

WSR 21-19-017

PROPOSED RULES

DEPARTMENT OF HEALTH

[Filed September 7, 2021, 11:23 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 20-07-054.

Title of Rule and Other Identifying Information: Chapter 246-15 WAC, Whistleblower complaints in health care settings. The department of health (department) is proposing amendments to sections of this chapter to implement SHB 1049 (chapter 62, Laws of 2019), amending RCW 43.70.075, and to ensure the rules are clear, up to date, and align with best practices.

Hearing Location(s): On November 2, 2021, at 10:00 a.m. In response to the coronavirus disease 2019 (COVID-19), the department will not provide a physical location for this hearing to promote social distancing and the safety of the citizens of Washington state. A virtual public hearing, without a physical meeting space, will be held instead. Register in advance for this webinar <https://us02web.zoom.us/join/9211111111>. After registering, you will receive a confirmation email containing information about joining the webinar.

Date of Intended Adoption: November 9, 2021.

Submit Written Comments to: Marlee O'Neill, P.O. Box 47850, Olympia, WA 98504-7850, email <https://fortress.wa.gov/doh/policyreview>, by November 2, 2021.

Assistance for Persons with Disabilities: Contact Marlee O'Neill, phone 360-236-4845, TTY 711, email marlee.oneill@doh.wa.gov, by October 25, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed rules will align chapter 246-15 WAC with RCW 43.70.075 and update procedures. RCW 43.70.075 was amended by SHB 1049 (chapter 62, Laws of 2019). The department is proposing amending the definitions in WAC 246-15-010 for health care facility, improper quality of care, whistleblower, and adding a definition for reprisal or retaliatory action. Proposed amendments to WAC 246-15-020 will align the expanded protection provided to the identity of the whistleblower. Amendments to WAC 246-15-030 will clarify department procedures for filing, investigating, and resolving whistleblower complaints. Housekeeping changes are proposed in WAC 246-15-001 as well.

Reasons Supporting Proposal: Rule making is necessary to align rule definitions and criteria with current law, which expanded whistleblower protections. Rule making will also clarify current procedures for filing, investigating, and resolving whistleblower complaints. These rule updates are needed to ensure consistency and enforceability.

Statutory Authority for Adoption: RCW 43.70.075.

Statute Being Implemented: SHB 1049 codified as RCW 43.70.075.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Department of health, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Marlee O'Neill, 111 Israel Road S.E., Tumwater, WA 98501, 360-236-4845.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rule is exempt from requiring a cost-benefit analysis. RCW 34.05.328 (5)(b)(ii) exempts rules that relate only to internal governmental operations that are not subject to violation by a nongovernment party.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party; and rule content is explicitly and specifically dictated by statute.

September 6, 2021
 Kristin Peterson, JD
 Deputy Secretary
 Policy and Planning
 for Umair A. Shah, MD, MPH
 Secretary

OTS-3160.1

AMENDATORY SECTION (Amending WSR 97-02-013, filed 12/20/96, effective 1/20/97)

WAC 246-15-001 Purpose and scope. (~~(Regulations for whistleblower protection are hereby)~~) The rules in this chapter are adopted pursuant to RCW 43.70.075. The purpose of these (~~(regulations)~~) rules is to protect the identity of persons who communicate in good faith to the department alleging the improper quality of care by a health care facility or provider as defined in this chapter, and set forth the process the department will use in receiving, investigating, and resolving complaints.

[Statutory Authority: RCW 43.70.075 and 43.70.040. WSR 97-02-013, § 246-15-001, filed 12/20/96, effective 1/20/97.]

AMENDATORY SECTION (Amending WSR 14-08-046, filed 3/27/14, effective 4/27/14)

WAC 246-15-010 Definitions. The (~~(words and phrases)~~) definitions in this section apply throughout this chapter (~~(have the following meanings)~~) unless the context clearly indicates otherwise.

(1) "Consumer" means:

(a) An individual receiving health care or services from a health care facility or health care professional;

(b) A person pursuant to RCW 7.70.065 authorized to provide informed consent to health care on behalf of (a) of this subsection who is not competent to consent.

(2) "Department" means the Washington state department of health.

(3) "Employee" means an individual employed by a health care facility or health care professional at the time the:

- (a) Alleged improper quality of care occurred; or
 (b) Alleged improper quality of care is discovered.
- (4) "Good faith" means an honest and reasonable belief in the truth of the allegation.
- (5) "Health care" means any care, service, or procedure provided by a health care facility or a health care provider:
- (a) To diagnose, treat, or maintain a patient's physical or mental condition; or
 (b) That affects the structure or function of the human body.
- (6) "Health care facility" (~~((includes the following))~~) means the following facilities and includes such facilities if owned and operated by a political subdivision or instrumentality of the state, and such other facilities as required by federal law and implementing regulations:
- ~~(a) ((Adult residential rehabilitation centers regulated pursuant to chapter 71.12 RCW;~~
~~(b) Alcoholism treatment facilities regulated pursuant to chapter 71.12 RCW;~~
~~(c) Alcoholism hospitals regulated pursuant to chapter 71.12 RCW;~~
~~(d) Ambulance and aid services regulated pursuant to chapter 18.73 RCW;~~
~~(e) Assisted living facilities regulated pursuant to chapter 18.20 RCW;~~
~~(f) Childbirth centers regulated pursuant to chapter 18.46 RCW;~~
~~(g) Home care agencies regulated pursuant to chapter 70.127 RCW;~~
~~(h)) Ambulatory diagnostic, treatment, or surgical facilities licensed under chapter 70.41 RCW;~~
(b) Ambulatory surgical facilities licensed under chapter 70.230 RCW;
(c) Behavioral health agencies licensed under chapter 71.05 or 71.24 RCW;
(d) Home health agencies ((regulated pursuant to)) licensed under chapter 70.127 RCW;
((i)) (e) Hospices ((agencies regulated pursuant to)) licensed under chapter 70.127 RCW;
((j)) (f) Hospitals ((regulated pursuant to)) licensed under chapter 70.41 RCW;
((k) Pharmacies regulated pursuant to chapter 18.64 RCW;
~~(l)) (g) Kidney disease treatment centers licensed under chapter 70.41 RCW;~~
(h) Nursing homes licensed under chapter 18.51 RCW;
(i) Private psychiatric hospitals ((regulated pursuant to)) licensed under chapter 71.12 RCW; or
((m) Residential treatment facilities for psychiatrically impaired children and youth regulated pursuant to chapter 71.12 RCW;
~~(n)) (j) Rural health care facilities ((regulated pursuant to chapter 70.175 RCW)) as defined in RCW 70.175.020.~~
- (7) "Health care provider," "health care professional," "professional" or "provider" mean a person who is licensed, certified, registered or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.
- (8) "Improper quality of care," (~~((as defined in RCW 43.70.075,))~~) means any practice, procedure, action, or failure to act that violates any state law or rule of the applicable state health licensing authority under Title 18 RCW or chapters 70.41, (~~((70.96A,))~~) 70.127, 70.175, 71.05, 71.12, and 71.24 RCW, and enforced by the department of health.

Each health disciplinary authority as defined in RCW 18.130.040 may, with consultation and interdisciplinary coordination provided by the department, further define improper quality of care. Improper quality of care shall not include good faith personnel actions related to employee performance or actions taken according to established terms and conditions of employment. ((Good faith personnel action will not prevent investigations of alleged improper quality of care.))

(9) "Reprisal" or "retaliatory action" means, but is not limited to:

(a) Denial of adequate staff to perform duties;

(b) Frequent staff changes;

(c) Frequent and undesirable office changes;

(d) Refusal to assign meaningful work;

(e) Unwarranted and unsubstantiated report of misconduct pursuant to Title 18 RCW;

(f) Letters of reprimand or unsatisfactory performance evaluations;

(g) Demotion;

(h) Reduction in pay;

(i) Denial of promotion;

(j) Suspension;

(k) Dismissal;

(l) Denial of employment;

(m) A supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower; or

(n) The revocation, suspension, or reduction of medical staff membership or privileges without following a medical staff sanction process that is consistent with RCW 7.71.050.

(10) "Whistleblower" means a consumer, employee, or health care professional ((who in good faith reports alleged quality of care concerns to the department of health)) including a health care provider as defined in RCW 7.70.020(1) or member of a medical staff at a health care facility, who in good faith reports alleged quality of care concerns to the department of health or initiates, participates, or cooperates in any investigation or administrative proceeding under RCW 43.70.075.

[Statutory Authority: RCW 43.70.075 and 2012 c 10. WSR 14-08-046, § 246-15-010, filed 3/27/14, effective 4/27/14. Statutory Authority: RCW 43.70.075 and 43.70.040. WSR 97-02-013, § 246-15-010, filed 12/20/96, effective 1/20/97.]

AMENDATORY SECTION (Amending WSR 97-02-013, filed 12/20/96, effective 1/20/97)

WAC 246-15-020 Rights and responsibilities—Whistleblower and department. (1) ~~((A person who in good faith communicates a complaint or information as defined in this chapter as provided in RCW 43.70.075 is:~~

~~(a) Immune from civil liability on claims based upon that communication to the department under RCW 4.24.510;~~

~~(b) Entitled to recover costs and reasonable attorneys' fees incurred in establishing a defense under RCW 4.24.510 if prevailing upon the defense; and~~

~~(c) Afforded the protections and remedies of the human rights commission pursuant to chapter 49.60 RCW. The department will refer whistleblowers expressing concern about reprisal or retaliatory action to the human rights commission.~~

~~(2) The department will protect))~~ The identity of the whistleblower ((by revealing it)) remains confidential when, in good faith, the whistleblower:

(a) Complains about the improper quality by a health care provider or in a health care facility;

(b) Initiates any investigation or administrative proceeding about a complaint of improper quality of care; or

(c) Submits a notification or report of an adverse event or an incident to the department under RCW 70.56.020 or to the independent entity under RCW 70.56.040.

(2) A whistleblowers identity will be revealed only:

(a) To appropriate ((department)) government agency staff or disciplining authority member;

(b) By court order; or

(c) If the complaint ((is not)) initiation, notification, or report was not made or done in good faith.

[Statutory Authority: RCW 43.70.075 and 43.70.040. WSR 97-02-013, § 246-15-020, filed 12/20/96, effective 1/20/97.]

AMENDATORY SECTION (Amending WSR 97-02-013, filed 12/20/96, effective 1/20/97)

WAC 246-15-030 Procedures for filing, investigation, and resolution of whistleblower complaints. ~~((In filing, investigating and resolving a whistleblower complaint, the department will follow its usual procedures for complaint processing while protecting a whistleblower's identity consistent with WAC 246-15-020.~~

~~(1) Filing.~~

~~(a) Upon receipt of a complaint from a whistleblower alleging improper quality of care, department staff will enter the complaint into the tracking system for complaints against health care providers or facilities and create a file on that complaint.~~

~~(b) Staff will affix a permanent cover to the letter of complaint, or other form of notice, in the complaint file, noting the statutory citation for protection of identity of the complainant.~~

~~(c) Staff will assess priority of the case and conduct the initial case planning based on the complainant information.~~

~~(2) Investigation.~~

~~(a) For cases assigned to an investigation, staff will develop an investigative plan. The investigator will gather pertinent information and perform other functions as appropriate to the allegation. The investigator may interview witnesses or others with information relevant to the investigation, review records and consult with staff of other agencies.~~

~~(b) At the conclusion of the investigation, the investigator will prepare the necessary documents, such as an investigative report summarizing the findings, and other documents necessary for the department to take further action.~~

~~(3) Resolution.))~~ (1) In filing, investigating, and resolving a whistleblower complaint, the department will protect a whistleblower's identity consistent with WAC 246-15-020.

~~(2) The regulatory authority ((for the health facility or provider)) will:~~

~~(a) Assess complaints based on potential imminent danger to the public and prioritize based on the initial determination;~~

~~(b) Review investigative findings to determine whether a violation of any statutes or rules occurred; and~~

~~((b)) (c) Take appropriate disciplinary action ((as necessary;~~

~~(c) Ensure upon case closure, that the permanent cover affixed in subsection (1)(c) of this section will remain;~~

~~(d) Will code or obliterate references to the whistleblower complainant in investigative materials or in the investigative report as necessary to protect the whistleblower's identity prior to any public disclosure; and~~

~~(e) Make the case file available to the public upon case closure, subject to public disclosure and other relevant laws))~~ or close the case.

[Statutory Authority: RCW 43.70.075 and 43.70.040. WSR 97-02-013, § 246-15-030, filed 12/20/96, effective 1/20/97.]