

**DEPARTMENT OF HEALTH**

**NOTICE OF FINAL RULEMAKING**

The Director of the Department of Health, pursuant to the authority set forth in Section 5(a) of the Health-Care and Community Residence Facility Hospice and Home Care Licensure Act of 1983, effective February 24, 1984 (D.C. Law 5-48; D.C. Official Code § 44-504(a) (2012 Repl. & 2019 Supp.)), as amended by the Health-Care Reporting Amendment Act of 2020, effective June 24, 2020 (D.C. Law 23-116, 67 DCR 8977; D.C. Official Code §§ 44-508, 509) (“Amendment”), and in accordance with Mayor’s Order 98-137, dated August 20, 1998, hereby gives notice of the adoption of a new Chapter 25, entitled “Health Professional Reporting Requirements”, to Subtitle B (Public Health and Medicine) of Title 22 (Health) of the District of Columbia Municipal Regulations (DCMR) and a new Section 3610 (Health Professional and Health Employer Reporting Infractions) to Chapter 36 (Department of Health (DOH) Infractions) of Title 16 (Consumers, Commercial Practices, and Civil Infractions) of the DCMR.

The adoption of Chapter 25 is necessary to implement the Amendment which, among other things, requires all licensed, registered or certified health professionals and all employers of licensed, certified or registered health professionals to report certain disciplinary or other actions to the respective authorities within specified timeframes. This reporting requirement is necessary so that a health professional whose employment is terminated cannot simply be rehired by another employer without the respective Board or other employers being aware of potential safety issues. While there had been a reporting requirement previously for employers of physicians, there were no listed enforcement mechanisms, which made enforcement of non-licensed health care employers difficult. The Amendment also creates a reporting requirement for all licensed, registered or certified health professionals, a requirement that previously was limited to licensed physicians.

The Proposed Rulemaking was published in the *D.C. Register* on July 23, 2021, at 68 DCR 007257. No comments were received and no changes have been made to the proposed rulemaking. This rulemaking was adopted as final on September 29, 2021 and shall become effective upon publication in the *District of Columbia Register*.

**Chapter 25, HEALTH PROFESSIONAL REPORTING REQUIREMENTS, of Subtitle B, PUBLIC HEALTH AND MEDICINE, of Title 22 DCMR, HEALTH, is added to read as follows:**

**2500 GENERAL PROVISIONS**

2500.1 This chapter requires any health professional, and any employer of a health professional, in the District of Columbia to timely report certain actions taken by or against the health professional to the board, commission or authority (“authority”) responsible for licensing, registering, or certifying the health professional.

2500.2 These reporting requirements will ensure that the appropriate authority is notified when a health professional has certain actions taken against him or her as a result

of his or her actions. The appropriate authority is authorized to take necessary action to ensure the health professional does not engage in unsafe practices which may endanger members of the public.

2500.3 Failure to comply with the reporting requirements in this chapter may lead to disciplinary actions as outlined below.

## **2501 REPORTING REQUIREMENTS FOR HEALTH PROFESSIONALS**

2501.1 Health professionals are required to submit a report to the board, commission or authority responsible for licensing, registering or certifying the health professional within ten (10) business days of any of the following occurrences:

- (a) The health professional obtains knowledge that a health care licensing authority of another state has taken disciplinary action against him or her; or
- (b) The health care professional has been:
  - (i) Named in a malpractice suit and received notice of a judgment against him or her in that suit; or
  - (ii) Convicted of a crime; or
  - (iii) A party to a settlement, whether or not confidential, stemming from a malpractice claim to be paid by the health professional, an insurer, or other entity on behalf of the health professional; or
- (c) The health professional's employer has:
  - (i) For reasons related to the health professional's clinical practice or employment standards:
    - a. Reduced, suspended, revoked, not renewed the health professional's employment or staff membership; or
    - b. Involuntarily terminated or restricted the health professional's employment or staff membership; or
  - (ii) Asked the health professional to resign because his or her conduct has been determined to violate D.C. Official Code § 3-1205.14 including professional incompetence; or
- (d) The health professional has voluntarily resigned or been asked by his or her employer to resign, while being investigated by the employer for conduct

in violation of D.C. Official Code § 3-1205.14, including professional incompetence.

## **2502 REPORTING REQUIREMENTS FOR EMPLOYERS**

2502.1 An employer of a licensed, certified or registered health professional shall submit a report notifying the board, commission or authority within ten (10) business days after taking any of the following actions:

- (a) For reasons related to the health professional's clinical practice or employment standards:
  - (i) Reduced, suspended, revoked or not renewed the health professional's clinical privileges; or
  - (ii) Involuntarily terminated or restricted the health professional's employment or staff membership; or
- (b) Asked the health professional to resign because his or her conduct has been determined to have committed a violation of D.C. Official Code § 3-1205.14, including professional incompetence; or
- (c) The health professional has voluntarily resigned, or been asked by the employer to resign, while being investigated by the employer for conduct in violation of D.C. Official Code § 3-1205.14, including professional incompetence.

2502.2 If the employer has temporarily suspended or required the relinquishment of privileges of a health professional while he or she enters and successfully completes a prescribed program of education or rehabilitation, no report needs to be made. However, if there is no reasonable expectation that the health professional will enter and successfully complete a prescribed program of education or rehabilitation, the employer shall submit a report immediately in accordance with Section 2503.

## **2503 REPORTS**

2503.1 Health professionals and employers are required to submit a report to the appropriate board, commission, or authority within ten (10) business days of any of the occurrences specified in §§ 2501 or 2502.

2503.2 Reports shall be submitted by registered or certified mail, return receipt requested, or by courier service, commercial carrier, personal service, or via e-mail to a secure e-mail address(es) identified by the Department.

2503.3 Reports shall include all relevant information including any investigative reports, witness statements, medical records and correspondence.

2503.4 Records reported and obtained as a result of this requirement shall remain confidential and not be disclosed except as otherwise authorized or required by law. Submission of records does not constitute a waiver of confidentiality.

2503.5 For any report submitted pursuant to the entry of a confidential settlement, the health professional shall not include any details required by the settlement to be kept confidential.

## **2504 IMMUNITY**

2504.1 The employer, or employee of the employer, who acting in good faith makes a report pursuant to this chapter, shall have immunity from administrative, civil, or criminal liability that might otherwise be incurred or imposed with respect to making the report. The same immunity shall extend to participation in any administrative or judicial proceeding involving the report.

2504.2 In all administrative, civil, or criminal proceedings resulting from the report, there shall be a rebuttable presumption that the maker of the report acted in good faith.

## **2505 ENFORCEMENT**

2505.1 Failure of either the employer or the health professional to submit a required report in accordance with this chapter to notify the proper authorities of actions identified in this chapter may result in the imposition of fines.

2505.2 The Director or the appropriate board, commission or authority may issue a Notice of Infraction (NOI) to the employer or health professional imposing a civil fine whenever the Director or board, commission or authority has reasonable grounds to believe the employer or health professional is in violation of a requirement of this title.

2505.3 An NOI shall be in writing in a form prescribed by the Director and shall include:

- (a) The name of the health provider or employer (“respondent”);
- (b) A citation or reference to the provision of this title that the respondent has violated;
- (c) The alleged event that occurred that was required to be reported;
- (d) The amount of the civil fine applicable to the infraction;
- (e) A statement that:

- (1) The fine must be paid within fifteen (15) calendar days of the date that the NOI has been served on the respondent;
- (2) The respondent has the right to request a hearing before the Office of Administrative Hearings (“OAH”); and
- (3) If the respondent fails to pay the fine or request a hearing within fifteen (15) calendar days of the date the NOI is served on the respondent, a penalty equal to the amount of the fine may be imposed; and

(f) Any other information the Director may require.

2505.4 Each NOI shall be served and filed in the manner prescribed by 16 DCMR § 3102.

2505.5 In response to an NOI, a respondent shall file a written answer with OAH within fifteen (15) calendar days of the date the NOI is served on the respondent. The answer shall:

- (a) Admit the infraction and pay the fine;
- (b) Admit the infraction with an explanation, and provide any supporting documentation; or
- (c) Deny the infraction and request a hearing.

2505.6 If a respondent admits an infraction in the NOI, the respondent shall include payment of the fine with the answer. If respondent pays the stated fine but fails to indicate a specific answer, the respondent shall be deemed to have admitted the infraction.

2505.7 If a respondent submits a written answer to OAH but does not pay the stated fine and fails to state an answer as required by § 2505.4, the respondent shall be deemed to have denied the infraction.

2505.8 If the respondent admits an infraction with an explanation, the respondent shall state in the written answer whether the respondent requests a hearing on the papers or an in-person hearing. The OAH may hold an in-person hearing in its sole discretion.

2505.9 If a respondent denies an infraction, OAH may schedule an in-person hearing in accordance with its rules.

2505.10 If a respondent does not answer the NOI within fifteen (15) calendar days:

- (a) OAH shall issue a default order; and

- (b) A civil penalty equal to double the amount of the fine imposed by the NOI shall be imposed by OAH in the default order.

2505.11 If a respondent fails to answer an NOI in a timely manner, the respondent shall not have a right to a hearing on the NOI, unless the respondent shows good cause for the failure to answer the NOI in a timely manner.

2505.12 If a respondent challenges an NOI as defective on its face, an administrative law judge (“ALJ”) within OAH may review the NOI prior to a hearing and, if the ALJ determines that the NOI is defective on its face, dismiss the NOI. If the ALJ does not dismiss the NOI, the respondent shall be deemed to have denied the infraction and the OAH shall schedule a hearing. The respondent's evidence presented in support of the denial may include evidence on whether the NOI is defective.

2505.13 In a proceeding challenging the imposition of a fine for failure to comply with these reporting requirements, the employer or the health professional has the burden of proving that the report was sent in accordance with the requirements of this chapter if the board, commission or authority states that it did not receive the report.

2505.14 A civil penalty, including a fine, may be downwardly modified by OAH if:

- (a) The downward modification is not inconsistent with the provision of this title or other applicable law that is the basis for the penalty;
- (b) The Director is provided with an opportunity to present to OAH its opinion on a proposed downward modification or fine reduction; and
- (c) The downward modification is based on a consideration of all relevant mitigating and aggravating factors.

2505.15 The schedule of fines for failure to submit a required report is:

- (a) For the first violation: \$ 2,500;
- (b) For the second violation: \$ 5,000;
- (c) For the third and subsequent violations: \$ 10,000.

## 2599 DEFINITIONS

2599.1 As used in this chapter, the following terms have the meaning ascribed:

**Board** - the Board of Audiology and Speech-Language Pathology, the Board of Chiropractic, the Board of Dentistry, the Board of Dietetics and Nutrition, the Board of Marriage and Family Therapy, the Board of Medicine, the

Board of Nursing, the Board of Long-Term Care Administration, the Board of Occupational Therapy, the Board of Optometry, the Board of Pharmacy, the Board of Physical Therapy, the Board of Podiatry, the Board of Professional Counseling, the Board of Psychology, the Board of Respiratory Care, the Board of Social Work, or the Board of Veterinary Medicine, all as established by the Health Occupations Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code §§ 3-1201.01 *et seq.*) as amended.

**Department** – the Department of Health or DC Health.

**Director** – the Director of the District of Columbia Department of Health.

**Employer** – any entity, including a facility, agency, assisted living residence, private office, health care provider, or group home in the District of Columbia that employs health care professionals or utilizes the services of a health professional who is contracted with a third party or is self-employed, including those engaged in the practice of pharmacy. This definition does not include the private person who, for his or her own health needs, has contracted directly with a health professional.

**Health professional** – a person licensed, registered, certified, or permitted to practice a health occupation regulated by a licensing board, commission or authority in the District of Columbia.

**Professional incompetence** – a health professional’s unfitness to continue in the health professional’s profession, or to provide one or more services ordinarily provided as part of the profession, as demonstrated by:

- (a) A lack of knowledge, skill or judgment; or
- (b) Disregard for the welfare of a patient or client.

**A new Section 3610, HEALTH PROFESSIONAL AND HEALTH EMPLOYER REPORTING INFRACTIONS, is added to Chapter 36, DEPARTMENT OF HEALTH (DOH) INFRACTIONS, of Title 16 DCMR, CONSUMERS, COMMERCIAL PRACTICES, AND CIVIL INFRACTIONS, to read as follows:**

**3610 HEALTH PROFESSIONAL AND HEALTH EMPLOYER REPORTING INFRACTIONS**

3610.1 Violation of any of the following provisions shall result in a \$2,500 fine for the first offense:

- (a) 22-B DCMR § 2501 (failure of a health professional to report disciplinary action, legal action or employment action against him or her); and

- (b) 22-B DCMR § 2502 (failure of an employer to report an action taken against a health professional).

3610.2 Violation of any of the following provisions shall result in a \$5,000 fine for the second offense:

- (a) 22-B DCMR § 2501 (failure of a health professional to report disciplinary action, legal action or employment action against him or her); and
- (b) 22-B DCMR § 2502 (failure of an employer to report an action taken against a health professional).

3610.3 Violation of any of the following provisions shall result in a \$10,000 fine for the third offense:

- (a) 22-B DCMR § 2501 (failure of a health professional to report disciplinary action, legal action or employment action against him or her); and
- (b) 22-B DCMR § 2502 (failure of an employer to report an action taken against a health professional).

3610.4 Fines issued under this chapter shall not preclude any other criminal or civil penalty or enforcement action provided by District law.

3610.5 For purposes of enforcement of this Chapter pursuant to Chapter 31 of this Title, the term “Director” shall mean the Director of the District of Columbia Department of Health or his or her designee.