

PATIENT ADVOCACY PROTECTIONS WHISTLEBLOWER LAWS

Bottom line

Nurses who report situations they believe expose a patient to harm are protected from retaliation and adverse licensure actions.

TNA believes patients are best served when nurses can be patient advocates without fear of retaliation. Advocating for the profession includes supporting a regulatory environment that protects nurses when advocating for their patients. TNA has advocated legislatively for over 20 years to make this a reality for Texas nurses. The table below sets out patient advocacy and whistleblower protections available to Texas nurses (RNs and LVNs) as a result of these TNA initiatives.

Protections from Retaliation

TNA's first legislative initiative to protect the right of nurses to be patient advocates was in 1987, when it successfully advocated for protections for nurses who reported a licensed health care practitioner or facility to an appropriate licensing agency.¹ This was followed by initiatives in 1995 (protections for refusal to engage in reportable conduct), 1997 (safe harbor nursing peer review), 1999 (protections from retaliation through negative job reference), 2002 (protections included in hospital staffing rules for raising staffing concerns), 2003 (protection when reporting patient care concerns within a facility), 2007 (clarifying and enhancing protections), and 2019 (oral request for nursing peer review), among others.²

Remedies if Retaliation Occurs

Sec. 301.413 of the Nursing Practice Act sets out the remedies available to nurses who are subject to retaliation. It authorizes a civil lawsuit for damages (minimum recovery of \$5000), attorney fees, and exemplary damages. It also creates a presumption that any disciplinary action taken against a nurse within 60 days of the nurse's reporting of conduct or raising a patient care concern will be considered retaliation against the nurse. The entity who disciplined or fired the nurse then has the burden of proving otherwise. A nurse also can report a facility or health care practitioner involved in the retaliation to an appropriate licensing agency.

Whistleblower Laws in Texas³

Conduct Covered	Texas Law	Protection from Action Against License	Protection from Retaliation
1. Nurse believes she/he is being requested to engage in conduct that would violate nurse's duty to patient as defined by BON standards of practice and unprofessional conduct rules	Safe Harbor Nursing Peer Review Occ. Code §303.005	Yes	Yes
2. Nurse advised another nurse about rights under safe harbor nursing peer review			
Nurse refusing to engage in conduct that would violate NPA or BON rule or make nurse reportable to BON	Nurse Practice Act Occ. Code §301.352	No	Yes
Nurse reporting concern within facility about patient(s) being exposed to substantial risk of harm due to failure of facility or practitioner to conform to minimum professional standards or regulatory/accreditation standards	Nurse Practice Act Occ. Code §301.4025	N/A	Yes
Nurse reporting of staffing concerns in hospital to nurse staffing advisory committee	Health and Safety Code §257.003 DSHS Rules 25 TAC 113.41(o)(2)(G) & 133.43	N/A	Yes
Nurse reporting a facility or practitioner for exposing a patient to substantial risk of harm due to failure to conform to minimum professional standards or regulatory/accreditation standards	Nurse Practice Act Occ. Code §301.4025	N/A	Yes
Nurse reporting a nurse to BON or to nursing peer review who engages in conduct subject to mandatory reporting	Nurse Practice Act Occ. Code §301.402	N/A	Yes

Things Every Whistleblower Should Know

In Texas, the Nursing Practice Act contains a whistleblower clause. The whistleblower clause protects registered nurses who report concerns about patient safety. If the registered nurse believes in good faith that the actions of a regulated entity (registered nurse, health care facility or other licensed provider) could harm or produce risk of harm to a patient or other person, and reports those concerns to an employer or regulatory authority, the nurse cannot be retaliated against. If in fact, retaliation does occur, the registered nurse has a civil cause of action against the entity who engages in that retaliation. To get more information about this law, contact TNA at 512-452-0645. You can also order TNA's Introduction to the Texas Nursing Practice Act at the online TNA marketplace.

If a registered nurse detects a problem with patient safety or patient rights, they should consider the following checklist before taking action. It is important to protect yourself while in advocacy situations.

- ▶ If you identify an illegal or unethical practice, reserve judgment until you have adequate documentation to establish there is wrongdoing.
- ▶ Do not expect those who are engaged in unethical or illegal behaviors to welcome any questions or concerns you have about the practice.
- ▶ Seek the counsel of someone you trust outside of the situation to provide you with an objective perspective.
- ▶ Before acting, if at all possible, consult with your professional organization or an attorney. Getting consultation can help you understand the laws and regulations that apply to the whistleblowing situation and will help you in taking appropriate steps to solve the problem you have identified.

- ▶ Remember you are not protected in a whistleblower situation from employer retaliation until you blow the whistle.
- ▶ Blowing the whistle means that you report your concern to your employer, the national or state agency responsible for regulating the person or facility, or a law enforcement agency in the case of criminal activity. In some cases, you may also report concerns to national accrediting groups such as JCAHO or NCQA and receive protections as a result of changes to hospital licensing regulations.
- ▶ TNA recommends that all whistle blowing be done in writing to employers and as a formal complaint when notifying state or national agencies of concerns. Concerns expressed in writing should include a record of the date and circumstances under which you brought an issue to the attention of an employer or regulatory agency. The written word provides credibility that a word-of-mouth complaint does not.
- ▶ Document all interactions related to the whistle blowing situation and keep copies for your personal files, including written correspondence related to the situation. Such documentation could include memos that describe the interaction or a personal log of the interactions for future reference.
- ▶ Keep all documentation and interactions objective.
- ▶ Remain calm and do not lose your temper. When those you are documenting become aware of your activities (and they will), they might attempt to provoke you.
- ▶ Remember, blowing the whistle is a very serious matter. The results can be negative for everyone involved so do not frivolously blow the whistle. Make sure you have correct facts before taking action.

¹ Tex. S.B. 1160, 70th Leg., R.S. (1987).

² Tex. H.B. 883, 74th Leg., R.S. (1995); Tex. S.B. 1081, 75th Leg., R.S. (1997); Tex. H.B. 341, 76th Leg., R.S. (1999); 25 Tex. Admin. Code § 133.41 (o)(2) adopted Sept. 1, 2002 (subsequent amendment history omitted); Tex. S.B. 718, 78th Leg., R.S. (2003); Tex. S.B. 993, 80th Leg., R.S. (2007); Tex. H.B. 2410, 86th Leg., R.S. (2019).

³ Information presented does not represent legal advice or constitute all relevant laws.