BOARD OF REGISTERED NURSING

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> *Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*
>
> — Business and Professions Code § 2708.1

The Board of Registered Nursing (BRN) is a consumer protection agency within the California Department of Consumer Affairs (DCA). Pursuant to the Nursing Practice Act, Business and Professions Code section 2700 et seq., BRN licenses registered nurses (RNs) and certifies advanced practice nurses, including certified nurse-midwives (CNMs), nurse practitioners (NPs), registered nurse anesthetists (CRNAs), clinical nurse specialists (CNSs), and public health nurses (PHNs). In addition to licensing and certification, BRN establishes accreditation requirements for California nursing schools and reviews nursing school criteria. It also receives and investigates complaints against its licensees, taking disciplinary action as appropriate. BRN's regulations implementing the Nursing Practice Act are codified in Division 14, Title 16 of the California Code of Regulations (CCR). As of 2021, BRN licenses over 450,000 RNs and certifies approximately 100,000 advanced practice nurses.

By law, the nine-member Board consists of four public members and five nurse licensees. The licensee members must include two direct-patient care nurses, an advanced practice nurse, a nurse administrator, and a nurse educator. Seven of the members (including all of the RN members) are appointed by the Governor, and two of the public members are appointed by the legislature. The Nursing Practice Act also requires BRN's Executive Officer to be a BRN licensee, a unique requirement among DCA boards.

At this writing, there are four vacancies on the Board, three to be appointed by the Governor—a direct patient care licensee member, and two public members—and one public member appointed by the Senate.

HIGHLIGHTS

California's Healthcare Worker Vaccine Mandate Further Impacts Nursing Shortage

On August 5, 2021, Tomás J. Aragón, the State Public Health Officer & Director of the California Department of Public Health (CDPH), issued an order requiring that all healthcare workers in California be vaccinated against COVID-19 (or to be tested at least once per week). The order followed Governor Newsom's July 26, 2021, announcement of the requirement. Pursuant to the order, workers in specified healthcare facilities are required to have received their first dose of a one-dose regimen vaccine (Johnson & Johnson) or second dose of a two-dose regimen vaccine (Pfizer-BioNTech or Moderna), and facilities are required to comply with the order by September 30, 2021. California is the first state to have a vaccine mandate for healthcare workers, including nurses.

This order came in response to increased outbreaks of COVID-19 caused by the highly transmittable Delta variant. According to CDPH's order, increasing numbers of healthcare workers are among the new positive cases, despite vaccinations having been prioritized for this group when vaccines initially became available. Outbreaks in healthcare settings have frequently been traced to unvaccinated staff members. The CDPH found that California's healthcare system is currently able to address the increase in cases and hospitalizations but that all healthcare workers must be vaccinated to reduce the chance of transmission to vulnerable populations. The mandate applies to

workers in 14 enumerated healthcare facilities, including hospitals, skilled nursing facilities, ambulatory surgery centers, clinics, and doctor offices.

According to the order, healthcare workers can be exempt from the vaccine requirement only if they provide the operator of their facility with a declination form stating either: (1) the worker is declining the vaccination based on religious beliefs, or (2) the worker is excused from receiving any COVID-19 vaccines due to a qualifying medical reason. To be eligible for a qualified medical reason, a worker must provide a written statement, signed by a licensed medical professional practicing under a physician's license, stating that the individual qualifies for the exemption and indicates a probable duration of the worker's inability to receive the vaccine. If a worker is exempt from the vaccine requirement, they must submit to weekly COVID-19 tests. Acute healthcare and long-term care workers must test twice a week, while workers in other healthcare settings must test once a week. Exempt workers must also wear surgical masks or other higher-level respirators (such as KN 95's) at all times while in the facility.

Hospitals nationwide face a widespread shortage of nurses due to the COVID-19 pandemic. According to media reports, California has the second-highest number of openings posted for nurses, following Texas. Experts say the primary cause of the shortage is emotional and physical exhaustion. Meanwhile, many hospitals have more patients now than in the COVID-19 surge last winter, which caused the emergency suspension of regulatory nurse-to-patient ratios. *[26:2 CRLR 76–78]*. Although the emergency suspension ended in February 2021, hospitals can apply for program flexibility waivers in response to staffing shortages. These waivers, with CDPH's approval, allow facilities to be exempt from ratio regulations due to staffing shortages.

Hospital administrators have publicly raised concern that the vaccine mandate will drive workers away. It has been reported that some nurses have joined other healthcare workers in protest

of the mandate and that traveling nurses—nurses from across the country hired temporarily by hospitals to meet rising demand—have begun turning down California assignments because they do not want to get vaccinated.

At this writing, BRN has yet to address the new healthcare worker vaccine mandate.

Nurse Practitioner Advisory Committee to Send AB 890 Rulemaking Recommendations to BRN

On August 31, 2021, September 21, 2021, and October 26, 2021, the Nurse Practitioner Advisory Committee (NPAC), an advisory committee created by the Board pursuant to AB 890 (Wood) (Chapter 265, Statutes of 2020), met to discuss the criteria and terms delineated in sections 2837.191, 2837.103, and 2837.104 of the Business and Professions Code. The legislature added these sections in 2020 pursuant to AB 890, which created two new categories of nurse practitioners, referred to as 103 and 104 NPs, in alignment with the code sections that created the designations. *[26:1 CRLR 63–64]* During the meetings, NPAC members set forth the Committee's purpose: to provide the full Board with recommendations for regulatory language creating licensing requirements for 103 and 104 NPs.

Business and Professions Code section 2837.101 requires the Board to define, through regulation, a minimum transition to practice requirement for 103 and 104 NPs. Business and Professions Code section 2837.103 allows certified 103 NPs to practice without standardized procedures in specified healthcare settings where physicians practice. This provides an opportunity for a new baseline scope of practice that does not require a standardized procedure. Certified 103 NPs who earn an additional three years of licensed practice and hold a master's or doctoral degree in nursing will qualify for a 104 certification. Business and Professions Code section 2837.104

allows 104 NPs to practice without standardized procedures in settings where physicians do not practice. The legislation allows the Board to lower the three-year licensed experience requirement for a nurse practitioner holding a Doctorate of Nursing Practice (DNP) if they elect to do so.

With respect to the minimum transition to practice requirement, NPAC discussed and recommended a grandfathering clause for experienced nurse practitioners and 4,600 hours of mentored practice requirement by a physician or NP. NPAC also recommends an attestation of supervision form [Agenda Item 6.0] and that a clinical competency committee be required to attest to competency for a 103 NP to practice independently. Additionally, NPAC passed a motion to advise the Board to reduce the three-year requirement for DNPs by an hour-to-hour ratio of inpatient care experience, provided that the experience was in the specified field in which they seek certification.

Business and Professions Code section 2837.105 requires the Board to request the Office of Professional Examination Services (OPES) to perform occupational analysis of Nurse Practitioners to determine if a supplemental examination is necessary and, if so, to create it. OPES presented updates to NPAC at the September 21, 2021 Committee meeting. OPES is required to complete its analysis by January 1, 2023.

The Board is behind on its projected notice publication date (August 2021) and projected public hearing date (September 2021) regarding rulemaking on nurse practitioners' practice scope. On October 26, 2021, NPAC held an interested parties meeting to take public comment on these topics and introduce draft regulation language. NPAC is scheduled to hold its next meeting on November 16, 2021, and the full Board will meet November 17–18, 2021. The Board will discuss and possibly take action to initiate rulemaking for AB 890 during this meeting [Agenda Item 6.4.1].

BRN Sunset Review Ongoing and Extended to January 1, 2023

On October 7, 2021, Governor Newsom signed AB 1532 (Committee on Business and Professions) (Chapter 628, Statutes of 2021), extending the BRN's sunset date to January 1, 2023. The Assembly Business and Professions Committee and the Senate Business, Professions and Economic Development Committee (Committees) identified key issues relating to the sunset review as discussed at the joint oversight hearing on March 12, 2021, and in the Board's written response to the Joint Committee's background paper. *[26:2 CRLR 80–85]*

On May 19, 2021, the Committees held a rare second sunset review hearing for the Board, focused on the following licensing-related issues: California's pathway's to licensure; the Nurse Licensure Compact, temporary licensure, and reciprocity; nursing education approval; nursing workforce and supply; and clinical education and placements. BRN President Dolores Trujillo, Vice President Ken Malbrough, and Executive Director Loretta Melby testified on behalf of the Board. The Committees also invited a number of additional witnesses to testify, including representatives from the National Council of State Boards of Nursing, nonprofit HealthImpact, the California Hospital Association, and faculty and administrators from various nursing schools in California. The COVID-19 related nursing shortage was a topic of contention during the hearing, particularly the issue of rural nursing shortages and the Board's lack of action in addressing this issue.

AB 1532 amends six sections and adds one section of the Nursing Practice Act in the Business and Professions Code to address some of the issues identified by the Joint Committee. The affected sections are 2701, 2701.5, 2708, 2702, 2727, 2733, and 2786.3.

Sections 2701 and 2708 extend until January 1, 2023, the repeal dates of Board members. Section 2702 removes the "citizen of United States" requirement for board members. SB 225 (Durazo) (Chapter 790, Statutes of 2019) authorized residents of the State of California, including non-U.S. citizens, to hold an appointed civil office. AB 1532 amends the Nursing Practice Act to adhere to this law. Section 2727 replaces the terminology of "domestic servants" with "domestic workers" and specifies that a pandemic qualifies as an emergency for the purpose of this subdivision.

Section 2733 requires the Board to display the availability of temporary licenses on the front page of their website, and section 2786.3 extends the COVID-19 related flexibilities on clinical, educational requirements to the 2021–2022 academic school year. Finally, section 2701.5 states that notwithstanding any other law, the repeal of section 2701 renders the Board subject to review by the appropriate policy committees of the legislature.

AB 1532 went through two significant changes since its introduction on February 19, 2021. First, on April 29, 2021, the Assembly removed the U.S. citizen requirement and required the Board to display temporary licenses on its home page. Then, on July 13, 2021, the Senate added the one-year extension to allow for the ongoing review of BRN. The reason for the one-year extension, versus a four-year extension that is typical after sunset review, is due to the legislature's finding that "[t]here are a number of issues raised in the staff background paper related to the operations of BRN that are not currently addressed by this bill, but are worthy of continued discussions in order to improve the operations and efficiencies of the BRN." The Committee and author noted many outstanding issues that need to be addressed in the subsequent year's sunset review, including school approval programs, clinical placements, and workforce assessments,

concurrency requirements, simulation, and implementation of the independent practicing nurse practitioners.

On May 19, 2021, the Senate Committee on Business, Professions, and Economic Development and the Assembly Committee on Business and Professions held a second sunset review hearing for the Board. This hearing addressed five issues: 1) California's pathway to licensure; 2) the Nurse Licensure Compact regarding temporary licensure and reciprocity; 3) nursing education approval; 4) nursing workforce and supply; and 5) clinical education and placements. The COVID-19 related nursing shortage was a topic of contention during the hearing—articularly the issue of rural nursing shortages and the Board's lack of action in addressing this issue.

Board President Dolores Trujillo and Executive Director Loretta Melby testified regarding California's pathways to licensure: examination and endorsement. Examination is the process whereby Californians pass the National Council Licensure Examination (NCLEX-RN®) after receiving Board-certified education. Endorsement is the process by which out-of-state nurses gain licensure in California. The endorsement process is quite time-consuming, and this issue was discussed at length during the hearing. The Board listed background checks, fingerprinting, and livescan as time-consuming barriers. The discussions ended with committee members asking the Board to look into expediting the process.

Rebbeca Fotch, Director of the National Council of State Boards of Nursing, testified regarding the Nurse Licensure Compact which was drafted by the National Council of State Board of Nursing, of which BRN is a member. The Compact allows out-of-state Compact nurses to use their license in other Compact states and operates similarly to the driver's license compact. AB 410 (Fong) would add California to the Nurse Licensure Compact. Assembly

Member Fong and Ms. Fotch advocate for joining the Compact because it will reduce the endorsement process and attract out-of-state nurses. In their hearing testimony, they emphasized that Compact states had an expedited and smooth process in recruiting emergency out-of-state nurses during the COVID-19 pandemic.

Ken Malbrough (Vice President of BRN), Loretta Melby, and Rebbeca Fotsch testified regarding nursing education approval. The Committee's questions highlighted issues regarding the lack of an appeal process for schools whose enrollments are limited or stopped by the Board.

Garret Chan (President and CEO of Healthimpact), BJ Barleston (Vice President of the California Hospital Association), and Amy Blumber (Director of Legislative Affairs of the California Association of Health Facilities) testified on nursing workforce and supply. Mr. Chan testified that despite using different methodologies, both the Office of Statewide Health Planning and Development (OSHPD) and the University of California at San Francisco (UCSF) projects illustrate regional nursing shortages. Chan also testified in support of reducing duplicative administrative oversights and unnecessary functions of the Board involving nursing education. They promoted reengineering outdated processes, increasing the use of technology in governance, removing unnecessary and duplicative requirements in the academic school approval process, and removing issues with workforce planning. They testified in support of AB 1236 (Ting), which would require BRN to create a minimum data set for licensees, which will be helpful in creating workforce planning. At the time of this writing, AB 1236 (Ting) had been ordered to the inactive file at the request of Member Ting.

Finally, Alice Martangerea (Associate Dean and Director of Nursing at Golden West College), Colleen O'Leary-Kelly (Director and Professor at California State University, San Jose), Renee Schweitzer (Vice President of West Coast University), and KT Waxman (Director

of California Simulation Alliance at Healthimpact) testified on clinical education and placements.

Alice Martangeara highlighted clinical education and placement issues particular to community colleges. Golden West College and other community colleges have had pre-pandemic difficulties fulfilling clinical placements, and these difficulties worsened exponentially due to the COVID-19 pandemic. Acute care facilities and other clinical placement facilities prefer proprietary schools and often do not leave clinical placement positions open for community colleges to fill. Clinical facilities seem to prefer proprietary schools because proprietary students are in baccalaureate programs (though approximately 90% of Golden West students move on to baccalaureate programs) and because community colleges cannot afford to offer faculty and continuing education units to the clinical facilities and the nurses who work with their students. Golden West and other community colleges are behind proprietary academia in terms of equipment and faculty training for simulation. This clinical placement issue is the primary factor limiting enrollment. Currently, Golden West has 400 qualified applicants to their program but can only take 45 students.

Colleen O'Leary-Kelly discussed the clinical placement issue from the perspective of proprietary schools. Many clinical placement sites cut pre-pandemic clinical hours due to COVID-19. AB 2288 (Low) gave schools flexibility and allowed evidence-based simulation practice for clinical hours. All four speakers on this topic testified in support of using evidence-based simulation practice. Loretta Melby, Executive Officer of BRN, testified on the Board's silence on simulation use. Ms. Melby testified that the Board's goal is to establish minimum criteria. Schools are allowed autonomy on simulation hours so long as they meet the Board's minimum direct patient care hours.

Conflict arose regarding concurrency requirements. The schools testified on the difficulties of having concurrent theory and clinical classes as required by regulation. When schools cannot secure an acute clinical position for a student, that student cannot take the concurrent theory class and falls behind in the program. Other professions, such as medicine, allow separation of theory and clinical training. The Board, however, was adamant against removing the concurrency requirement. Ms. Melby emphasized the benefits of concurrency and rejected the creation of an exception for students unable to secure clinical placements. Ms. Melby described the separation as "a bad payday loan…borrowing from Peter to pay Paul."

MAJOR PUBLICATIONS

The following reports/studies/guidelines have been conducted by or about BRN during this reporting period:

- ***BRN Report Newsletter – Fall 2021***, BRN (newsletter to update their licensees. This edition discussed: ensuring the BRN has licensee emails; name and address changes; the Nursing Practice Act Reference Manual; a new phone system; Board Members; and other updates relevant to licensees).

- ***The Impact of the COVID-19 Pandemic on California's Registered Nurse Workforce: Preliminary Data***, Joanne Spetz, Lela Chu, and Lisel Blash, August 2021 (University of California San Francisco Health Workforce Research Center on Long-Term Care used data from two surveys to assign the current and future supply of RNs. They determined that many older RNs have left nursing, and many others intend to retire in the next two years. The study concludes that the COVID-19 related nursing shortage will not end until 2026).

RULEMAKING

- **Unprofessional Conduct, Disciplinary Guidelines, and Criminal Conviction Substantial Relationship and Rehabilitation Criteria**: On May 20, 2021, OAL approved BRN's proposed amendments to sections 1441, 1444, 1444.5, and 1445, Title 16 of the CCR, to expand the definitions of "unprofessional conduct" and "criteria for rehabilitation" when considering discipline or denying licensure for a licensee or applicant convicted of a crime. The Board originally commenced the rulemaking process on March 12, 2020, in order to implement AB 2138 (Chiu) (Chapter 995, Statutes of 2018), which aims to increase access to licensure for individuals with prior convictions. *[25:2 CRLR 56]* The new regulations became effective May 20, 2021.

- **Approval Requirements and Changes to an Approved Program**: On November 12, 2021, BRN published notice of its intent to amend sections 1423 and 1432, Title 16 of the CCR. Existing law for approval of prelicensure programs provides that the Board may deny approval to a nursing program or revoke an approved program's approval if the applicant makes a material misrepresentation of fact to the Board. Existing regulation only addresses the misrepresentation of facts but not a concealment of facts. The Board has proposed to amend the regulation to adopt more comprehensive language to address both types of misrepresentation to ensure that all relevant information is provided to the Board. Further, according to the Initial Statement of Reasons, the Board historically had the authority to require preapproval of an approved nursing program's changes in enrollment numbers or patterns. The public comment period on this issue ends on December 27, 2021.

- **Clinical Facilities**: On November 12, 2021, BRN published notice of its intent to amend section 1427, Title 16 of the CCR, to adopt a 90-day reporting requirement for changes

within a nursing program's clinical facility, as well as an annual report. "Changes" requiring reporting would include changes to the number of students approved for placement; changes in annual clinical placement capacity; and cancellation or alteration of clinical affiliation agreements. According to the Initial Statement of Reasons, the Regional Nursing Summits Report of 2019 shows California's demand for pre-licensure RN clinical education capacity is outpacing current acute care capacity. The Board anticipates this proposal to improve the integrity of BRN oversight of clinical facilities. This issue of clinical displacement has been on the agenda of the Board for years and was discussed at length during BRN's 2021 sunset hearing (see HIGHLIGHTS). The public comment period on this issue ends on December 28, 2021.

- **Continuing Education Courses**: On November 12, 2021, BRN noticed its proposed language to amend sections 1450 and 1456, Title 16 of the CCR to adopt and define regulatory criteria pertaining to "experimental medical procedures or treatments," "implicit bias," and "direct patient care." According to the Initial Statement of Reasons, the Board noticed these regulations because SB 799 (Hill) (Chapter 520, Statutes of 2017) prompted the Board to re-evaluate its standards for continuing education content after legislators expressed concern about BRN's continued laxness in standards for continuing education providers. Furthermore, AB 241 (Kamlager-Dove) (Chapter 417, Statutes of 2019) requires the Board to adopt continuing education courses containing a curriculum on implicit bias as of January 1, 2022. The public comment period on these matters ends on December 28, 2021.

- **Nurse Practitioner Education**: On November 12, 2021, BRN noticed its proposed language to amend section 1484, Title 16 of the CCR to add language that the Nurse Practitioner Educational Curriculum Program shall meet "and may exceed" the minimum 500 clinical hour

requirement. According to the Initial Statement of Reasons, stakeholders have expressed confusion on the Board's interpretation of existing regulations regarding the clinical hours requirement. This proposal is intended to eliminate that confusion. The public comment period on this issue ends on December 27, 2021.

LEGISLATION

- **AB 1532 (Committee on Business and Professions)**, as amended July 13, 2021, amends sections 2701, 2702, 2708, 2727, 2733, and 2786.3, and adds section 2701.5 to the Business and Professions Code. This bill extends the repeal date for the Board to 2023; removes the "citizen of the United States" requirement for board members; and requires the Board to display temporary license availabilities on their website. At its May 12, 2021 meeting, the Board voted to support the bill. Governor Newsom signed AB 1532 on October 7, 2021 (Chapter 628, Statutes of 2021) (see HIGHLIGHTS).

- **AB 133 (Committee on Budget)**, as amended July 11, 2021, and as it applies to BRN, amends section 2717 of the Business and Professions Code. According to the author, this is an omnibus trailer health bill intended to implement health-related provisions associated with the Budget Bill of 2021. This bill expands Medi-Cal to all income-eligible adults aged 50 and older, regardless of immigration status, and orders BRN to collect workforce data from licensees for future workforce planning. Governor Newsom signed AB 133 on July 27, 2021 (Chapter 143, Statutes of 2021).

- **AB 1015 (Blanca Rubio)**, as amended September 1, 2021, adds section 2717 to the Business and Professions Code. Section 2717 requires the Board to incorporate regional forecasts into its analysis of the nursing workforce and to develop a plan to address regional shortages

identified in the workforce forecast. The California State Auditor noted problems with BRN's approval of clinical nursing placements with significant displacements in rural areas. According to the author, this bill codifies recommendations from the State Auditor to ensure that the prelicensure process is efficient and effective. At its May 12, 2021 meeting, the Board voted to support the bill. Governor Newsom signed AB 1015 on October 6, 2021 (Chapter 591, Statutes of 2021).

- **AB 1407 (Burke)**, as amended July 15, 2021, amends sections 2786 and 2811.5 of the Business and Professions Code and adds section 123630.5 to the Health and Safety Code. This bill requires nursing programs and schools to include one hour of implicit bias training as a requirement for graduation; requires RNs to complete one hour of implicit bias continuing education within the first two years of licensure; and requires hospitals to implement implicit bias training as part of any new graduate training program. According to the author, this bill will help health care facilities aggressively pursue strategies to eliminate implicit bias within the health care system. At its May 12, 2021 meeting, the Board voted to support the bill with amendments to make courses a graduation requirement instead of a licensing requirement. The legislature adopted these amendments. Governor Newsom signed AB 1407 on October 1, 2021 (Chapter 445, Statutes of 2021).

The following bills, reported in Volume 26, No. 2 (Spring 2021), died in Committee or otherwise failed to be enacted in 2021: AB 1236 (Ting), relating to demographic data collection of licensees; AB 269 (Patterson), relating to reduced license renewal fees for retired registered nurses; AB 852 (Wood), relating to increased authorizations for newly created independent Nurse Practitioners; AB 225 (Gray), relating to temporary licenses to veterans and active-duty members

of Armed Forces who meet specified criteria; AB 410 (Fong), relating to joining the Nurse Licensure Compact; SB 213 (Cortese), relating to establishing health care workers' compensation for certain infectious diseases; and AB 858 (Jones-Sawyer), relating to protecting and empowering general acute care hospital workers who exercise independent clinical judgment.

LITIGATION

- ***California State Bd. of Registered Nursing v. Superior Court*, Case No. S267294 (Cal.)**. On April 21, 2021, the Court denied the petition for review. This upholds the Fourth District Court of Appeal's January 15, 2021 opinion reversing the lower Court's order and granting BRN's motion for a protective order over subpoenaed documents pertaining to disciplined nurses and opioids. *[see 26:2 CRLR 80–82]*