

California Senate Bill 798 and its Impact on Section 805.01 Reporting Requirements

Insights

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California law has long imposed reporting requirements for restrictions or termination of a physician's clinical privileges for "medical disciplinary cause or reason."^[1] The duty to report is set forth in both Sections 805 and 805.01 of the California Business and Professions (B&P) Code. On October 13, 2017, California Gov. Jerry Brown signed Senate Bill 798 (SB 798) into state law, which included a variety of provisions, but of relevance to the current discussion is its amendment to Section 805.01.^[2] While the triggering factors for a report under Section 805.01 have not been altered, SB 798 now authorizes the Medical Board of California (MBC) to impose fines on individuals who fail to comply with the reporting obligations under this section.^[3]

The amendment went into effect January 1, 2018. SB 798 corrected what was perceived as an oversight in Section 805.01 as violations of the reporting obligations contained in Section 805 have long carried a penalty provision while Section 805.01 carried no such provision. This article discusses the legal analysis and practical considerations for medical staffs, hospitals, health plans, and other peer review bodies following SB 798's enactment.

DISTINGUISHING BETWEEN "805" AND "805.01" REPORTS

Both Sections 805 and 805.01 require certain representatives of a "peer review body" to make reports of adverse actions against licensees to the MBC under certain circumstances. Such reports must be signed by (1) the chief of staff of a medical or professional staff/peer review body and (2) by the chief executive officer or administrator of that entity.^[4]

The primary distinction between these two reporting requirements is the action which triggers the need to submit a report. Section 805 reports apply to a broader set of actions as they stem from a variety of proposed adverse actions premised on "a medical disciplinary cause or reason."^[5] Section 805.01 reports, on the other hand, arise only when a formal investigation results in a finding that at least one of the four following specific events have occurred:

- Incompetence, or gross or repeated deviation from the standard of care involving death or serious bodily injury to one or more patients, to the extent or in such a manner as to be dangerous or injurious to any person or to the public;
- The use of, or prescribing for or administering to himself or herself, any controlled substance, or the use of any dangerous drug or of alcoholic

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beverages to the extent or in such a manner as to be dangerous or injurious to the licentiate, any other person, or the public, or to the extent that such use impairs the licentiate's ability to practice safely;

- Repeated acts of excessively prescribing, furnishing, or administering of controlled substances or repeated acts to a patient with or without an appropriate prior examination of the patient and medical reason therefor (this is not applicable to prescribing, furnishing, or administering controlled substances for intractable pain, as consistent with lawful prescribing); or
- Sexual misconduct with one or more patients during a course of treatment or an examination.[6]

The 805.01 reporting requirement only applies when a "formal investigation" has been completed and concluded that one of the reportable situations has occurred. For most Medical Staffs, this should mean when the Medical Staff Executive Committee has concluded its investigatory process and reached a decision. This is important in assessing when and under what circumstances an 805.01 report needs to be filed.

Another distinction between the reporting requirements is the time frame by which a report needs to be submitted to the MBC. Under Section 805, a report would be due "within 15 days after the action's effective date." [7] This allows the peer review body some flexibility in setting the effective date and, by extension, the reporting deadline. Section 805.01, by comparison, requires a report "within 15 days after a peer review body makes a final decision or recommendation [after investigation] regarding the disciplinary action" to be taken. [8] This means that once the peer review body concludes that one of the four scenarios has occurred and that adverse action needs to be taken, the 15 day reporting deadline has been triggered.

The rationale behind Section 805.01 is that these four triggering events are so egregious that the MBC should be notified as soon as possible and not have to wait until there has been a hearing pursuant to individual medical staff bylaws or Business and Professions Code Section 809.2. In practical application, these scenarios almost uniformly result in a summary suspension, which necessitates a report under Section 805. However, Section 805.01 makes clear that this report must be filed even if there is a separate 805 report required. Given the fine structure now present under both statutes, peer review bodies must comply with this seemingly needless duplication.

SB 798 TO DETER LACK OF COMPLIANCE WITH SECTION 805.01

Since its enactment, failure to report under Section 805 carried substantial penalties (up to \$50,000 for each required signer and \$100,000 per signer for willful violations). [9] Section 805.01, on the other hand, did not. In its 2016 Sunset Review Report, the MBC asserted that it "believes entities are not submitting 805.01 reports as required." [10] The MBC noted, for example, that in FY2015/2016, only five reports were submitted under 805.01 as compared to 127 reports under Section 805. [11] Seeking additional tools to address what it saw as a lack of compliance by health care entities, the MBC requested legislative change to require penalties for failing to report under 805.01. [12] The Legislature responded by passing SB 798 and imposing the same fines for reporting failures under Section 805.01 as under Section 805.

In February 2018, the MBC coordinated with the California Department of Public Health (CDPH) to develop an All Facilities Letter regarding SB 798 and Section 805.01 reports (AFL 18-14). [13] AFL 18-14 first makes clear that SB 798 allows MBC to impose fines and then sets forth the circumstances that require reporting, who is responsible for reporting, and which disciplinary actions must be reported as discussed above.

AFL 18-14 neglects to include language that a "formal investigation" must first be conducted and completed before 805.01 reporting requirements are triggered. However, AFL 18-14 specifically states that "SB 798 does not change the existing reporting requirements" and notes that facilities with reporting obligations are responsible for following "all laws and regulations." AFL 18-14 refers entities to the "full text of all applicable sections of the B&P Code to ensure compliance." AFL 18-14 should, however, be read as a clear indication that MBC intends to exercise its ability to impose fines for failure to submit reports under Section 805.01 (even if doing so duplicates a reporting requirement under Section 805, which will often be the case).

TAKEAWAYS FROM SB 798 AND WHAT IT MEANS FOR PEER REVIEW BODIES

The same circumstances which require a report under Section 805.01 will likely continue to also trigger a summary suspension and, thus, a Section 805 report. Therefore, from a practical standpoint, the amendments to Section 805.01 will likely result in an increased number of Section 805.01 reports, which was the goal of the amendments from the MBC's perspective.[14] Determining when a "formal investigation" has concluded and resulted in an 805.01 reportable decision will continue to be a key issue for 805.01 reporting and the necessity of undertaking this analysis has been heightened now that the MBC has the ability to impose fines. Peer review bodies should take time to evaluate their current practices and ensure that they have made efforts to remain in compliance with both Section 805 and Section 805.01.

[1] See Cal. Bus. & Prof. Code § 805(b); see also § 805(a)(6).

[2] A complete copy of SB 798 can be found at

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB798

[3] The fines can be up to \$50,000 per violation for failing to file an 805.01 report to the MBC, and up to \$100,000 per violation for willful failures to report to file an 805.01 report. Cal. Bus. & Prof. Code § 805.01(g), (h). These amounts mirror the fines that can be imposed for violations under Cal. Bus. & Prof. Code § 805(k), (l).

[4] Cal. Bus. & Prof. Code § 805(b), (c); § 805.01(b).

[5] Section 805 includes incidents where a licensee resigns or withdraws an application "after receiving notice of a pending investigation initiated for a medical disciplinary cause or reason." Cal. Bus. & Prof. Code § 805(c).

[6] Cal. Bus. & Prof. Code § 805.01(b).

[7] See Cal. Bus. & Prof. Code § 805(b).

[8] Cal. Bus. & Prof. Code § 805.01(b).

[9] Cal. Bus. & Prof. Code § 805(k), (l).

[10] Medical Board of California, *Sunset Review Report 2016*, available at

http://www.mbc.ca.gov/Publications/Sunset_Report/sunset_report_2016.pdf, pp. 97-98; see also p. 156.

[11] *Id.*, at p. 204.

[12] *Id.*, at p. 205.

[13] California Department of Public Health, *All Facilities Letter (AFL 18-14)*, available at

<https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-18-14.aspx>

[14] See Medical Board of California, *Sunset Review Report 2016*, available at

http://www.mbc.ca.gov/Publications/Sunset_Report/sunset_report_2016.pdf, pp. 204-205.

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