not employees of a hospital, the remedies available to them could be entirely different, depending on the retaliatory action that was taken.

According to the CMA, examples of actions a hospital can take to suppress physician-whistleblowers or to retaliate against them are: (1) underwriting the salary and/or practice expenses of a competing physician; (2) establishing a medical care foundation and supporting its physicians with hospital funds; (3) recruiting competing physicians to the community in the absence of a community deficit for that specialty; (4) establishing a medical practice administrative service company for selected physicians and charging below market rates so that the doctor keeps a higher percentage of the collections and gains a competitive advantage; (5) buying the medical building with the physician's office and

refusing to renew the physician's lease; (6) inducing primary care physicians to refer patients to the hospital outpatient facility for tests, bypassing the specialist's office-based testing (e.g., imaging and cardiac tests); (7) providing special scheduling priorities for hospital facilities; (8) underwriting certain physicians and empowering them with control or influence over the peer review process; (9) developing investment partnerships with selected physicians (surgery center, MRI center) that provide lucrative annual returns on investment (e.g., 50% return on investment (ROI) annually); and (10) providing special equipment leasing arrangements for selected physicians with above market ROI.

AB 632 however would provide only the following remedies to a physician who was discriminated or retaliated against: reinstatement (of privileges?), reimbursement for lost income resulting from any change in the terms of conditions of his or her privileges caused by the health facility's acts or acts of any other facility owned or operated by the entity, and the legal costs of pursuing the case.

It would seem that none of these remedies would give adequate redress to a physician who suffered any of the retaliatory acts named above.

SHOULD THERE BE A CATCH-ALL PROVISION FOR A COURT TO FASHION WHATEVER REMEDY WOULD FIT THE RETALIATORY ACT?

As to the "other health care workers" – the bill does not provide for any remedy that would be available to these workers, should they be the victims of the employer's discrimination or retaliation.

SHOULD THERE BE A LIST OF REMEDIES FOR THESE OTHER HEALTH CARE WORKERS TOO?

3. Whistleblower protection and the peer review process

Peer review is the process by which the medical staff evaluates physicians with respect to the patient care they provide in a hospital. (Bus. & Prof. C. §§ 809, 809.5.) The peer review process is given great deference as a means of ensuring safe health care in the state. Thus, various provisions, such as immunity from monetary liability and protection from discovery under Evidence Code §§ 1156 and 1157, were enacted to encourage participation by physicians in the peer review process and to ensure their freedom from fear of retribution for participating.

Opponent California Hospital Association (CHA) contends that one of the "unintended consequences" of extending Health & Safety Code § 1278.5 to

members of the medical staff is the "chilling effect it would have on peer review." The CHA claims that the bill could stop a peer review process in its tracks by the simple filing of a § 1278.5 action, or it could compel a peer review committee to not initiate a peer review process for fear that it could be considered a retaliatory action and subject the committee to the misdemeanor penalties of § 1278.5. The CHA also points out the lack of clarity as to when a § 1278.5 action would have to be filed. [Where there is no statute of limitations specified, an action upon a statute for a penalty or forfeiture must be commenced within one year of the date the event or the action that gave rise to the cause of action occurred. (C.C.P. § 340.)]

The critical question, according to the principal opponents of AB 632, is what would happen to a pending peer review action, or to the evidentiary protections and immunity from liability that attend peer review actions, once the member of the medical staff files a § 1278.5 action? The hospital, CHA states, could very well be required to produce evidence in the § 1278.5 action even before that evidence has been fully developed and presented in a Medical Staff fair hearing under Bus. & Prof. C. § 809 et seq.

The interplay between the whistleblower protection offered to physicians by this bill and the peer review process is summarized thus by opponent United Hospital Association:

> ...AB 632 would also add burdens to, and perhaps have a chilling effect on, the critically important medical staff peer review function within hospitals. This process is an especially important and crucial element of a hospital's responsibility. Under existing California and federal law, hospital governing boards must work closely with their medical staff's elected leaders to review the quality of care provided by physicians who hold medical staff membership and privileges at the hospital. That process is already governed by a complex and well-developed body of law, including multiple substantial protections for the physicians who are subjected to discipline by their peers. The volunteer physicians who participate in peer review are already concerned about their potential liability and the other burdens associated with their involvement in that process. Adding whistleblower protections and penalties will further complicate the process and may tend to chill the frankness and candor necessary to allow the peer review process to function effectively.

SHOULD A § 1278.5 ACTION BE HELD IN ABEYANCE UNTIL A PEER REVIEW PROCESS, IF INITIATED, HAS BEEN COMPLETED?

4. Expansion of whistleblower statute in other ways

In addition to expanding the coverage of whistleblower protections to medical staff and other health care workers, this bill would extend liability for a violation to the owner or operator of a health facility. Further, the bill would define "health facility" to include the "medical staff" as well as administrative personnel. According to the opponents, under existing law a hospital medical staff is required to be a self-governing body and therefore its actions cannot and should not be imputed to the hospital.

To the proponents, however, these are simply clarifying amendments to existing law, and do not in any way increase the liability of a health facility for its discriminatory or retaliatory acts against a whistleblower.

5. Other opponents' concerns; supporters' contentions

To be sure, CHA is not the only hospital group opposing AB 632. The United Hospital Association, representing 114 investor-owned California hospitals, states that while its members support the ability of their employees to raise concerns regarding patient health and safety free of retaliation, the extension of these protections to non-employee medical staff ignores the existing relationship between the hospital on the one hand and the physicians and other health care practitioners who have privileges on the hospital's medical staff, on the other. They point to current state and federal laws that already provide protections for individuals, including physicians, who voice their concerns, and are free from retaliation by the hospital. They note Bus. & Prof. C. § 2056 (protecting physicians from retaliation for advocating for medically appropriate health care for their patients) and prohibitions against retaliation under the Stark and anti-kickback statutes (31 U.S.C. § 3730(h); Gov. C. § 12653(a)(b).)

Another opponent points to the intent behind passage of § 1278.5: "When this [statute] was added, it was not intended nor should it apply to physicians as there is no evidence that they have been subject to retaliation. ...The current statutory protections are clearly not inadequate nor is it necessary to extend them at this time."

Some supporters simply state that "[i]ndividuals should not be threatened into silence when they observe abusive practices. Failing to protect whistleblowers can result in costly lawsuits from the victims, as abusive practices are allowed to continue while those supposed to be responsible knowingly permit them." (Citizens Commission on Human Rights, Los Angeles/Hollywood Chapter letter dated 6/18/07.) Others state that if the opponents (hospital trade associations) really believe that existing law already covers physician members of a hospital medical staff, then AB 632

merely reiterates and clarifies the law so that no new burden is imposed by the bill. (California Society of Anesthesiologists, letter date 6/20/07.)

Finally, a supporter states that "[e]nactment of AB 632 would help provide job security and create a climate in which health care workers feel encouraged to report problems in the workplace, instead of feeling that raising concerns will result in a backlash." (San Bernardino Public Employees Association letter dated April 4, 2007.)

Support: California Society of Anesthesiologists (CSA); Citizens Commission on Human Rights Los Angeles/Hollywood; American Academy of Pediatrics - California; California Chapter of the American College of Emergency Physicians (CAL/ACEP); American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO; California Academy of Opthalmology; California Alliance for Retired Americans; San Bernardino Public Employees Association; California Teamsters Public Affairs Council; California Podiatric Medical Association; United Food and Commercial Workers Union, Western States Council; Engineers and Scientists of California, IFPTE Local 20

Opposition: United Hospital Association; Adventist Health; Loma Linda University Medical Center; Hospital Corporation of America; California Hospital Association

HISTORY

Source: California Medical Association (CMA)

Related Pending Legislation: None Known

Prior Legislation: SB 97 (Burton), Chapter 155, Statutes of 1999, established whistleblower protections for patients and employees of a health facility.

Prior Vote: Assembly Health Committee (Ayes 16, Noes 0)
Assembly Appropriations Committee (Ayes 15, Noes 0)
Assembly Floor (Ayes 70, Noes 0)
Senate Health Committee (Ayes 11, Noes 0)

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SENATE HEALTH
COMMITTEE ANALYSIS
Senator Sheila J. Kuehl, Chair

BILL NO:	**AB 632**	**A**
AUTHOR:	**Salas**	**B**
AMENDED:	**June 6, 2007**	
HEARING DATE:	**June 13, 2007**	**6**
REFERRAL:	**Health and Judiciary**	**3**
FISCAL:	**Appropriations**	**2**

CONSULTANT:
Diaz/Hansel/cjt

SUBJECT

Health care facilities: whistleblower protections.

SUMMARY

Establishes protections, similar to those in existing law for employees and patients, for medical staff and other health care workers who file complaints or grievances concerning a licensed health care facility, or who initiate or participate in an investigation or proceeding related to the quality of care, services, or conditions at the facility.

CHANGES TO EXISTING LAW

Existing state law
Existing law prohibits a health care facility from discriminating or retaliating against a patient, employee, or any other person who presents a grievance or complaint, or has initiated or cooperated with a government agency in the investigation about the care, services, or conditions of the facility. Existing law subjects a health care facility to a civil penalty of no more than $25,000 for violations of these provisions, and provides that any person who willfully violates them is guilty of a misdemeanor punishable by a fine of no more than $20,000.

Existing law provides that any type of discriminatory treatment of a patient by whom, or on whose behalf, a grievance or complaint has been submitted, within 180 days of the filing of the grievance or complaint, raises a rebuttable presumption that a retaliatory action was taken. Existing law also provides that any discriminatory treatment of an employee who has presented a grievance or complaint, or has initiated, participated, or cooperated in an investigation or proceeding, within 120 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that a retaliatory action was taken. Existing law defines discriminatory treatment of an employee to include the discharge, demotion, suspension, any unfavorable changes in the terms or conditions of employment, or the threat of these actions.

Continued---

Existing law requires that employees who have been discriminated against by their employers be reinstated and reimbursed for lost wages and benefits and for the legal costs associated with pursuing their case.

Existing law provides similar whistleblower protections for patients and employees of long-term care facilities and extends those protections additionally to complainants generally. Existing law also provides that the protections do not apply to an inmate of a correctional facility, juvenile detention facility, or local detention facility.

Existing law also provides that it is the public policy of the state to encourage physicians and surgeons to advocate for medically appropriate health for their patients and provides that no person shall terminate, retaliate against, or otherwise penalize a physician and surgeon for that advocacy, nor shall any person prohibit, restrict, or in any way discourage a physician and surgeon from communicating to a patient information in furtherance of medically appropriate health care. For purposes of existing law, advocating for medically appropriate care is defined as the appeal of a payer's decision to deny payment for a service pursuant to the grievance or appeal procedure established by a medical group, independent practice association, preferred provider organization, foundation, hospital medical staff and governing body, or payer, or to protest a decision, policy, or practice that a physician believes impairs his or her ability to provide medically appropriate health care to his or her patients.

Existing federal law

Existing federal law, the Sarbanes-Oxley Act of 2002, prohibits a publicly traded company or any officer, employee, contractor, subcontractor, or agent of such company, from discriminating against or retaliating against an employee who has provided information or assisted in an investigation relating to mail, telecommunications, or shareholder fraud involving the company. Additionally, the federal Civil False Claims Act provides protections for persons who are demoted, suspended, threatened, harassed, or in any manner discriminated against for filing a complaint or providing information that a person or company has knowingly submitted false claims for reimbursement to the federal government.

This bill:

This bill extends the protection from discrimination or retaliation by a health care facility against persons who present grievances or complaints, or who initiate an investigation regarding the facility's quality of care, services, or conditions, to members of the medical staff and other health care workers of the facility. This bill also extends the rebuttable presumption that a retaliatory action has occurred, if discriminatory treatment occurs within 120 days of the filing of the grievance or complaint, to members of the medical staff and other health care workers.

This bill provides that members of the medical staff who have suffered from such retaliation or discrimination shall be reinstated and reimbursed for lost income resulting from any change in the terms or conditions of their privileges caused by the acts of the facility or entity that owns the facility.

The bill additionally clarifies that the prohibition on discriminatory or retaliatory action by a health facility extends to the facility's administrative personnel, employees, boards,

and committees of the board, and medical staff, as well as an entity that owns or operates a health care facility.

This bill also clarifies that complaints to and investigations carried out by entities or agencies responsible for accrediting or evaluating the facility are subject to health facility whistleblower protections.

FISCAL IMPACT

The Assembly Appropriations Committee analysis states that there will be negligible costs for hospitals to comply with the provisions of this bill.

BACKGROUND AND DISCUSSION

According to the author, existing law does not fully protect physicians and other health professionals from retaliation if they make a complaint or grievance about a health facility. The author states that currently, this protection only applies to patients, employees, and the nebulous term, "any other person." The author states that some attorneys have interpreted this to deny protections to physicians and other members of the medical staff because they are not employees or patients of the health facility. Members of the medical staff, which can include physicians and surgeons, podiatrists, opthamologists, pathologists, and radiologists, interact with peer review bodies that establish by-laws and regulations pertaining to professional conduct. Complaints about quality of care issues pertaining to health facilities can be raised with a peer review body, hospital governing board, or accrediting agency. However, the author and sponsor state that, in some cases, physicians who raise a complaint to any of these bodies are not protected under current law against retaliation and that AB 632 will clarify existing law to prevent abuses against physicians and other health professionals

Process to file complaints and grievances

Complaints about the quality of care, services, or conditions of health care facilities can be submitted in a number of ways. Any person can present a complaint to the chief administrative officer of the health facility or file a complaint with Department of Health Services' (DHS) licensing and certification unit by contacting the district office where that health facility is located. A complaint may also be filed with the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which may conduct an onsite evaluation if the complaint made about an accredited health facility raises serious concerns about patient safety or failure to comply with quality standards of care. The Joint Commission states on its website that it forbids accredited or certified health care organizations from taking retaliatory actions against employees for reporting quality of care concerns.

Employment status of medical staff

Current state law prohibits the employment of physicians by corporations or other entities that are not controlled by physicians. For that reason, most members of the medical staff are not considered employees of a hospital and must establish contractual relationships with the hospital, either individually or through medical groups. Some exceptions are

teaching hospitals, certain clinics, and hospitals owned and operated by a health care district.

Number of complaints regarding health facilities
DHS reports that in 2006 there were a total of 30,287 complaints made about the quality of care, services, or conditions of health facilities in California. A majority of these complaints (70.25 percent) were reported by a health facility official or employee, while 29.25 percent were reported by patients and other persons. At this time, however, DHS cannot provide data distinguishing whether the health facility official who made the complaint was a physician, nurse, or other health care staff member who is not an employee.

Arguments in support
CMA, the sponsor of this bill, states that AB 632 is necessary to clarify existing law to protect physicians from retaliation or discrimination related to raising concerns about patient care. According to CMA, hospitals may use a variety of methods to suppress physician whistleblowers, including removing a physician from a referral list, forcing a doctor out of a hospital-owned complex, or underwriting the salary or practice expense of a competing physician. As a result, physicians must decide between reporting allegations of poor patient care and protecting their practice and livelihood from harm.

CMA cites the case of Integrated Healthcare Holdings, Inc. (IHHI), the owner of Western Medical Center in Santa Ana, CA, which sued Dr. Michael Fitzgibbons after he expressed concerns that the hospital's financial troubles threatened the ability of physicians to provide quality care for their patients. According to CMA, during the lawsuit, IHHI threatened to retaliate against the medical staff at Western Medical Center and the staff at three other IHHI-owned hospitals if they participated in the investigation. CMA also cites a similar case that occurred when Tenet, one of the largest for-profit hospital chains, silenced physicians at a Redding, CA hospital who knew about unnecessary open-heart surgeries and Medicare billing fraud occurring at the hospital.

The California chapter of the American College of Emergency Physicians and the California Academy of Ophthamology state that AB 632 would go a long way to help to improve the quality of care for patients by eliminating the fear of retribution or retaliation physicians face when reporting sub-standard patient care, services or facilities. The American Federation of State, County, and Municipal Employees (AFSCME) and the San Bernardino Public Employees Association believe that AB 632 strengthens job security for health care workers so that they feel encouraged to report problems in the workplace instead of facing backlash.

Arguments in opposition
The California Hospital Association (CHA) believes there are already sufficient whistleblower protections in existing state and federal law for physicians and surgeons. In addition, CHA states that there is no evidence that physicians have been subject to retaliation or that current statutory protections are inadequate. CHA further argues that the statute that this bill seeks to amend was designed to protect patients and employees from retaliation for raising quality of care concerns, and was not designed to protect physicians and surgeons. CHA argues that the relationship between a hospital and physicians and surgeons who have staff privileges at the hospital differs significantly

from the hospital's relationship with its employees. Among other things, the relationship between hospitals and physicians is governed by medical staff by-laws and hospital peer review processes. In addition, physicians and surgeons already have protections under state law for instances in which they advocate for medically appropriate care, and are also protected under federal statutes for reporting instances of fraud, overbilling, and violations of Stark and anti-kickback statutes. Finally, CHA believes that this bill needs further clarification to ensure that hospitals retain the right to take disciplinary action with regard to disruptive behavior by employees, patients and physicians, regardless of their protected activity.

PRIOR ACTIONS

Assembly Health Committee:	16-0
Assembly Appropriations:	15-0
Assembly Floor:	70-0

POSITIONS

Support: California Medical Association (sponsor)
American College of Emergency Physicians, California Chapter
American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME)
California Academy of Ophthalmology
California Alliance for Retired Americans
California Society of Anesthesiologists
Citizens' Commission on Human Rights
San Bernardino Public Employees Association
One radiologist

Oppose: California Hospital Association

-- END --

AMENDED IN SENATE JULY 17, 2007

AMENDED IN SENATE JUNE 6, 2007

AMENDED IN ASSEMBLY APRIL 17, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL No. 632

Introduced by Assembly Member Salas

February 21, 2007

An act to amend Section 1278.5 of the Health and Safety Code, relating to health care facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 632, as amended, Salas. Health care facilities: whistleblower protections.

Existing law provides for the licensure and regulation of health care facilities, as defined, by the State Department of Public Health. Under existing law, a health facility is prohibited from retaliating or discriminating against an employee of a health facility that has presented or initiated a complaint or initiated, participated, or cooperated in an investigation or proceeding of a government entity relating to the care, services, or conditions of the facility. Existing law makes the violation of these provisions a crime and subject to the assessment of a civil penalty.

This bill would prohibit a health facility, from discriminating or retaliating against any patient, employee, a member of the facility's medical staff, or any other health care worker of the facility ~~who~~ *because that person* (1) has presented a grievance, complaint, or report to an entity or agency responsible for accrediting or evaluating the facility or to any other governmental entity; or (2) has initiated, participated,

or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility, as provided.

This bill would provide that an employee who has been discriminated against in employment in violation of those provisions shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, or to any remedy deemed warranted by the court pursuant to those provisions, or to any applicable provisions of statutory or common law, as specified. The bill would also entitle a health care worker who has been discriminated against, in violation of those provisions, and who prevails in court, to restitution and any legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to those provisions, or any other applicable statutory or common law.

Because the bill would expand the definition of a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1278.5 of the Health and Safety Code is amended to read:

1278.5. (a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

(b) (1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical

staff, or any other health care worker of the health facility ~~who~~ *because that person* has done either of the following:

(A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.

(B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

(2) No entity that owns or operates a health facility, or which owns or operates any other health facility, shall discriminate or retaliate against any person who has taken any actions pursuant to this subdivision.

(3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to a governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

(d) (1) There shall be a rebuttable presumption that discriminatory action was taken by the health facility, or by the entity that owns or operates that health facility, or that owns or operates any other health facility, in retaliation against an employee, member of the medical staff, or any other health care worker of the facility, if responsible staff at the facility or the entity that owns or operates the facility had knowledge of the actions, participation, or cooperation of the person responsible for any acts described in paragraph (1) of subdivision (b), and the discriminatory action occurs within 120 days of the filing of the grievance or complaint by the employee, member of the medical staff or any other health care worker of the facility.

(2) For purposes of this section, discriminatory treatment of an employee, member of the medical staff, or any other health care worker includes, but is not limited to, discharge, demotion, suspension, or any other unfavorable changes in the terms or conditions of employment or of the privileges of the employee, member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions.

(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in Section 603 of the Evidence Code.

(f) Any person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars ($20,000).

(g) An employee who has been discriminated against in employment pursuant to this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case, *or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to restitution and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law.* A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case, *or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.*

(h) The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process.

~~(h)~~

(i) For purposes of this section, "health facility" means any facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff.

~~(i)~~

(j) This section shall not apply to an inmate of a correctional facility or juvenile facility of the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

~~(j)~~

(k) This section shall not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

~~(k)~~

(l) Nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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CALIFORNIA HOSPITAL ASSOCIATION

Providing Leadership in Health Policy and Advocacy

SENATE FLOOR ALERT

August 21, 2007

TO: The Honorable Members of the State Senate

FROM: David van der Griff, Legislative Advocate

SUBJECT: AB 632 (Salas) – OPPOSE, Unless Amended

The California Hospital Association (CHA), representing nearly 400 hospitals and health systems in California, opposes AB 632 (Salas) unless it is amended. Hospitals have every interest in ensuring that employees, patients, and members of the medical staff have appropriate avenues to raise quality of care issues. We think that this bill will have many unintended consequences.

CHILLING EFFECT ON PEER REVIEW

One of the unintended consequences of extending Health and Safety Code section 1278.5 to members of the medical staff is the chilling effect it could have on peer review. Peer review is the process by which the self-governing medical staff, not hospital administrators, evaluates physicians and surgeons with respect to patient care they provide in a hospital. This approach to peer review reflects the long-standing public acknowledgement and preference that physician peers are in the best position to evaluate each others' delivery of patient care. Thus they – not the hospital administration and not the government – represent the first line of protection of the public interest in assuring quality patient care in the hospital. In this respect, the members of the medical staff are in a decidedly different position than are hospital employees, who, unlike physicians, are not entrusted with the responsibility to conduct peer review on each other and, in essence, discipline themselves.

Because there is no limitation on when a Health and Safety Code section 1278.5 lawsuit might be filed, it is highly likely that a disgruntled member of the medical staff would be able to stop a peer review action in its tracks by citing a previously expressed complaint or by filing a complaint as soon as he/she learns that a peer review action may be contemplated. It is not at all clear what happens to the pending peer review action, or to the evidentiary protections and liability immunities that attend peer review actions, once the member of the medical staff files a section 1278.5 action. Given the presumption set forth in Health and Safety Code section 1278.5, a hospital might be required to produce evidence of why the peer review action is being contemplated or conducted even before that evidence has been fully developed and presented in a medical staff fair hearing.

This impact undermines the public policy importance of effective peer review. The California Legislature has recognized this public policy by creating not only extensive liability protections for the process [see, e.g., Civil Code sections 43.7, 43.8 43.97], but also comprehensive evidentiary protections [Evidence

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Code sections 1156 and 1157]. These latter protections, especially, reflect legislative acknowledgement that, even when granted liability immunities, professional peers are unlikely to voluntarily criticize each other unless those criticisms are shielded from discovery. Extending Health and Safety Code section 1278.5 to members of a medical staff could well have a chilling effect on peer review because this bill creates a presumption that any peer review action taken after a member of a medical staff has raised an ill-defined "complaint" is retaliatory and that the participants in the peer review process are engaging in criminal behavior. While we would expect that a hospital or medical staff engaged in bona fide peer review would ultimately prevail in the face of a section 1278.5 complaint, the participants in the peer review may be subject to the inconvenience and expense of litigation – all without recourse when they *do* prevail. (Of particular note in this regard, there is provision in the proposed legislation for attorney's fees to benefit a prevailing physician who has been wrongfully discriminated against; but there is no corollary provision when the hospital and/or medical staff representatives prevail in defending the action.)

Under California law, the medical staff fair hearing provides the affected physician extensive rights to challenge a peer review action [Business & Professions Code section 809 et seq], and the law provides a cause of action in damages in the event the physician prevails either in the peer review hearing or if the ultimate decision is later set aside by a reviewing court. [Business & Professions Code section 809.9]. These appropriate avenues of redress are significantly obfuscated by the proposed Health and Safety Code section 1278.5. The deference afforded medical staff and hospital responsibility and decision-making, as reflected in the judicial requirements to exhaust administrative remedies and the mandamus standard of review that now applies to peer review actions [Code of Civil Procedure section 1094.5], will be significantly undermined if a member of the medical staff is able to move directly into court without completing the fair hearing process.

Our proposed amendments address these concerns by including a statement in subdivision (a) that this section does not conflict with medical staff peer review actions or proceedings conducted pursuant to current law. The bill further replaces the language in subdivision (h) to specify that section 1278.5 does not apply to a proposed or taken investigation, corrective or disciplinary action by a medical staff or a hospital governing board against a member of a medical staff or an applicant unless and until there has been a determination that the member or applicant has been determined to have substantially prevailed in such action as specified in current law.

NEW CLASS OF LITIGANTS AND NEW CAUSES OF ACTIONS

While the negative impact on peer review is our major concern with this bill, there are others. For example, "any other health care worker" is included in the list of protected parties in the bill. Since this term is not defined, it is not clear who would qualify under this designation. In subdivision (d) "discriminatory treatment" for members of a medical staff is not qualified to take into account that a privilege may be revoked, suspended or limited because of patient care, general health and safety or a deviation from lawful standards adopted by the medical staff or health facility. We think this is necessary because other provisions of law *require* the hospital and its medical staff to undertake such remedial measures whenever a medical staff member's performance or conduct warrant. Our proposed amendments clarify this point by creating a new paragraph (3) within this subdivision, which, in essence, exempts appropriate remedial action from the definition of a discriminatory act.

TOO MUCH JUDICIAL DISCRETION

In Health and Safety Code section 1278.5(g), a court is granted the authority to grant any "remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law." This provision gives the court too much discretion when the damages for a retaliatory action can be accurately and thoroughly measured, and is not consistent with the principles that generally apply to legal review of medical staff peer review matters.

NEW LIABIIITIES

In Health and Safety Code section 1278.5(i), the bill defines "health facility" to include the "medical staff." As noted above, pursuant to California law, a hospital medical staff is required to be a self-governing body, with the full authority to initiate and prosecute medical staff peer review actions. While such actions are subject, ultimately, to review by the hospital governing body, there are significant statutorily-imposed constraints on the governing body's ability to initiate peer review actions in the first instance, or to overturn such actions that may be taken by the medical staff. Under these circumstances, the actions of the medical staff cannot and should not be automatically imputed to the hospital. We believe further clarity is needed on the specific methods of complaint that are protected, e.g. filing a written complaint with the health facility in accordance with facility's complaint procedure. Accordingly, we have suggested language in subdivision (j).

For these reasons, we respectfully request that you vote "No" unless the bill is amended.

BILL NUMBER: AB 632 AMENDED
BILL TEXT

AMENDED IN SENATE JULY 17, 2007
AMENDED IN SENATE JUNE 6, 2007
AMENDED IN ASSEMBLY APRIL 17, 2007

INTRODUCED BY Assembly Member Salas

FEBRUARY 21, 2007

An act to amend Section 1278.5 of the Health and Safety Code,
relating to health care facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 632, as amended, Salas. Health care facilities: whistleblower protections.

Existing law provides for the licensure and regulation of health care facilities, as defined, by the State Department of Public Health. Under existing law, a health facility is prohibited from retaliating or discriminating against an employee of a health facility that has presented or initiated a complaint or initiated, participated, or cooperated in an investigation or proceeding of a government entity relating to the care, services, or conditions of the facility. Existing law makes the violation of these provisions a crime and subject to the assessment of a civil penalty.

This bill would prohibit a health facility ~~,~~ from discriminating or retaliating against any patient, employee, a member of the facility's medical staff, or any other health care worker of the facility ~~who~~ *because that person* (1) has presented a grievance, complaint, or report to an entity or agency responsible for accrediting or evaluating the facility or to any other governmental entity; or (2) has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility, as provided.

This bill would provide that an employee who has been discriminated against in employment in violation of those provisions shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, or to any remedy deemed warranted by the court pursuant to those provisions, or to any applicable provisions of statutory or common law, as specified. The bill would also entitle a health care worker who has been discriminated against, in violation of those provisions, and who prevails in court, to restitution and any legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to those provisions, or any other applicable statutory or common law.

Because the bill would expand the definition of a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1278.5 of the Health and Safety Code is amended to read:

1278.5. (a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, , employees and members of the medical staff, to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations or medical staff peer review actions or proceedings conducted pursuant to section 809 through 809.7 of the Business and Professions Code.

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(b) (1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, or member of the medical staff of the health facility ~~who~~ *because that person* has done either of the following:

(A) Presented a written grievance, complaint, or report related to the quality of care, services, or conditions at the facility to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.

(B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility, that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

(2) No entity that owns or operates a health facility, or which owns or operates any other health facility, shall discriminate or retaliate against any person because that person has taken any actions pursuant to this subdivision.

(3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to a governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

(d) (1) There shall be a rebuttable presumption that retaliatory action was taken by the health facility, or by the entity that owns or operates that health facility, or that owns or operates any other health facility, against an employee or member of the medical staff of the facility, if responsible staff at the facility or the entity that owns or operates the facility had knowledge of the actions, participation, or cooperation of the person responsible for any acts described in paragraph (1) of subdivision (b), and the discriminatory treatment occurs within 120 days after the act described in paragraph (1) of subdivision (b) has occurred.

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(2) For purposes of this section, discriminatory treatment of an employee includes, but is not limited to, discharge, demotion, suspension, or any other unfavorable changes in the terms or conditions of employment or the threat of any of these actions.

(3) For purposes of this section, discriminatory treatment of a member of the medical staff, includes, but is not limited to, denial, restriction or revocation of medical staff membership or clinical privileges for reasons not reasonably related to the delivery of patient care, the health and safety of any individual, or other lawful standards adopted by the medical staff or health facility or the threat of any of these actions.

(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in Section 603 of the Evidence Code.

(f) Any person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars ($20,000).

(g) An employee who has been subject to retaliation in violation of this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case. A member of the medical staff who has been subject to retaliation in violation of this section shall be entitled to reinstatement of medical staff membership or clinical privileges, reimbursement for lost income directly resulting from any change in the terms or conditions of his or her privileges caused by the unlawful acts of the facility or the entity that owns or operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case.

(h) With respect to medical staff members or applicants, this section shall not apply to any investigation or corrective or disciplinary action proposed or taken by a medical staff or its authorized members, or by a hospital governing body pursuant to section 809 et seq. of the Business and Professions Code, unless and until such action has been reversed following the exhaustion of all remedies currently available under law, and the medical staff member or applicant has been determined to have substantially prevailed as described in section 809.9 of the Business and Professions Code.

~~(h)~~

(i) For purposes of this section, "health facility"

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Deleted: discriminated against in employment pursuant to this section

Deleted: *, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to restitution and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law .*

Deleted: discriminated against pursuant to this section

Deleted: *, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.*

Deleted: *The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters from the complainant in an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process.*

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means any facility defined under this chapter.

~~(i)~~

Deleted: , including, but not limited to, the facility's administrative personnel, employees, boards, and members of the Board, and medical staff.

(j) For purposes of this section, "presented a written grievance, complaint, or report related to the quality of care, services, or conditions at the facility, to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity" means to:

(1) present a written complaint to the health facility in accordance with the health facility's complaint procedure;

(2) file a written complaint with the Department of Public and Health licensing and certification unit in the district office where the health facility is located;

(3) file a written complaint with a federal governmental agency; or

(4) file a written complaint with an accrediting body of the health facility.

(k) This section shall not apply to an inmate of a correctional facility or juvenile facility of the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

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~~(j)~~

(l) This section shall not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

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~~(k)~~

(m) Nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law.

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SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the

California Constitution.

BILL ANALYSIS

CONCURRENCE IN SENATE AMENDMENTS
AB 632 (Salas)
As Amended September 5, 2007
Majority vote

ASSEMBLY:	70-0	(May 3, 2007)	SENATE:	38-1	(September 10, 2007)

Original Committee Reference: HEALTH

SUMMARY : Expands to members of health facility medical staffs, whistleblower protections currently provided to patients, employees, and others in health facility settings that prohibit owners and operators of any health facility from retaliating because a person from one of these groups has notified government entities of suspected unsafe patient care and conditions.

The Senate amendments :

1) Revise the new category of medical professionals to whom whistleblower protections are extended, from physicians and surgeons to members of the medical staff. Revise the definition of members of health facility medical staffs, to provide equivalent whistleblower protection to a doctor that is currently available to an employee or patient of a hospital facility and to other health care workers.

2) Eliminate the application of civil penalties to health facility affiliates.

3) Expand the definition of discriminatory treatment of an employee, member of the medical staff, of any other health care worker to also include any unfavorable changes in, or breach of, the terms or conditions of a contract.

4) Specify that, for damages to any employee, health care worker, or member of the medical staff who has been discriminated or retaliated against, he or she is entitled to any remedy deemed warranted by the court in lieu of reinstatement, reimbursement for lost wages and work benefits, and legal costs.

5) Make technical changes in the wording of the list of

financially related circumstances to be taken under

consideration for remedy when there is a determination that discrimination has occurred.

6) Require that a health care worker determined to have been discriminated against is entitled to reimbursement for lost income rather than restitution.

7) Authorize a member of the medical staff to petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on pending peer review matters if the physician has filed a whistleblower complaint or if the evidentiary demands would impede the peer review process or endanger patient health and safety.

8) Require that an in camera review of evidentiary demands be held to determine if the evidentiary demands will impede the peer review process.

EXISTING LAW prohibits any health facility from discriminating or retaliating in any manner against any patient or employee of any health facility because that patient or employee, or any other person, has presented any grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility. "Health facility" does not include long-term care facility for these purposes. Any health facility that violates such prohibitions may be subject to a civil penalty of not more than $25,000, and any person associated with the facility, as specified, who willfully violates such prohibitions, may be subject to a misdemeanor punishable by a fine of not more than $20,000.

AS PASSED BY THE ASSEMBLY , this bill extended to physicians and surgeons whistleblower protections that currently apply to patients and employees of health facilities. Specifically, this bill:

1) Prohibited a health facility or its affiliate from discriminating or retaliating in any manner against a physician and surgeon on the medical staff of the health facility or its affiliate because the physician and surgeon has presented a grievance or complaint, or has initiated, participated, or cooperated in an investigation or proceeding of any governmental entity, relating to the care, services, or

conditions of the facility or its affiliate.

2) Required that any discriminatory treatment of a physician and surgeon within 120 days of the filing of the grievance or complaint raises a rebuttable presumption that the action was taken by the health facility in retaliation, if the health facility had knowledge of the physician's initiation, participation, or cooperation. Specifies that "discriminatory treatment of a physician or surgeon" includes discharge, demotion, suspension, any other unfavorable changes in the

terms or conditions of the privileges of the physician and surgeon at the health facility or its affiliate, or the threat of any of these actions.

3) Entitled a physician and surgeon who has been discriminated against pursuant to this bill, to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or its affiliate, and the legal costs associated with pursuing the case.

FISCAL EFFECT : According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS : The Senate amendments clarify that this bill applies to physicians and surgeons who are on the medical staff of a health facility. The Senate Judiciary Committee analysis notes that using the phrase "members of the medical staff" is consistent with language in the Business and Professions Code.

According to the Senate Judiciary Committee, the Senate amendment in #3) above was added by their committee to ensure that the health facility peer review committee continues to operate as it has under current law. As stated in the Senate Judiciary Committee analysis:

> Peer review is a process by which the medical staff evaluates physicians with respect to the patient care they provide.?Thus, the various provisions, such as immunity from monetary liability and protection from discovery?were enacted to encourage participation by physicians in the peer review process and to ensure their freedom from fear of retribution for participation.

The Senate amendments allowing a physician to petition the court

are based on the Senate Judiciary Committee's judgment that a judge would be the party best suited to determine what specific items among those actions sought by the health facility would impact the peer review committee and or patient health and safety.

Hospitals oppose this bill, as amended, because they argue it will have a chilling affect on the peer review process. In addition, they argue this bill is not necessary to protect physicians against retaliation and discrimination because existing law provides adequate protection. This bill is supported by physician organizations that see a need for clarifying existing law to protect physicians from retaliation or discrimination, which they argue is expressed in a variety of methods, including termination of a physician or surgeon's hospital privileges.

According to the Senate Judiciary Committee, the amendments made to this bill on September 5, 2007, were taken to deal with some

objections made by the hospitals regarding the impact of the bill on the peer review. This analysis also states:

> This bill would provide equivalent whistleblower protection to a doctor that is currently available to an employee or patient of a hospital facility and to other health care workers. The amendments would provide for an in camera hearing of evidentiary requests by a whistleblower complainant so that a court may determine whether or not the evidentiary demands would impede a peer review proceeding. The amendments would further clarify that the bill would not be construed to limit the ability of the medical staff to carry out its legitimate peer review activities.

Analysis Prepared by : M. Anne Powell / HEALTH / (916) 319-2097

FN: 0003293

AMENDED IN SENATE SEPTEMBER 5, 2007

AMENDED IN SENATE JULY 17, 2007

AMENDED IN SENATE JUNE 6, 2007

AMENDED IN ASSEMBLY APRIL 17, 2007

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL No. 632

Introduced by Assembly Member Salas

February 21, 2007

An act to amend Section 1278.5 of the Health and Safety Code, relating to health care facilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 632, as amended, Salas. Health care facilities: whistleblower protections.

Existing law provides for the licensure and regulation of health care facilities, as defined, by the State Department of Public Health. Under existing law, a health facility is prohibited from retaliating or discriminating against an employee of a health facility that has presented or initiated a complaint or initiated, participated, or cooperated in an investigation or proceeding of a government entity relating to the care, services, or conditions of the facility. Existing law makes the violation of these provisions a crime and subject to the assessment of a civil penalty.

This bill would prohibit a health facility from discriminating or retaliating against any patient, employee, a member of the facility's medical staff, or any other health care worker of the facility because that person (1) has presented a grievance, complaint, or report to an

entity or agency responsible for accrediting or evaluating the facility or to any other governmental entity; or (2) has initiated, participated, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility, as provided.

This bill would provide that an employee who has been discriminated against in employment in violation of those provisions shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, or to any remedy deemed warranted by the court pursuant to those provisions, or to any applicable provisions of statutory or common law, as specified. The bill would also entitle a health care worker who has been discriminated against, in violation of those provisions, and who prevails in court, to ~~restitution~~ *reimbursement for lost income* and any legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to those provisions, or any other applicable statutory or common law.

Because the bill would expand the definition of a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 1278.5 of the Health and Safety Code is amended to read:

1278.5. (a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to assist those *accreditation and* government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing

provisions in state and federal law relating to employee and employer relations.

(b) (1) No health facility shall discriminate or retaliate, in any manner, against any patient, employee, member of the medical staff, or any other health care worker of the health facility because that person has done either of the following:

(A) Presented a grievance, complaint, or report to the facility, to an entity or agency responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any other governmental entity.

(B) Has initiated, participated, or cooperated in an investigation or administrative proceeding related to, the quality of care, services, or conditions at the facility that is carried out by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or governmental entity.

(2) No entity that owns or operates a health facility, or which owns or operates any other health facility, shall discriminate or retaliate against any person ~~who~~ *because that person* has taken any actions pursuant to this subdivision.

(3) A violation of this section shall be subject to a civil penalty of not more than twenty-five thousand dollars ($25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to a governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

(d) (1) There shall be a rebuttable presumption that discriminatory action was taken by the health facility, or by the entity that owns or operates that health facility, or that owns or operates any other health facility, in retaliation against an employee, member of the medical staff, or any other health care worker of the facility, if responsible staff at the facility or the entity that owns or operates the facility had knowledge of the actions, participation, or cooperation of the person responsible for any acts described in paragraph (1) of subdivision (b), and the

discriminatory action occurs within 120 days of the filing of the grievance or complaint by the employee, member of the medical staff or any other health care worker of the facility.

(2) For purposes of this section, discriminatory treatment of an employee, member of the medical staff, or any other health care worker includes, but is not limited to, discharge, demotion, ~~suspension, or any other unfavorable changes in the terms or conditions of employment or of the privileges of the employee,~~ *suspension, or any unfavorable changes in, or breach of, the terms or conditions of a contract, employment, or privileges of the employee,* member of the medical staff, or any other health care worker of the health care facility, or the threat of any of these actions.

(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in Section 603 of the Evidence Code.

(f) Any person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars ($20,000).

(g) An employee who has been discriminated against in employment pursuant to this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law. A health care worker who has been discriminated against pursuant to this section shall be entitled to ~~restitution~~ *reimbursement for lost income* and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law. A member of the medical staff who has been discriminated against pursuant to this section shall be entitled to reinstatement, reimbursement for lost income resulting from any change in the terms or conditions of his or her privileges caused by the acts of the facility or the entity that owns or operates a health facility or any other health facility that is owned or operated by that entity, and the legal costs associated with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law.

(h) The medical staff of the health facility may petition the court for an injunction to protect a peer review committee from being required to comply with evidentiary demands on *a* pending peer review ~~matters~~ *hearing* from the ~~complainant in~~ *member of the medical staff who has filed* an action pursuant to this section, if the evidentiary demands from the complainant would impede the peer review process or endanger the health and safety of patients of the health facility during the peer review process. *Prior to granting an injunction, the court shall conduct an in camera review of the evidence sought to be discovered to determine if a peer review hearing, as authorized in Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code, would be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall be granted until the peer review hearing is completed. Nothing in this section shall preclude the court, on motion of its own or by a party, from issuing an injunction or other order under this subdivision in the interest of justice for the duration of the peer review process to protect the person from irreparable harm.*

(i) For purposes of this section, "health facility" means any facility defined under this chapter, including, but not limited to, the facility's administrative personnel, employees, boards, and committees of the board, and medical staff.

(j) This section shall not apply to an inmate of a correctional facility or juvenile facility of the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

(k) This section shall not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

(l) Nothing in this section shall be construed to limit the ability of the medical staff to carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive, of the Business and Professions Code.

~~(l)~~

(m) Nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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CALIFORNIA HOSPITAL ASSOCIATION

Providing Leadership in Health Policy and Advocacy

ASSEMBLY FLOOR ALERT

September 10, 2007

TO: The Honorable Members of the State Assembly

FROM: David van der Griff, Legislative Advocate

SUBJECT: AB 632 (Salas) – OPPOSE, Unless Amended

The California Hospital Association (CHA), representing nearly 400 hospitals and health systems in California, opposes AB 632 (Salas) unless it is amended. Hospitals have every interest in ensuring that employees, patients, and members of the medical staff have appropriate avenues to raise quality of care issues. We think, however, that this bill is unnecessary and will have many unintended consequences.

NEW JOINT COMMISSION RULE – AB 632 IS UNNECESSARY

Last week on September 5, the Joint Commission issued a revision to include physicians and medical staff that in a rule that prohibits hospitals from retaliating against hospital staff when they register concerns about safety and quality of care at the facility. The Joint Commission evaluates and accredits nearly 15,000 health care organizations and programs in the United States. An independent, not-for-profit organization, The Joint Commission is the nation's predominant standards-setting and accrediting body in health care.

This revised rule becomes effective on January 1, 2008. As a result of this revised rule, any accredited hospital in California that violates this rules risks loss of its Joint Commission accreditation, which could lead to being dropped from participation in the federal Medicare program and private health plans. Given these risks, this revised rule provides a strong deterrent to a hospital to engage in retaliatory actions against physicians and members of a medical staff. Therefore, AB 632 is unnecessary.

UNLIMITED CIVIL DAMAGES

In Health and Safety Code section 1278.5(g), a court is granted the authority to grant any "remedy deemed warranted by the court pursuant to this chapter or other applicable provision of statutory or common law." This provision gives the court too much discretion when the damages for a retaliatory action can be accurately and thoroughly measured, and is not consistent with the principles that generally apply to legal review of medical staff peer review matters. Moreover, such a provision could serve as an incentive for more litigation in an already overburdened civil justice system and the filing of frivolous lawsuits.

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Corporate Members: Hospital Council of Northern and Central California, Hospital Association of Southern California, and Hospital Association of San Diego and Imperi

CHILLING EFFECT ON PEER REVIEW

Although the bill was recently amended on September 5 to address concerns about peer review, these amendments are inadequate. The provision in subdivision (l) only allows the hospital defendant to make a motion to a court, which may or may not be granted. The right to seek an injunction in subdivision (h) is only good to prevent "premature" access to peer review information, i.e., before an action is taken that gives rise to a hearing. This does not, however, address the real issue, which is allowing someone to get into court on a retaliation claim while a peer review action is either still in the investigatory stage -- peer review action not yet taken or recommended or underway -- a peer review action has been recommended or taken, but the hearing/appeal is not yet completed and the governing body has not taken final action.

If the hospital/medical staff has to defend a retaliation claim before they have had a chance to prove the validity of the peer review action, then the court will be itself assessing the validity of the not-yet-taken or underway peer review action BEFORE it's been completed. Moreover, it will not be reviewing it via a mandamus action pursuant to Code of Civil Procedure 1094.5 action, where the standard of review is a "substantial evidence" standard by which the court reviews fair hearing/appeal decisions, but rather it will be independently assessing the validity of the unfinished peer review action and doing so in a circumstance where the burden of proof is on the hospital.

Our proposed amendments address these concerns by including a statement in subdivision (a) that this section does not conflict with medical staff peer review actions or proceedings conducted pursuant to current law. The bill further replaces the language in subdivision (h) to specify that section 1278.5 does not apply to a proposed or taken investigation, corrective or disciplinary action by a medical staff or a hospital governing board against a member of a medical staff or an applicant unless and until there has been a determination that the member or applicant has been determined to have substantially prevailed in such action as specified in current law.

NEW CLASS OF LITIGANTS AND NEW CAUSES OF ACTION

While the negative impact on peer review is a major concern with this bill, there are others. For example, "any other health care worker" is included in the list of protected parties in the bill. Since this term is not defined, it is not clear who would qualify under this designation. In subdivision (d) "discriminatory treatment" for members of a medical staff is not qualified to take into account that a privilege may be revoked, suspended or limited because of patient care, general health and safety or a deviation from lawful standards adopted by the medical staff or health facility. We think this is necessary because other provisions of law *require* the hospital and its medical staff to undertake such remedial measures whenever a medical staff member's performance or conduct warrant. Our proposed amendments clarify this point by creating a new paragraph (3) within this subdivision, which, in essence, exempts appropriate remedial action from the definition of a discriminatory act.

NEW LIABILITIES

In Health and Safety Code section 1278.5(i), the bill defines "health facility" to include the "medical staff." As noted above, pursuant to California law, a hospital medical staff is required to be a self-governing body, with the full authority to initiate and prosecute medical staff peer review actions. While such actions are subject, ultimately, to review by the hospital governing body, there are significant statutorily-imposed constraints on the governing body's ability to initiate peer review actions in the first instance, or to overturn such actions that may be taken by the medical staff. Under these circumstances, the actions of the medical staff cannot and should not be automatically imputed to the hospital. We believe further clarity is needed on the specific methods of complaint that are protected, e.g. filing a written complaint with the health facility in accordance with facility's complaint procedure. Accordingly, we have suggested language in subdivision (j).

For these reasons, we respectfully request that you "Non-Concur" in the Senate amendments unless the bill is amended.

California Medical Association
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Phone: (916) 444-5532 • Fax: (916) 444-5689
Physicians dedicated to the health of Californians
GOVERNMENT RELATIONS

To: Members of the State Assembly

Date: 9/11/2007

The California Medical Association is pleased to Sponsor Assembly Bill 632 which increases the quality of care provided to patients in California by clarifying that existing law extends whistleblower protection to members of a medical staff. The bill states that it is the public policy of California to encourage physicians and surgeons, among others, to notify responsible entities when they see problems with quality patient care and that as whistleblowers they will be protected from retaliation.

All too often, physicians and surgeons face retaliatory actions if they speak out about sub-standard care or conditions. This bill clearly gives protection to members of a medical staff and will be used as a tool to encourage reporting of potentially dangerous practices, conditions, or processes that can endanger patient safety.

This bill passed out of the Assembly with a 70-0 vote and off of the Senate Floor 38-1. It is now back for concurrence with Senate Amendments which further clarify that this bill is not to interfere with legitimate peer review activities.

AB 632 specifically includes members of the medical staff in Health and Safety Code 1278.5. Currently that code provides protections to employees and patients and the nebulous term "or any other person". Unfortunately, enterprising attorneys have used this section to deny protections to a physician who raised concerns by correctly stating that the physician was not an employee or patient. This bill will prevent that argument from occurring again. Since most physicians are not employees of the hospital, this code section is ambiguous and in need of clarification.

Retaliation and discrimination can come in many forms, such as economic pressure through removing a physician from a referral list, forcing a doctor out of a hospital owned office complex, or manipulating the surgery schedule. However, the most prevalent and most detrimental to quality patient care comes in the form of threats. Often physicians are faced with having to decide if they should report allegations of poor patient care or conditions knowing their practice and their livelihood may be harmed.

The CMA respectfully requests you AYE vote on the Assembly Floor. If you need further information, please contact Brett Michelin at (916) 444-5532.

PLEASE VOTE AYE ON AB 632

PROOF OF SERVICE

I, Melinda Less, declare that I am a resident of the State of California. I am over the age of 18 years and not a party to the within action; that my business address is Hanson Bridgett LLP, 425 Market Street, 26th Floor, San Francisco, California 94105. On February 4, 2013, I served a true and accurate copy of the document(s) entitled:

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPENING BRIEF ON THE MERITS; SUPPORTING MEMORANDUM; SUPPORTING DECLARATION OF GLENDA M. ZARBOCK

on the party(ies) in this action as follows:

Stephen D. Schear, Esq. Law Office of Stephen Schear 2831 Telegraph Avenue Oakland, CA 94609	Counsel for Plaintiff Mark T. Fahlen, M.D.
Jenny C. Huang, Esq. Justice First, LLP 180 Grand Avenue, Suite 1300 Oakland, CA 94612	Counsel for Plaintiff Mark T. Fahlen, M.D.
Court of Appeal of the State of California Fifth Appellate District 2424 Ventura Street Fresno, CA 93721	Court of Appeal
The Honorable Timothy W. Salter Department 22 Stanislaus County Superior Court 801 10th Street Modesto, CA 95353	Superior Court

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Hanson Bridgett LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 4, 2013, at San Francisco, California.

Melinda Less