

Employment Performance Review Excluded from Peer Review Confidentiality

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The Pennsylvania Supreme Court ruled, on March 27, 2018, in **Regenelli v. Boggs, Monogahela Valley Hospital and UPMC/ERMI** that physician performance reviews of an ER physician, who was provided by ERMI to Mon Valley Hospital, performed by a management physician within ERMI, were not protected peer review activities, and therefore the performance reviews were not protected from discovery by a third party malpractice plaintiff for a variety of reasons:

- Peer review conducted by the director of the Mon Valley Emergency Department, employed by ERMI, was not part of the peer review process of Mon Valley Hospital;
- ERMI was not a healthcare provider covered by the Pennsylvania Peer Review Protection Act.
- The contractual agreement between ERMI and Mon Valley Hospital did not create a collaborative peer review organization whose activities would have been protected by the Pennsylvania Peer Review Protection Act.

Although this is only a decision in one state, this decision highlights an issue that Robert Harrison and I presented to a conference of the American Health Lawyers Association in New Orleans in February, 2018, entitled “Peer Review Re-Engineered: The New Paradigm of Employed Physicians and Peer Review”, regarding the protection of performance reviews arising from pay for performance reimbursement programs.

In that presentation, we posit that continuing “economic evaluation” of physicians under pay for performance and value based purchasing arrangements by individuals or entities not covered by a recognized peer review or confidentiality statute risks potential disclosure in third party litigation regarding malpractice, reimbursement, audit, compliance, etc.

The AHLA medical staff credentialing and peer review practice group recently raised this same issue online, to which I submitted the following response:

This question presents several distinct issues, and the answers also depend upon the context of the evaluation.

First, is this for an employed physician, a physician under contract under a payment arrangement such as an ACO, or an independent medical staff member?

Second, is this a quality assessment, a utilization or efficiency assessment or a compensation assessment, i.e., is the employee or the contracted physician receiving a bonus or being penalized for hitting or failing to hit quality marks or targets?

Third, is this assessment being conducted in a quality/peer review context or an HR or financial context?

Fourth, is it the intent of the evaluator to maintain the confidentiality of this evaluation?

In reverse order, if maintaining confidentiality is the significant issue, then only the quality/peer review evaluation will be confidential and then only from outside third parties (but not from the physician). An HR evaluation will presumably be part of the physician’s employee file and accessible under state law and any other type of context provides no confidentiality.

If confidentiality is one of the fundamental requirements, then the evaluation must be done as part of the peer review process as defined by the state peer review confidentiality law, and the peer review process must be modified so that it encompasses these P4P or performance evaluations which would presumably, without some advance planning, not be

part of the peer review process.

If it is simply an incentive or compensation-based evaluation for an employed physician, none of the confidentiality rules would otherwise apply, but you must ask yourself whether you want the failure to hit certain quality targets to be public information.