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## NLRB: Peer Review Obligations Trumped by NLRA



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**O**n August 27, 2015, the National Labor Relations Board (“NLRB”) held that a Kansas hospital must afford an employee *Weingarten* rights before a nursing Peer Review Committee, allow the union access to peer review documents and information on prior peer review matters, and cannot enforce a confidentiality rule limiting discussion of issues pending before the Peer Review Committee. *Midwest Division – MMC LLC d/b/a Menorah Medical Center*, 362 NLRB No. 193 (8-27-15). This decision poses a real threat to confidentiality provisions of most state statutes which are designed to maintain hospital staff competency by encouraging frank and open discussions in peer review.

### The Facts of the Case

The case involved two nurses who were represented by a union and were notified by the hospital’s Peer Review Diversion Prevention Committee (“Committee”) that it had reviewed cases which indicated the two nurses may have engaged in unprofessional conduct that the Committee could be required to report to the Kansas State Board of Nursing.

The two nurses asked for union representation (*Weingarten* rights) but that request was denied. Attendance at the Committee meeting was limited to members of the Committee and each nurse. The union also asked for information about the Committee process. The information the union sought included: (1) a copy of the discipline issued by the Committee, all documents utilized by the Committee and identification of all Committee members; (2) a description of the Committee, its purpose, members, how members were selected and the scope and role of the Committee; (3) a copy/record of where the Committee’s discipline was placed (personnel file or other files), whether inside or outside the hospital; (4) the names of all nurses who have received a notice to appear before the Committee; (5) copies of all professional



discipline issued to any nurse; and (6) “all information” regarding allegations of professional discipline against all nurses. The hospital denied the request for information stating the information sought was not relevant and further that it was confidential under the state peer review statute.

The hospital also had a rule restricting employee discussion of matters that had come before the Committee and events underlying peer review investigations. The hospital believed that this rule was necessary to effect the statutory confidentiality requirements for the peer review process.

### Kansas Peer Review

The NLRB interpreted Kansas law on peer review and its implications on federal labor law. The Kansas peer review statute provides privilege for documents and information used in the peer review process. Subject to certain exceptions, “reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees or officers, *shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity* or be admissible in evidence in any judicial or administrative proceeding. Information contained in such records shall not be discoverable or admissible at trial...” (Emphasis added.) Kansas risk management statutes require medical care facilities to establish an internal risk management program and reporting system. Medical care facilities are required to investigate incidents in a peer review process and report certain incidents to appropriate state licensing authorities. K.S.A. 65-4922, 65-4923 and 65-4924. This legislation’s purpose was to provide and regulate certain aspects of health care delivery to protect the public’s general health, safety and welfare. K.S.A. § 65-4929.

The Kansas Supreme Court, in a medical malpractice lawsuit, concluded that a peer review committee’s decision-making process, conclusions, and final decisions are protected from discovery by the statutory privilege. *Adams v. St. Francis Regional Medical Center*, 955 P.2d 1169, 1186-1187 (Kan. 1998). In *Adams*, the court held that plaintiffs were only entitled to access to “relevant facts” obtained in peer review.

*Id.* The Court also held that the trial court judge must conduct an *in camera* inspection and craft a protective order which would permit plaintiffs access to the “relevant facts” but redact information about the committee’s deliberations, conclusions and final decisions. *Id.*

### Weingarten Rights and Peer Review

The NLRB rejected the hospital’s position on refusing union representation during a peer review meeting; it held that employees have *Weingarten* rights if they are faced with attending a Committee meeting and reasonably believe that professional discipline can be imposed as a result of that review. The NLRB rejected the argument that *Weingarten* rights do not apply because peer review committees reports relate to state licensing only and not disciplinary action by the employer. The NLRB unanimously held that a *Weingarten* right to union representation before a peer review committee occurs because the Committee had an obligation to refer certain offenses to the Kansas State Board of Nursing which could cost employees their licenses – and employees without licenses would lose their jobs as nurses at the hospital.

Once a nurse requested union representation in peer review, the NLRB held the employer had three options: (1) grant the request; (2) cease or not conduct the interview; or (3) offer the nurse a choice of either conducting the interview unaccompanied by a union representative or have no interview with the Committee. For hospitals determined not to have union stewards sitting in with peer review committees, option three would seem to be most appropriate, as whichever choice the nurse makes, there will be no outsider at the Committee meeting.





There are other options to limit union participation in peer review. Hospital employers may limit employee interviews to factual issues – or opt to use written questions to the professional in lieu of an interview. All deliberations, decision-making processes, conclusions, and final decisions should be conducted outside the presence of anyone who is not a designated member of the Committee to protect confidentiality and privilege.

### Information about Peer Review

A majority of the NLRB also rejected the Hospital's argument that the union had no right to information about the Committee, the record of peer review "discipline" and all records of nurses called before the Committee. The NLRB, after reviewing state law, found that the Committee did not meet its burden to establish a legitimate and substantial confidentiality interest in the requested information. The NLRB required all requested documents to be produced and all information disclosed.

The dissent said the majority gave "short shrift...to the policies behind (peer review) statutes and (criticized the majority for its) "refusal to give such policies significant weight..." The dissent argued that the majority was improperly second guessing "the state's determination that non-disclosure of some information is fundamental to its regulatory scheme" and objected to requiring the Committee to provide documents and information about past cases. The dissent argued that the hospital had a "legitimate confidentiality interest in maintaining the integrity of...the process by protecting the candor required for peer review to effectively function, which...safeguards and improves public health outcomes." The dissent believed the public health interest "outweighs" an employer's typical obligation to disclose documents.

The majority and dissent had differing interpretations of the *Adams* case. The majority acknowledges that deliberations of the committee are privileged but ultimately requires the hospital to produce all of the information and documents requested by the union. The dissent contended that *Adams* protection of peer review information is broader.

The dissent argued that *Adams* only obligated the trial court to conduct an *in camera* inspection and create a protective order to permit plaintiffs access to the facts of the event, while redacting protected information. Thus, the dissent would have found that employees' discipline as well as records "created for and submitted to the Committee for purposes of its decision-making" were privileged.

However, the dissent conceded the majority properly required the hospital to disclose general procedural information on peer review to the union. The dissent also stated that the hospital should have offered to engage in a bargaining with the union about the confidentiality of those prior peer review matters to see if some accommodation could be reached.

### The Hospital's Policy Prohibiting Discussion of Peer Review

Lastly, the employer had a written rule which prohibited employees from discussing ongoing investigations by peer review committees and "reportable incidents" with co-workers which the NLRB found included not only events which occurred at peer review committee meetings but events underlying peer review investigations. The NLRB believed that the rule prohibited employees from discussing the events of peer review investigations and the events underlying the peer review investigations; this, the NLRB held, interfered with the fundamental right to engage in concerted activities, including an employee's right to share information about terms and conditions of employment with co-workers. The NLRB unanimously held there was no "legitimate basis" for those prohibitions and that the rule was unlawful under the National Labor Relations Act (NLRA). The NLRB relied upon the failure of



the Kansas peer review statute to specifically require confidentiality by employees participating in peer review.

The NLRB's decision rejecting confidentiality for employees ignores the potential waiver of peer review privilege associated with employees discussing peer review with co-workers. Hospitals desiring to preserve the privilege under their state law should consider appointing non-employees or supervisors (who are not covered by Section 7 rights) to peer review committees.

The NLRB's decision prohibiting the hospital's confidentiality rule requiring its employees not to discuss peer review applies to all hospitals, not just those with union represented professionals. Section 7 rights of employees to discuss terms and conditions of employment apply to all employees, not just represented employees.

## Conclusion

This decision will impact the manner in which health care employers, particularly those with represented professionals, conduct peer review; it will also diminish the employer and employees' expectation of confidentiality of the process. Although this decision may be modified or denied enforcement as a result of an appeal to a Circuit Court of Appeals, employers with represented professionals should review their applicable state peer review statute, peer review policies, and documents utilized in the peer review process, to develop strategies to manage requests for information and *Weingarten* requests. Such an analysis can protect the important policies of peer review and minimize the risk of NLRB challenges to the process. ■



## For More Information

For more information regarding this alert, please contact one of the authors, a member of the Polsinelli's Health Care practice, or your Polsinelli attorney.

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<sup>1</sup> *U.S. News & World Report*, November 2014

<sup>2</sup> *Modern Healthcare*, June 2015

<sup>3</sup> *Chambers USA: America's Leading Lawyers for Business*, May 2015

## About Polsinelli

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