

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4581**

BY DELEGATES TULLY, HORST, J. JEFFRIES, DEAN, FAST,  
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HONAKER

[Introduced February 08, 2022; Referred to the  
Committee on Health and Human Resources then the  
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
2 designated §21-17-1, §21-17-2, §21-17-3, §21-17-4, §21-17-5, §21-17-6, and §21-17-7,  
3 all relating to establishing a nurse staffing and safe harbor peer review process; defining  
4 safe harbor; establishing protections for nurse licensure under safe harbor; providing for  
5 invocation of safe harbor protections; establishing a withdrawal of request for safe harbor  
6 nursing review; establishing a Safe Harbor Peer Review committee and providing for the  
7 makeup and composition of the committee; providing when to invoke safe harbor and  
8 refuse nursing assignments; defining protection from civil or criminal liability under safe  
9 harbor; and defining CNOs/Nurse Practitioners.

*Be it enacted by the Legislature of West Virginia:*

## **ARTICLE 17. NURSE STAFFING AND SAFE HARBOR REVIEW PROCESS.**

### **§21-17-1. Definition of Safe Harbor.**

1 Safe harbor is a nursing peer review process that a nurse may initiate when asked to  
2 engage in an assignment or conduct that the nurse believes in good faith would potentially result  
3 in a violation of the Nursing Practice Act (NPA) or BON rules or be a violation of the nurse's duty  
4 to a patient. When properly invoked, safe harbor protects a nurse from employer retaliation for  
5 making the request and from discipline by the BON. Safe harbor must be invoked prior to  
6 engaging in the conduct or assignment for which nursing peer review is requested and may be  
7 invoked when the nurse refuses to engage in the conduct or assignment or at any time during the  
8 work period when the initial assignment changes.

9 Examples of when invocation of safe harbor may be appropriate include situations  
10 concerning clinical assignments related to staffing and/or acuity of patients where the nurse  
11 believes patient harm may result or situations when a nurse is requested to engage in  
12 unprofessional or illegal conduct, such as falsifying medical record documents. The latter are  
13 examples of when a prudent nurse would refuse to engage in the unprofessional or illegal conduct  
14 requested.

15 Safe harbor also allows for a nurse to request that a determination be made on the medical  
16 reasonableness of a physician’s order.

**§21-17-2. Applicable protections of nurse licensure under safe harbor.**

1 A nurse who in good faith requests Safe Harbor Nursing Peer Review:

2 (a) May not be disciplined or discriminated against for making the request;

3 (b) May engage in the requested conduct pending the Safe Harbor Nursing Peer Review;

4 and

5 (c) May not be disciplined by the board for engaging in that conduct while the nursing peer  
6 review is pending.

**§21-17-3. Invocation of safe harbor protections.**

1 At the time the nurse is requested to engage in the activity, prior to engaging in the conduct  
2 or assignment, he/she must notify the supervisor making the assignment that the nurse is invoking  
3 safe harbor. The nurse may use any means of recording the initial request for safe harbor in  
4 writing. If a nurse is unable to complete a written form meeting the requirements for a Safe Harbor  
5 Quick Request due to immediate patient care needs, the nurse may orally invoke safe harbor by  
6 notifying the nurse’s supervisor of the request. After receiving oral notification of a request, the  
7 nurse’s supervisor must record in writing the requirements of request, which must be signed and  
8 attested to by the requesting nurse and the nurse’s supervisor who prepared the written record.

9 The information that must be included is the following:

10 (a) The nurse(s) name making the safe harbor request and his/her signature(s);

11 (b) The date and time of the request;

12 (c) The location of where the conduct or assignment is to be completed;

13 (d) The name of the person requesting the conduct or making the assignment;

14 (e) The name of the supervisor recording the request, if applicable;

15 (f) A brief explanation of why safe harbor is being requested; and

16 (g) A description of the collaboration between the nurse and the supervisor, if applicable.

17 This written request may be brief, but before leaving at the end of the work period, the nurse must  
18 submit a Comprehensive Written Request (detailed account) of his/her request for safe harbor.  
19 The comprehensive report shall be sent to the West Virginia Board of Nursing and OHFLAC for  
20 review. If the Safe Harbor Peer Review is related to inadequate staffing, OHFLAC and the West  
21 Virginia Board of Nursing is required to evaluate the facility staffing plan. DHHR and OHFLAC will  
22 establish a Safe Harbor Peer Review committee comprised of 5 West Virginia nurses, in which  
23 not less than 4 are engaged in full time direct care activities. All Safe Harbor Peer Review requests  
24 will be reviewed by OHFLAC and the West Virginia Board of Nursing. A written determination of  
25 findings will be issued within 14 days of filing of a Safe Harbor Peer Review request. The findings  
26 will be recorded in a format and database by OHFLAC and a copy of the finding will be sent to  
27 the nurse requesting the Safe Harbor Peer Review.

**§21-17-4. Withdrawal of request for Safe Harbor Nursing Peer Review.**

1 The nurse's request for Safe Harbor Nursing Peer Review does not become invalid and  
2 the nurse does not have to withdraw his/her request for safe harbor just because a supervisor is  
3 able to respond with adequate staff, equipment, or whatever else was at issue with the original  
4 requested assignment. It is the nurse's choice whether or not he/she wishes to still have a nursing  
5 peer review of the situation.

**§21-17-5. When to invoke safe harbor and refuse nursing assignment.**

1 Safe Harbor Peer Review permits a nurse to refuse an assignment when the nurse  
2 believes in good faith that the requested conduct or assignment would constitute grounds for  
3 reporting the nurse to the board, constitute a minor incident, or constitute another violation of the  
4 NPA or board rules, if the nurse notifies the person at the time of the refusal that the reason for  
5 refusing is the conduct constitutes grounds for reporting him/her to the board or is a violation of  
6 the NPA or a board rule. Nurses and administrators shall maintain a safe environment for  
7 patients/clients and others for whom the nurse is responsible. Safe harbor can assist nurses in  
8 situations when they feel their duty to a patient may be violated by allowing them to accept an

9 assignment without fear of board disciplinary action as they try to deliver the best care possible  
10 to the patient(s).

11 Patients may be better off with the nurse accepting the assignment and providing care to  
12 the best of his/her ability than without the nurse providing any care at all in the vast majority of  
13 cases; however, a nurse should refuse the assignment or requested conduct pending a Safe  
14 Harbor Nursing Peer Review determination if the requested assignment or conduct is one that:

15 (a) Constitutes a criminal act;

16 (b) Constitutes unprofessional conduct; or

17 (c) The nurse lacks the basic knowledge, skills, and abilities necessary to deliver nursing  
18 care that is safe and that meets the minimum standards of care to such an extent that accepting  
19 the assignment would expose one or more patients to an unjustifiable risk of harm.

20 Alternatively, a request for a nurse to accept an assignment when safe harbor was invoked  
21 because the nurse believes the nurse staffing levels are unsafe is an example of conduct the  
22 nurse may engage in pending the nursing peer review's determination since the supervisor  
23 normally could have some reasonable legal or factual basis to support her/his belief that the  
24 requested assignment does not violate a nurse's duty to a patient, even if the nursing peer review  
25 committee ultimately determines otherwise.

26 While the duty of the nurse and administration is to maintain patient safety, each nurse  
27 shall "accept only those nursing assignments that take into consideration client safety and that  
28 are commensurate with the nurse's educational preparation, experience, knowledge, and physical  
29 and emotional ability." It is impossible in the rule-writing process for regulators to anticipate every  
30 possible situation a nurse might face in every practice setting, and every possible scenario where  
31 a nurse may believe in good faith that his/her duty to one or more patients is in greater jeopardy  
32 to accept the assignment than to refuse it. The nurses are urged to consider his/her duty to the  
33 patient(s) as the highest priority in making any determination to accept or refuse an assignment  
34 or requested conduct. The nurse's ability to invoke safe harbor protections is the same whether

35 the nurse accepts or refuses the assignment.

36 The nurse and supervisor are required to collaborate in an effort to identify an assignment  
37 that “is within the nurse’s scope and enhances the delivery of safe patient care” in situations when  
38 a nurse refuses to engage in the conduct or assignment because he/she believes it is beyond  
39 his/her basic knowledge, skills and abilities (i.e., scope of practice). This is based on the premise  
40 that in any staffing crisis, the patients could be better off with the nurse than without the nurse. A  
41 collaborative effort with patient safety as the focus will require the nurse and supervisor to set  
42 aside any personal animosity and to explore additional options that are safer for both the patient(s)  
43 and the nurse(s).

**§21-17-6. Protection from civil or criminal liability under safe harbor.**

1 Safe harbor has no effect on a nurse’s civil or criminal liability for his/her nursing practice.  
2 The BON does not have any authority over civil or criminal liability issues. Safe harbor does  
3 protect the nurse from retaliation by an employer or contracted entity for whom the nurse performs  
4 nursing services. There is no expiration of the protection against retaliatory actions by the  
5 employer, such as, demotion, forced change of shifts, pay cut, or other retaliatory action against  
6 the nurse, when a nurse invokes safe harbor in good faith.

**§21-17-7. Duties of CNOs/Nurse Administrators.**

1 CNOs/Nurse Administrators shall remember that each nurse has a duty to advocate for  
2 patient/client safety. National patient safety organizations, such as the Institute for Safe  
3 Medication Practices, would also be applicable with regard to “best practices” in a given area of  
4 nursing and patient safety. Safe harbor nursing peer review can be an opportunity to take stock  
5 of how nursing and support departments surrounding nursing are organized and how safe patient  
6 care is enhanced or hindered by those systems.

NOTE: The purpose of this bill is to establish a nurse staffing and safe harbor peer review process. The bill defines safe harbor. The bill creates protections for nurse licensure under safe harbor. The bill provides for invocation of safe harbor protections. The bill establishes a withdrawal of request for safe harbor nursing review. The bill provides for when to invoke safe harbor and refuse nursing assignments. The bill establishes a Safe Harbor Peer

Review committee and designates the makeup of that committee. The bill defines protection from civil or criminal liability under safe harbor. Finally, the bill defines the duties of CNOs/Nurse Administrators.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.