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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 847
OREGON MEDICAL BOARD

FILED

04/09/2024 4:44 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Clarifies a reporting timeframe, updates NCCAOM code of ethics, and amends definition of unprofessional conduct.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 05/22/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

The proposed rule amendments are needed to (1) Clarify that a licensee and health care facility must report a voluntary withdrawal from practice, resignation, or limitation of privileges while the licensee is under investigation within 30 calendar days. The 30-day requirement aligns with the ORS 677.172(1) requirement that all licensees notify the Board of any practice address changes within 30 days. (2) Update the National Certification Commission for Acupuncture and Oriental Medicine's (NCCAOM) code of ethics to the 2023 version. (3) Update the definition of "unprofessional conduct" to include within the practice of acupuncture the failure to meet the standard of care. (4) Update the definition of "unprofessional conduct" to include discrimination in the practice of medicine, podiatry, and acupuncture, which would make discrimination a ground for discipline. (5) Update an outdated "Board of Medical Examiners" reference in OAR 847-010-0070.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

ORS 677, https://www.oregonlegislature.gov/bills_laws/ors/ors677.html
NCCAOM Code of Ethics, November 2023, https://www.nccaom.org/wp-content/uploads/pdf/NCCAOM_Code_of_Ethics_Nov-2023.pdf

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The proposed rule amendments update the definition of "unprofessional conduct" to include discrimination in the practice of medicine, podiatry, and acupuncture, which would make discrimination a ground for discipline. The proposed rule may favorably impact racial equity by making discrimination a ground for discipline for OMB licensees. It is not known how the other proposed rule amendments will impact racial equity in the state.

FISCAL AND ECONOMIC IMPACT:

The proposed rule amendment will have a minimal fiscal and economic impact to the Oregon Medical Board, the OMB's licensees, and facilities where OMB licensees practice.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) In general, the rule amendment will have no economic impact on state agencies, units of local government, or the public. There may be a minimal impact to the OMB based on expanding the definition of "unprofessional conduct" which could result in additional board investigations. The rule will impact licensees who are investigated under a new ground for "unprofessional conduct." (2) The rule amendment applies to individual licensees of the Oregon Medical Board; small businesses are not eligible for a Board license. (b) The rulemaking imposes no additional mandatory reporting, recordkeeping or other administrative requirements on small businesses. (c) The rulemaking imposes no additional requirements regarding equipment, supplies, labor or administration.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Members of the Board who were consulted in the development of the rule represent small businesses. The rule was reviewed by the Administrative Affairs Committee of the Board on March 13, 2024, as well as the full Board at its quarterly meeting on April 4, 2024.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The rule was reviewed by the Administrative Affairs Committee of the Board on March 13, 2024, as well as the full Board at its quarterly meeting on April 4, 2024. Board members represent the interests of persons and communities likely to be affected by a proposed rule. Overall, board members are licensees of the Oregon Medical Board or public members who represent Oregon patients.

RULES PROPOSED:

847-010-0070, 847-010-0073

AMEND: 847-010-0070

RULE SUMMARY: The proposed rule amendment updates an outdated "Board of Medical Examiners" reference to the "Board."

CHANGES TO RULE:

847-010-0070

Competency Examination ¶¶

(1) Whenever the Board of Medical Examiners orders a medical competency examination pursuant to ORS 677.420, it may require or administer one, all, or any combination of the following examinations:¶¶

(a) The Special Purpose Examination (SPEX);¶¶

(b) The Comprehensive Osteopathic Medical Variable-Purpose Examination (COMVEX);¶¶

(c) Oral examination;¶¶

(d) Any other examination that the Board determines appropriate.¶¶

(2) Failure to achieve a passing grade on any examination shall constitute grounds for suspension or revocation of examinee's license on the grounds of Manifest Incapacity to Practice Medicine as provided by ORS 677.190(15).¶¶

(3) If an oral examination is ordered by the Board, an Examination Panel shall be appointed. The examination shall include questions which test basic knowledge and also test for knowledge expected of a physician with a practice

similar in nature to that of the examinee's. The panel shall establish a system for weighing the score for each question in the examination. After it is prepared, the examination shall be submitted to the Board for review and approval.¶¶

(4) Appointment of an Examination Panel is required only when administering an oral examination.¶¶

(5) The examinee shall be given no less than two weeks' notice of the date, time and place of any examination to be administered.¶¶

(6) The medical competency examination shall be paid for by the licensee.

Statutory/Other Authority: ORS 677.265

Statutes/Other Implemented: ORS 677.110

AMEND: 847-010-0073

RULE SUMMARY: The proposed rule amendment: (1) Clarifies that a licensee and health care facility must report a voluntary withdrawal from practice, resignation, or limitation of privileges while the licensee is under investigation within 30 calendar days. The 30-day requirement aligns with the ORS 677.172(1) requirement that all licensees notify the Board of any practice address changes within 30 days. (2) Updates the National Certification Commission for Acupuncture and Oriental Medicine's (NCCAOM) code of ethics to the 2023 version. (3) Updates the definition of "unprofessional conduct" to include within the practice of acupuncture the failure to meet the standard of care. (4) Updates the definition of "unprofessional conduct" to include discrimination in the practice of medicine, podiatry, and acupuncture, which would make discrimination a ground for discipline.

CHANGES TO RULE:

847-010-0073

Reporting Requirements ¶

(1) Board licensees and health care facilities must report to the Board as required by ORS 676.150, 677.092, 677.190, and 677.415. These reports include, but are not limited to, the following:¶

(a) A licensee must self-report to the Board:¶

(A) Any conviction of a misdemeanor or felony or any arrest for a felony crime to the Board within 10 days after the conviction or arrest;¶

(B) Any adverse action taken by another licensing jurisdiction or any peer review body, health care institution, professional or medical society or association, governmental agency, law enforcement agency or court for acts or conduct similar to acts or conduct that would constitute grounds for disciplinary action as described in ORS chapter 677;¶

(C) Any official action taken against the licensee within 10 business days of the official action; or¶

(D) A voluntary withdrawal from practice, voluntary resignation from the staff of a health care facility or voluntary limitation of the licensee's staff privileges at a health care facility if the licensee's voluntary action occurs while the licensee is under investigation by the health care facility or its committee for any reason related to possible medical incompetence, unprofessional conduct or physical incapacity or impairment within 30 calendar days.¶

(b) A licensee who has reasonable cause to believe that another state licensed health care professional has engaged in prohibited or unprofessional conduct must report the conduct within 10 working days to the board responsible for the other professional unless disclosure is prohibited by state or federal laws relating to confidentiality or protection of health information.¶

(c) A licensee must report within 10 business days to the Board any information that appears to show that a licensee is or may be medically incompetent or is or may be guilty of unprofessional or dishonorable conduct or is or may be a licensee with a physical incapacity.¶

(d) A health care facility must report to the Board:¶

(A) Any official action taken against a licensee within 10 business days of the date of the official action; or¶

(B) A licensee's voluntary withdrawal from practice, voluntary resignation from the staff of a health care facility or voluntary limitation of the licensee's staff privileges at a health care facility if the licensee's voluntary action occurs while the licensee is under investigation by the health care facility or its committee for any reason related to possible medical incompetence, unprofessional conduct or physical incapacity or impairment within 30 calendar days.¶

(2) For purposes of the statutes, reporting to the Board means making a report to the Board's Investigation Unit or the Board's Executive Director or the Board's Medical Director. Making a report to the Board's Health Professionals' Services Program (HPSP) or HPSP's Medical Director does not satisfy the duty to report to the Board.¶

(3) For the purposes of ORS chapters 676 and 677, the terms medical incompetence, unprofessional conduct, and impaired licensee have the following meanings:¶

(a) Medical Incompetence: A licensee who is medically incompetent is one who is unable to practice medicine with reasonable skill or safety due to lack of knowledge, lack of ability, or impairment. Evidence of medical incompetence shall include:¶

(A) Gross or repeated acts of negligence involving patient care.¶

(B) Failure to achieve a passing score or satisfactory rating on a competency examination or program of evaluation when the examination or evaluation is ordered or directed by the Board or a health care facility.¶

(C) Failure to complete a course or program of remedial education when ordered or directed to do so by the Board or a health care facility, or a medical education or training program.¶

(b) Unprofessional conduct: Unprofessional conduct includes the behavior described in ORS 677.188(4), defined as conduct which is unbecoming to a person licensed by the Board or detrimental to the best interest of the public, and which includes:¶

(A)(i) Any conduct or practice contrary to recognized standards of ethics of the medical, podiatric, or acupuncture professions, or¶

(ii) Any conduct which does or might constitute a danger to the health or safety of a patient or the public, to include a violation of patient boundaries, or¶

(iii) Any conduct or practice which does or might adversely affect a provider's ability to safely and skillfully practice medicine, podiatry, or acupuncture; or¶

(iv) Practicing with a condition that is adversely affecting a provider's ability to safely and skillfully practice medicine, podiatry, or acupuncture.¶

(B) Willful performance of any surgical or medical treatment which is contrary to acceptable medical standards.¶

(C)(i) Willful and repeated ordering or performance of unnecessary laboratory tests or radiologic studies; or¶

(ii) Administration of unnecessary treatment; or ¶

(iii) Employment of outmoded, unproved, or unscientific treatments, except as allowed in ORS 677.190 (1)(b); or¶

(iv) Failing to obtain consultations when failing to do so is not consistent with the standard of care; or¶

(v) Otherwise utilizing medical service for diagnosis or treatment which is or may be considered inappropriate or unnecessary.¶

(D) Fraud in the performance of, or the billing for, medical procedures.¶

(E) Repeated instances of disruptive behavior in the health care setting that could adversely affect the delivery of health care to patients.¶

(F) Sexual misconduct: Licensee sexual misconduct is behavior that exploits the licensee-patient relationship in a sexual way. The behavior is non-diagnostic and non-therapeutic, may be verbal, physical or other behavior, and may include expressions of thoughts and feelings or gestures that are sexual or that reasonably may be construed by a patient as sexual. Sexual misconduct includes but is not limited to:¶

(i) Sexual violation: Licensee-patient sex, whether or not initiated by the patient, and engaging in any conduct with a patient or the patient's immediate family that is sexual or may be reasonably interpreted as sexual, including but not limited to:¶

(I) Sexual intercourse;¶

(II) Genital to genital contact;¶

(III) Oral to genital contact;¶

(IV) Oral to anal contact;¶

(V) Genital to anal contact;¶

(VI) Kissing in a romantic or sexual manner;¶

(VII) Touching breasts, genitals, or any sexualized body part for any purpose other than appropriate examination or treatment, or where the patient has refused or has withdrawn consent;¶

(VIII) Encouraging the patient to masturbate in the presence of the licensee or masturbation by the licensee while the patient is present; or¶

(IX) Offering to provide practice-related services, such as medications, in exchange for sexual favors.¶

(ii) Sexual impropriety: Behavior, gestures, or expressions that are seductive, sexually suggestive, or sexually demeaning to a patient or the patient's immediate family, to include:¶

(I) Sexually exploitative behavior, to include taking, transmitting, viewing, or in any way using photos or any other image of a patient, their family or associates for the prurient interest of others.¶

(II) Intentional viewing in the health care setting of any sexually explicit conduct for prurient interests.¶

(III) Having any involvement with child pornography, which is defined as any visual depiction of a minor (a child younger than 18) engaged in sexually explicit conduct.¶

(IV) Sexually explicit communication in person, by mail, by telephone, or by other electronic means, including but not limited to text message, e-mail, video or social media.¶

(G) Conduct not otherwise allowed by Oregon law which is contrary to or inconsistent with recognized standards of ethics of the medical, podiatric, or acupuncture professions, specifically conduct that is contrary to or inconsistent with:¶

(i) Any principle, opinion, or provision of the American Medical Association's 2016 Code of Ethics.¶

(ii) Ethical standards established by a specialty board as defined in OAR 847-020-0100:¶

(I) In which the licensee is certified, and¶

(II) Which were in place at the time the conduct occurred.¶

(iii) Ethical standards established by the medical college or specialty society:¶

(I) In which the licensee practices or practiced at the time of the conduct, and¶

(II) Which were in effect as of April 7, 2022.¶

(iv) Any provision of the American Osteopathic Association's 2016 Code of Ethics.¶

- (v) Any provision of the American Podiatric Medical Association's 2017 Code of Ethics.¶
- (vi) Any provision of the 2008 (reaffirmed in 2013) American Association of Physician Assistants' Guidelines for Ethical Conduct for the Physician Assistant Profession.¶
- (vii) Any provision of the Oregon Association of Acupuncture and Oriental Medicine's 2008 Code of Ethics.¶
- (viii) Any provision of the National Certification Commission for Acupuncture and Oriental Medicine's 2016~~23~~ Code of Ethics.¶
- (H) Intentionally contacting the known complainant or allowing any person authorized to act on behalf of the licensee to contact the known complainant in regard to the complaint or investigation unless and until the licensee has requested a contested case hearing and the Board has authorized the taking of the complainant's deposition pursuant to ORS 183.425.¶
- (I) In the practice of acupuncture, the failure to meet the standard of care of a reasonably prudent, careful, and skillful practitioner of acupuncture under the same circumstances, in the same or similar community. In the practice of acupuncture, errors of such repetition or magnitude that a willful disregard of practice standards or patient safety may be inferred.¶
- (J) In the practice of medicine, podiatry, or acupuncture, discrimination through unfair treatment characterized by implicit and explicit bias, including microaggressions, or indirect or subtle behaviors that reflect negative attitudes or beliefs about a non-majority group. Discrimination is differences in the quality of healthcare delivered that is not due to access-related factors or clinical needs, preferences, and appropriateness of intervention.¶
- (c) Licensee Impairment: A licensee who is impaired is a licensee who is unable to practice medicine with reasonable skill or safety due to factors which include, but are not limited to:¶
 - (A) The use of alcohol, drugs, prescribed medication, or other substances while on or off duty which causes impairment when on duty, including taking call or supervising other healthcare professionals, regardless of practice setting.¶
 - (B) Mental or emotional illness.¶
 - (C) Physical deterioration or long term illness or injury which adversely affects cognition, motor, or perceptive skills.¶
- (4) For the purposes of the reporting requirements of this rule and ORS 677.415, licensees shall be considered to be impaired if they refuse to undergo an evaluation for mental or physical competence or chemical impairment, or if they resign their privileges to avoid such an evaluation, when the evaluation is ordered or directed by a health care facility or by this Board.¶
- (5) For the purposes of the reporting requirements of this rule and ORS 677.415, official action does not include administrative suspensions of seven or fewer calendar days for failure to maintain or complete records. Administrative suspensions described in this section must be reported as an official action when the suspensions occur more than three times in any 12-month period. ¶
- (6) A report made by a board licensee or the Oregon Medical Association or other health professional association, to include the Osteopathic Physicians and Surgeons of Oregon, Inc, or the Oregon Podiatric Medical Association to the Board under ORS 677.415 shall include the following information:¶
 - (a) The name, title, address and telephone number of the person making the report;¶
 - (b) The information that appears to show that a licensee is or may be medically incompetent, is or may be guilty of unprofessional or dishonorable conduct or is or may be a licensee with an impairment.¶
- (7) A report made by a health care facility to the Board under ORS 677.415 (5) and (6) shall include:¶
 - (a) The name, title, address and telephone number of the health care facility making the report;¶
 - (b) The date of an official action taken against the licensee or the licensee's voluntary action withdrawing from practice, voluntary resignation or voluntary limitation of licensee staff privileges; and¶
 - (c) A description of the official action or the licensee's voluntary action, as appropriate to the report, including:¶
 - (A) The specific restriction, limitation, suspension, loss or denial of the licensee's medical staff privileges and the effective date or term of the restriction, limitation, suspension, loss or denial; or¶
 - (B) The fact that the licensee has voluntarily withdrawn from the practice of medicine or podiatry, voluntarily resigned from the staff of a health care facility or voluntarily limited the licensee's privileges at a health care facility and the effective date of the withdrawal, resignation or limitation.¶
- (8) A report made under ORS 677.415 Section 2 may not include any information that is privileged peer review data, see ORS 41.675.¶
- (9) All required reports shall be made in writing.¶
- (10) Any person who reports or provides information in good faith as required by the statutes is immune from civil liability for making the report.

Statutory/Other Authority: ORS 677.265, 677.417

Statutes/Other Implemented: ORS 676.150, 677.092, 677.190, 677.205, 677.265, 677.415