

# Year in Review - Medical Staff Legal Update

Overview and analysis of recent litigation, legislative changes, and emerging legal trends

# MEDICAL STAFF SEMINAR 2023

PRESENTED BY HALL RENDER'S MEDICAL STAFF SERVICES TEAM

**DECEMBER 7-8, 2023**

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# Overview

- *Gilbert v. Kent County Memorial Hospital*, 64 F.4th 44 (1st Cir. 2023)
- *John Mitchell Farmer, MD v. Baptist Health Medical Group, Inc.*, No. 20-CI-006143 (Ky. Jeff. 12th Circ. Mar. 6, 2023)
- *Owens v. Oregon Clinic, P.C.*, 2022 WL 3715292 (D. Oregon 2022)
- *Behram v. Adventist Health Care, Inc.*, 2023 WL 4011686 (Md. Ct. Spec. App. June 15, 2023)
- *Byrnes v. St. Catherine Hosp.*, 2023 WL 2734229 (D. Kan. Mar. 31, 2023)
- *Equal Employment Opportunity Comm v. Yale New Haven Hospital Inc.*
- *Mogk v. Henry Ford Health et al*, (E.D. Mich. Sep 28, 2023)





## HCQIA Immunity

- *Gilbert v. Kent County Memorial Hospital, 64 F.4th 44 (1st Cir. 2023)*
  - Facts:
    - Disruptive behavior case involving allegations of physician engaging in lewd and offensive behavior during procedures while patients were sedated.
    - Board revoked physician's privileges despite MEC's recommendation for suspension.
    - Physician sued claiming violations of the Bylaws and due process, breach of good faith and fair dealing, defamation, and violation of the Rhode Island Civil Rights Act for perceived disability discrimination.

# HCQIA Immunity

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    - Physician sued claiming violations of the Bylaws and due process, breach of good faith and fair dealing, defamation, and violation of the Rhode Island Civil Rights Act for perceived disability discrimination.
  - Holding:
    - Hospital Board and Hospital President were entitled to immunity from liability to physician for damages under HCQIA for revoking his privileges. Although physician claimed a lack of evidence to support a finding of a threat to patient safety, nothing indicated Board's conclusion was based on anything but a reasonable belief that the facts justified the action.
  - Takeaways:
    - Demonstrates how courts will evaluate the 4th prong of the HCQIA immunity analysis (*action must be taken in the reasonable belief that the action was warranted by the facts known after undertaking a reasonable effort to obtain the facts*).
    - Overcoming the presumption of HCQIA immunity requires demonstrating that a hospital did not conduct the relevant peer review actions in accordance with one of the HCQIA standards.
    - HCQIA immunity will attach even when the Board's decision differs from the MEC recommendation if the Hospital can demonstrate that there is a sufficient basis for the hospital's action.

## Reporting Statutes and Immunity

- *John Mitchell Farmer, MD v. Baptist Health Medical Group, Inc*, No. 20-CI-006143 (Ky. Jeff. 12th Circ. Mar. 6, 2023)
  - Facts
    - Dr. Farmer accused of substance abuse
    - Hospital referred Dr. Farmer to Kentucky Physicians Health Foundation (KPHF) and reported him to the Kentucky Board of Medical Licensure (KBML)
    - Hospital allegedly interfered with the KBML investigation in bad faith
    - Hospital claimed it had immunity under KRS 311.6191

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  - Holding
    - The Court stated that KRS 311.6191 provides “qualified” immunity in relation to permissive board reporting
    - The Court found Dr. Farmer raised a material issue of fact as to whether Hospital acted in good faith in relation to the board investigation and related report
  - Takeaways
    - Each state has different reporting obligations and related protections
    - Consider the impact of language used in relation to your reporting
    - Be mindful of the different types of peer review immunity (absolute vs. qualified immunity)
    - Best practice is to err on the side of a “fair” process

# NPDB Reporting: Resignation Under Investigation

- *Owens v. Oregon Clinic, P.C., 2022 WL 3715292 (D. Oregon 2022)*
  - Facts:
    - Physician sought injunction ordering hospital to withdraw Databank report stating that physician surrendered hospital privileges while under investigation.
    - Physician engaged in questionable medical record-keeping practices at hospital that raised concerns of improper billing practices, improper professional conduct, and potentially clinical incompetence.
    - Physician refused to participate in hospital's efforts to investigate the matter.
    - Physician entered into employment separation agreement that precluded physician from providing services at hospital for a period of time, causing physician to fail to meet certain criteria for maintaining Hospital privileges, which led to physician's voluntary surrender of privileges, triggering hospital report to Databank.



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  - Holding:
    - Hospital has statutory obligation under HCQIA to report to the NPDB whenever a physician resigns clinical privileges while under investigation.
    - Hospital has no obligation, under statute or applicable Bylaws, to provide "adequate notice and hearing procedures" before an investigation may be commenced.
  - Takeaway:
    - A surrender of clinical privileges or failure to renew clinical privileges while under investigation or to avoid investigation must be reported.
    - For NPDB reporting purposes, the term 'investigation' is not controlled by how that term may be defined in a health care entity's Bylaws or policies and procedures, and there is no requirement in the context of NPDB reporting that the health care practitioner be notified or aware of the investigation.
    - Physicians has the right to dispute a Databank report and/or submit a Subject Statement offering their own explanation of what occurred.

## NPDB Reporting: Reputational Harm

- *Behram v. Adventist Health Care, Inc., 2023 WL 4011686 (Md. Ct. Spec. App. June 15, 2023)*
  - Facts
    - Dr. Behram alleged that another doctor leveraged leadership positions at Hospital to interfere with his practice and reputation
    - Hospital launched a series of investigations against Dr. Behram, which included suspending and reinstating his privileges several times
    - Hospital was alleged to have summarily suspended Dr. Behram's privileges for over a year without a hearing
    - Hospital and Dr. Behram entered into a Settlement agreement, which outlined the language for reports to the Medical Board and NPDB
    - Hospital allegedly strayed from the Agreement's language
    - Dr. Behram complained, but Hospital stated that it was protected by HCQIA and the liability release in the Settlement Agreement

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  - Holding
    - While the liability release protected reports made prior to the Settlement Agreement, the Court held that HCQIA did not protect Hospital from materially false NPDB reports made after the Agreement, which it found to be defamatory per se
  - Takeaways
    - Comply with your corrective action processes and related NPDB obligations for immunity (including due process obligations)
    - Carefully consider any agreed upon reporting-language as part of a settlement
    - If you do agree upon such language, you should comply with same
    - Consider the NPDB codes carefully as part of such agreements

## Peer Review Committees, Privilege, and Privilege Logs

- *Byrnes v. St. Catherine Hosp., 2023 WL 2734229 (D. Kan. Mar. 31, 2023)*
  - Facts
    - Dr. Byrnes complained that “Dr. X” was harassing nurses and providing substandard patient care
    - Hospital disagreed after stating it had investigated the complaint, and in fact, actually requested (thereafter) that Dr. Byrnes submit to a psychological assessment
    - Hospital allegedly did not investigate the concerns through a peer review committee/process
    - Anonymous person reported Dr. Byrnes to the Kansas Board of Healing Arts
    - Hospital terminated Dr. Byrnes without cause
    - Dr. Byrnes requested hospital records related to the above matters.
    - Hospital refused to turn over documents related to Dr. Byrnes’s federal employment complaints, claiming peer review privilege



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    - Hospital terminated Dr. Byrnes without cause
    - Dr. Byrnes requested hospital records related to the above matters.
    - Hospital refused to turn over documents related to Dr. Byrnes’s federal employment complaints, claiming peer review privilege
  - Holding
    - Court conducted in-camera review of privilege logs and ultimately determined many documents were not peer review privileged
    - The Court held that state peer review statutes do not necessarily apply to federal employment claims
  - Takeaways
    - Ensure “peer review documents” are truly connected to a functioning Peer Review Committee/Process
    - Ideally label these documents accordingly

# Late Career Practitioner Policy Litigation Update

- *Equal Employment Opportunity Comm v. Yale New Haven Hospital Inc.*
  - Cross Motions for Summary Judgement filed in March
    - Rulings pending
  - Amicus Briefs
    - In support of Yale New Haven Summary Judgment Motion filed by: The National Academy of Neuropsychology, MDReview, the California Public Protection & Physician Health, the National Association of Medical Staff Services, and Dr. John A. Fromson
    - In support of EEOC Summary Judgment Motion filed by AARP
- *Mogk v. Henry Ford Health et al*, (E.D. Mich. Sep 28, 2023)
  - Age discrimination lawsuit brought by 84-year-old ophthalmologist
  - Filed September on 28, 2023
  - Challenges Health System's Senior and Bioscientific Fitness for Duty Policy
    - Policy requires cognition assessment on all Medical Group members who are 70 or older
    - Assessment is given again at age 75 and then every year thereafter
  - Lawsuit alleges that if employee does not comply with screening, they will either voluntarily resign or be terminated

# Practical Takeaways

## HCQIA Immunity

Actions should be taken in reasonable belief after undertaking a reasonable effort to obtain the facts

If the Hospital can demonstrate that there is a sufficient basis for the hospital's action, HCQIA immunity will attach

## Reporting Statutes and Immunity

Each state has different reporting obligations and related protections; consider the impact of language used in relation to your reporting

Best practice is to err on the side of a "fair" process

## NPDB Reporting: Resignation Under Investigation

A surrender of clinical privileges or failure to renew clinical privileges while under investigation or to avoid investigation must be reported.

For reporting purposes, the term investigation is not defined in a health care entity's Bylaws or policies & procedures, and there is no requirement in the context of NPDB reporting that the health care practitioner be notified or aware of the investigation.

## NPDB Reporting: Reputational Harm

Carefully consider any agreed upon reporting-language as part of a settlement. If you do agree upon such language, you should comply with same.

Consider the NPDB codes carefully as part of such agreements.

## Peer Review Privilege

Ensure "peer review documents" are truly connected to a functioning Peer Review Committee/Process. Ideally label these documents accordingly.

## Late Career Practitioners

Policies that require mandatory screening or testing at a defined age are still risky.

Proceed cautiously.

# Questions?





# Contact Us

For more information on these topics  
visit [hallrender.com](https://hallrender.com).

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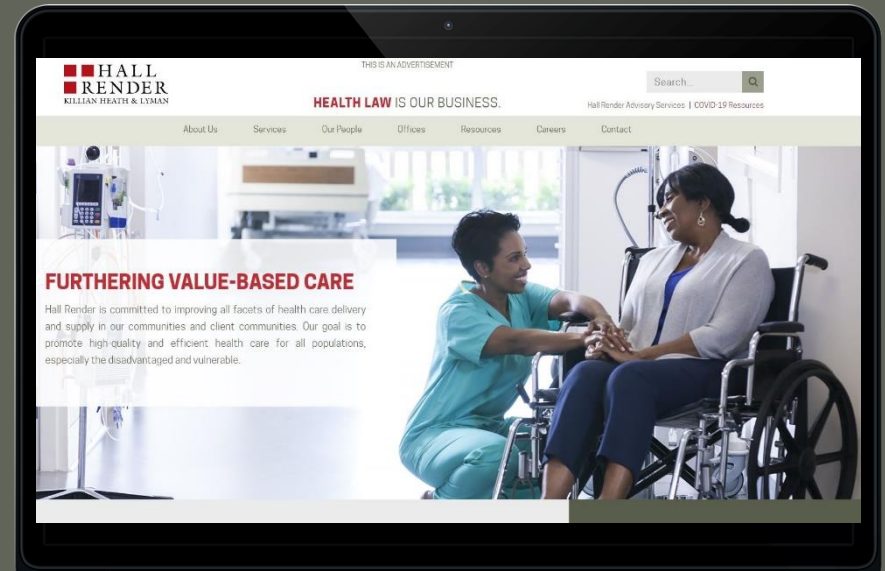
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