

House Bill 5829 (Substitute H-2)
First Analysis (12-4-02)

Sponsor: Rep. Barb Vander Veen
Committee: Health Policy

THE APPARENT PROBLEM:

The Whistleblowers' Protection Act, Public Act 469 of 1980, prohibits an employer from discharging, threatening, or otherwise discriminating against employees who report a known or suspected violation of a law, administrative regulation or rule, or a local ordinance. Whistleblowers who believe that their employer has retaliated against them for reporting such a violation may sue for an injunction and damages, but over the years, health care workers have argued that these "after-the-fact" remedies fail to adequately protect workers who want to report problems anonymously while their complaints are being investigated. Although it is arguable that all workers suffer from gaps in the protection provided by the whistleblowers' act, health care workers have been particularly active in trying to gain additional protections because unsafe activities and conditions in a health care setting threaten their patients' lives and their own lives in some cases. As a result of their efforts, various whistleblower protections for health care workers have been added to the health code. Now the health code generally prohibits health facilities and agencies from retaliating against employees who testify in a malpractice trial or who report malpractice or a violation of the code's articles dealing with controlled substances, occupations, and health facilities and agencies to the Department of Consumer and Industry Services (CIS).

With respect to Article 17, which concerns health facilities and agencies, the health code grants immunity from civil or criminal liability and protection under the whistleblowers' act to persons employed by or under contract to a health facility or agency (or to any other persons acting in good faith) who do any of the following: make a report or complaint, including a report or complaint of a violation of Article 17 or a rule promulgated under the article; assist in originating, investigating, or preparing a report or complaint; or assist CIS in carrying out its duties under the article. The code requires CIS to protect the confidentiality of complaints made by health care workers regarding violations of the article unless and until the

complainant is required to testify in disciplinary proceedings.

Representatives of the Michigan Nurses Association have observed that these protections for health care workers reports focus heavily on workers who report or make complaints about *illegal* activities and conditions in their workplaces. Although the health code states that a person is protected if he or she, acting in good faith, makes a report or complaint "including, but not limited to," a violation of Article 17 or a rule promulgated under the article, it is unclear whether someone is protected if he or she makes a report or complaint about an unsafe condition or practice that is not illegal. According to committee testimony, such conditions and practices are not uncommon. For instance, many hospitals are suffering from a shortage of nurses, and at least some require existing staff to compensate for the shortage by working overtime. In this case, a hospital may be creating a climate where nurses are more likely to misread a patient's chart or make other mistakes, but the hospital's inability to hire a sufficient number of nurses may not constitute a violation of a law or administrative rule. If the condition threatens to cause workplace injuries, CIS may be able to investigate the matter under the Michigan Occupational Safety and Health Act (MIOSHA), but for threats to patient safety, CIS has little if any authority to order a hospital to change an unsafe condition or practice unless it constitutes a violation of a law or rule.

The health code already prohibits nursing home workers and administrators from physically, mentally, or emotionally abusing, mistreating, or harmfully neglecting a patient and, as amended by Public Act 11 of 2002, sets forth a process for nursing homes to accept and respond to complaints. Legislation has been introduced to set forth conditions under which persons employed by or under contract to a hospital would be given job protection and immunity from civil and criminal liability if they made a report or complaint

concerning an unsafe, but not illegal, practice or condition in a hospital.

THE CONTENT OF THE BILL:

House Bill 5829 would amend the Public Health Code to specify that immunity from civil and criminal liability and other protections would be granted to a person employed by or under contract to a hospital if the person reported to the Department of Consumer and Industry Services (CIS) unsafe practices or conditions that do not violate Article 17 of the health code or a rule promulgated under that article.

As noted above, the health code currently extends immunity from liability and other protections to health care workers who make reports and complaints. House Bill 5829 would add to these provisions specific protections for hospital workers—i.e., persons employed by or under contract to a hospital licensed under Article 17 of the health code. A hospital worker would be immune from civil or criminal liability that might otherwise be incurred and could not be discharged, threatened, or otherwise discriminated against by the hospital regarding his or her compensation or the terms, conditions, location, or privileges of his or her employment, if he or she reported to CIS, verbally or in writing, an issue related to the hospital that is an unsafe practice or condition that is neither a violation of Article 17 nor a violation of a rule promulgated under Article 17. The bill specifies that these protections would not limit, restrict, or diminish, in any way, the protections afforded under the Whistleblowers' Protection Act.

In general, a hospital worker would be eligible for the immunity and protection only if he or she met both of the following conditions before reporting to CIS the unsafe practice or condition that is not a violation of the article or rule. First, the person would have to have given the hospital 60 days' written notice of the unsafe practice or condition. A person who provided a hospital such written notice could not be discharged, threatened, or otherwise discriminated against by the hospital regarding that person's compensation or the terms, conditions, location, or privileges of his or her employment. Within 60 days after receiving such written notice, the hospital would have to provide a written response to the person who had provided the written notice. Second, the person could not have had any "reasonable expectation" that the hospital had taken or would take timely action to address the unsafe practice or condition. However, the hospital worker would be granted the immunity and protection if he or she was required by law to

report the issue related to the hospital that is an unsafe practice or condition that is not a violation of the article or rule before the expiration of the required 60 days' notice.

Hospitals would be required to post notices and use other appropriate means to keep hospital workers informed of their protections and obligations relative to reports and complaints about violations of the article or rule and other unsafe practices and conditions that do not violate the article or rule. The notices would have to be in a form approved by CIS. The notice would have to be made available on CIS' Internet web site and would have to be posted in one or more "conspicuous places" where notices to hospital workers are customarily posted.

MCL 333.20180

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal impact on the state or on local units of government. (12-4-02)

ARGUMENTS:

For:

Hospital administrators, nurses, and representatives of other hospital workers agree that any unsafe condition or practice is a potential threat to patient well-being and that it should be reported and addressed without any fear that the "whistleblower" will be sued, fired, or demoted. Ensuring that hospital workers who report unsafe conditions or practices--whether or not they are illegal--receive various "whistleblowers' protections" would help Michigan's hospitals deliver the highest possible quality of care to their patients. While it is arguable that the state's health code does not limit protections to those who report illegal activities, the Department of Consumer and Industry Services has limited authority to address conditions or practices that do not violate state law, rules, or regulations. Thus, many hospital workers assume that protections under current law will apply to them only if the conditions or practices they complain about are illegal, and because many hospital workers do not know whether specific conditions or practices are illegal, they are likely to be overly cautious about making any complaints. As a result, patients' well-being is put in jeopardy.

Hospitals want *all of their employees* to contribute to their mission of providing the best possible care to patients, but by reporting a condition or practice that

seems unsafe but is not illegal, an employee would essentially be going behind the hospital's back. When hospitals are engaged in outright illegal activities, the state's interest in protecting health, safety, and welfare of its residents overrides the hospital's interest in solving problems in house. But unsafe conditions and practices that are not illegal should first be reported to the hospital, so that the hospital has a chance to address the worker's concern before bringing regulatory officials into the discussion. Since CIS might not be able to require a hospital to correct an allegedly unsafe condition or practice unless it is illegal anyway, it is important that the hospital and its employees approach such issues collaboratively rather than in a confrontational manner. The bill would establish a cooperative process allowing a hospital worker to make a written report or complaint to the hospital about an unsafe condition or practice that is not illegal and would require the hospital to respond to the worker within 60 days. As long as the worker did this, he or she could not be discharged, threatened, or otherwise discriminated against by the hospital regarding his or her compensation or the terms, conditions, location, or privileges of his or her employment. The bill should satisfy all involved: the employees who would be given not only job protection but also a reminder that their contributions to patients' well being are valuable, the hospitals who would be allowed to address such issues in house, and most importantly, patients, who are the ultimate beneficiaries of increased focus on ensuring the quality of health care.

Response:

Ultimately, it is not clear that the bill would do anything in terms of ensuring that an unsafe practice or condition that is not illegal is addressed. After making a written complaint and then following up with CIS, unless CIS believed that the hospital had violated a law, rule, or regulation, CIS would have no more authority to force a change in behavior than it does under current law. Therefore, it is unclear whether the bill would actually benefit patients.

Reply:

The bill would create a cooperative, collaborative process for addressing safety concerns. Hospitals are interested in addressing such concerns, whether or not government regulators are pressuring them to do so.

Against:

The bill would not necessarily enhance protection for hospital workers who blow the whistle and could, however unintentionally, make employees even less willing to speak up when they see problems whose legal status is not clear. Currently the state health

code does not distinguish between hospital workers who report unsafe conditions or practices that are illegal and those who report unsafe conditions or practices that are not illegal. It simply states that health care employees can make "good faith" complaints regarding perceived violations of laws and regulations covering health facilities and agencies. By creating two clearly separate tracks—one for complaints about illegal activities and another for complaints about legal activities—as well as an exception for hospital workers who report violations of other laws, such as the Michigan Occupational Safety and Health Act, the bill would put the onus on hospital workers to determine the legal status of various activities. This would increase the uncertainty and the perceived risks for an employee who believes a condition to be unsafe and yet does not know whether or not it is illegal. Hospital employees should be allowed to report all such conditions to CIS and let CIS determine which conditions or actions violate the health code or other laws, which are legal but unsafe and in need of rectification, and which are simply spurious concerns or malicious attempts to sully the hospital's image. As written, the bill seems to be focused on protecting hospitals from potential complaints that may eventually prove mistaken or misguided rather than ensuring that hospital workers feel comfortable reporting problems and erring on the side of caution.

Although the bill states that the protections afforded under the new provisions would not limit, restrict, or diminish the protections afforded under the Whistleblowers' Protection Act, a worker would be protected in the case of a report or complaint concerning an unsafe, but legal, practice or condition only in very narrow circumstances. The person would have to give the hospital 60 days' written notice of the problem. Requiring a complainant to provide written notice, which is not required under the current law, would force a complainant to give up his or her anonymity. Unless workers can make complaints anonymously, they will not truly feel protected from potential backlash. Also, many lower-level hospital workers may feel intimidated by having to write a complaint. Further, the bill would specify that a complainant could have no reasonable expectation that the hospital had taken or would take timely action to address the problem, but it is unclear what constitutes a "reasonable expectation". For instance, what would happen if the hospital responded *verbally* to the complainant within the 60-day period, saying that the hospital was still looking into the matter and would respond in writing as soon as it had completed its investigation? Would a worker who received such a response have a

“reasonable” expectation that the hospital would take timely action to address the issue?

Perhaps what hospital workers and employees of other health facilities and agencies really need is an employee education campaign to make employees aware of their rights under current law. If not, leaving the law alone is preferable to changing it in the ways that the bill proposes.

Response:

The bill states that the new protections would not limit, restrict, or diminish, in any way, the protections afforded under the Whistleblowers’ Protection Act. A worker who reported an unsafe condition or practice to CIS in good faith, not knowing whether or not it was illegal, could still do so anonymously, unless and until disciplinary proceedings were to be held. By this point, it would be clear that CIS regarded the matter as a violation of law or rule. If it was not a violation, CIS would probably suggest that the worker follow the new procedure by giving the hospital 60 days’ written notice. Either way, the intent of the bill is clearly to encourage cooperation between hospitals and their employees when conditions or practices are unsafe but not illegal, while continuing to protect anyone who makes a good faith report or complaint about an unsafe condition or practice to CIS.

POSITIONS:

The Michigan Nurses Association supports the bill. (12-3-02)

The Service Employees International Union supports the bill. (12-4-02)

A representative of the Michigan Health and Hospital Association testified in support of the bill. (12-3-02)

The Department of Consumer and Industry Services does not have an official position on the bill, but does not object to the bill in concept. (12-4-02)

A representative of the Michigan Campaign for Quality Care testified in opposition to the bill. (12-3-02)

Analyst: J. Caver

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.