

PHYSICIAN ASSISTANT BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: April 23, 2018

Subject Matter of Proposed Regulations: Citations for Unlicensed Practice

Section Affected: Section 1399.573 of Title 16 of the California Code of Regulations

Specific Purpose of each adoption, amendment, or repeal:

1. Problem being addressed:

Business and Profession Code section 148 (Section 148) authorizes the Physician Assistant Board (Board) to establish, by regulation, a system similar to that authorized by Business and Professions Code section 125.9, for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee under the jurisdiction of the Board. Existing regulation, Title 16, California Code of Regulations (CCR) section 1399.573 (Section 1399.573) limits the executive officer's authority to issue unlicensed activity citations, fines and orders of abatement only in cases where an individual who was previously licensed by the Board has practiced with a delinquent license (i.e., the license expired).

When the existing regulation was first adopted, it was anticipated that cases in which a person who had never previously held a license would be prosecuted criminally for unlicensed activity in accordance with Business and Professions Code section 3532. However, in 2014, the Board received a complaint that a person who had never been licensed as a physician assistant had seen patients, performed patient exams and identified himself as a licensed physician assistant. A request by the Board for a criminal misdemeanor prosecution was declined. As a result, the Board had no legal recourse to prevent further violations of the law and to protect consumers since the Board had no authority to issue a citation, fine and order of abatement for unlicensed activity to persons who had never been previously licensed by the Board due to the limitations in Section 1399.573.

Upon review of Section 1399.573, the Board determined that this section should be amended to authorize the Board's executive officer to issue an administrative citation to any unlicensed person acting in the capacity of a physician assistant, regardless of whether the individual had ever been previously licensed by the Board. As Section 1399.573 is currently written, the Board's executive officer is only authorized to issue a citation and order of abatement and levy fines in the case of a physician assistant who had previously held a license and then practiced with a delinquent license. As this case demonstrates, there is more than one way for an individual to be considered unlicensed.

However, legally there is no distinction between an individual who has previously held a license and allowed it to expire and an individual who has never had a license; both have the status of being “unlicensed.” As the California Court of Appeal has explained it in a case involving a real estate broker’s delinquent license:

There is nothing in the law which compels a licensed real estate broker to continue in business or to renew his license, and if he does not do so he is unlicensed after the expiration date. That is the status which appellant achieved as of midnight, June 30, 1951, and which it has retained ever since. It was, therefore, unlicensed when it contracted to serve defendants as a real estate broker and when, according to its allegations, the cause of action here sued upon arose. (*Mortgage Finance Corp. v. Strizek* (1957) 148 Cal.App.2d 817, 819.)

To avoid a recurrence of the type of problem faced by the Board in 2014, the Board would like to expand the authority of the executive officer to issue citations and fines to those who have never been licensed and are holding or have held themselves out as a physician assistant. The Board’s proposed amendment to Section 1399.573 will allow the executive officer to do so consistent with Section 148. The issuance of a citation, an order of abatement, and a fine by the executive officer would not preclude the Board from also pursuing criminal charges for performing medical services as a physician assistant without a license.

2. Anticipated benefits from this regulatory action:

The Board’s mission is to protect consumers. It is the Board’s responsibility to set minimum licensing standards for physician assistants in the practice of medicine and to ensure that those standards are continuously met for the protection of the public. This proposal would allow the Board to better protect the health, safety and welfare of consumers by authorizing the Board to issue citations, fines and orders of abatement to any person who is acting in the capacity of a physician assistant without licensure. This would help enforce current law, provide better consumer protection, deter prospective violators, and help provide a fair and competitive environment for the Board’s licensees.

Factual Basis/Rationale

Amend Section 1399.573 of Article 6 in Division 13.8 of Title 16 of the California Code of Regulations

Factual basis for the determination that each proposed amendment to Section 1399.573 is reasonably necessary to address the problem for which it is proposed:

The proposed amendment to Section 1399.573 would remove the current limitation on the executive officer, who is currently authorized to issue a citation and order of abatement and levy fines only in the case of a physician assistant who has practiced with a delinquent license. The proposal would add authority for the executive officer to issue a citation and order of abatement and levy fines against any person who is acting

in the capacity of a licensee under the jurisdiction of the Board, who is not otherwise exempt from licensure. The proposed amendment is reasonably necessary for the Board to authorize its executive officer to issue administrative citations to any unlicensed persons acting in the capacity of a physician assistant, without limitations on how that individual became unlicensed.

At the Board's November 3, 2014 meeting, Board members discussed who may call themselves physician assistants. Business and Professions Code section 3501(a)(4) defines a physician assistant as "a person who meets the requirements of this chapter and is licensed by the board." It was brought to the attention of the members that the Board had received a complaint against a person who had held himself out as a physician assistant and had never been previously licensed. The Board was informed that Title 16 CCR section 1399.573 does not authorize the executive officer to issue citations for unlicensed practice, unless the person is practicing with a delinquent license.

At the Board's February 9, 2015 meeting, proposed text to amend section 1399.573 was reviewed, discussed and approved by the Board. The proposed text addressed the authority of the executive officer to issue citations for all forms of unlicensed practice by generally allowing the executive officer to act "against any person who is acting in the capacity of a licensee under the jurisdiction of the board and who is not otherwise exempt from licensure."

Section 148 authorizes all boards, including the Physician Assistant Board, in the Department of Consumer Affairs to establish by regulation, the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee under the jurisdiction of the respective boards. Many boards within the Department have implemented Section 148's authority using the broadest language possible to cover all possible forms of unlicensed activity. For instance, the Dental Board's regulation at Title 16, CCR section 1023.7 states, in pertinent part:

The executive officer may issue a citation, in accordance with Section 148 of the code, against any unlicensed person who is acting in the capacity of a licensee under the jurisdiction of the board and who is not otherwise exempt from licensure.

Authorizing the Board's executive officer to issue citations and orders of abatement and levy fines in all cases of unlicensed activity helps protect consumers from receiving substandard care from unlicensed individuals acting in the capacity of a licensee under the Board's jurisdiction. This amendment would provide for greater consumer protection by empowering the Board to take administrative action to protect the consumer from receiving substandard care from unlicensed individuals acting in the capacity of a licensee under the Board's jurisdiction. This proposal would also authorize the Board to use the full enforcement power authorized by the Legislature, and deter prospective violators. Absent this amendment, the Board would continue to be limited in its enforcement capabilities, allowing prospective violators to potentially harm patients.

Underlying Data

Technical, theoretical or empirical studies, reports, or documents relied upon (if any):

- (1) Minutes of the Physician Assistant Board's November 3, 2014 meeting.
- (2) Minutes of the Physician Assistant Board's February 9, 2015 meeting.

Business Impact

This regulation will not have a significant adverse economic impact on businesses. This initial determination is based on the following facts:

The Physician Assistant Board has approximately 11,920 licensees for the current fiscal year. Physician assistants work in a variety of practice settings and specialties under the supervision of licensed physicians. Aside from the incident in 2014, the Board does not have data on the number of individuals who have never been licensed and are holding themselves out as a physician assistant. However, the regulatory proposal would only affect an individual if they are found to be in violation. A licensee that is found to be non-compliant with statutes and regulations enforced by the Board may be impacted through the assessment of a citation with an administrative fine which may not exceed \$5,000 for each inspection or each investigation made with respect to the violation in accordance with Section 125.9(b)(3) of the Business and Professions Code. In the last three years, the Board has issued four (4) citations to individuals who have practiced without a license with an average cost of \$500 each.

Economic Impact Assessment

This regulatory proposal will have the following effects:

It will not create or eliminate jobs within the State of California because this proposed regulation will authorize the Board's executive officer to issue citations and orders of abatement and levy fines in cases of unlicensed activity and the potential economic impact should not be significant if individuals comply, including seeking licensure with the Board. This proposal will update the executive officer's authorization to issue citations and orders of abatement and levy fines in cases of unlicensed activity. However, the regulatory proposal would only affect an individual if they are found to be in violation. A licensee that is found to be non-compliant with statutes and regulations enforced by the Board may be impacted through the assessment of a citation with an administrative fine which may not exceed \$5,000 for each inspection or each investigation made with respect to the violation in accordance with Section 125.9(b)(3) of the Business and Professions Code. In the last three years, the Board has only issued four (4) citations to individuals who have practiced without a license with an average cost of \$500 each.

It will not create new business or eliminate existing businesses within the State of California because the proposal will update the executive officer's authorization to issue citations and orders of abatement and levy fines in cases of unlicensed activity and the proposal should not affect businesses that hire only licensed physician assistants.

It will not affect the expansion of businesses currently doing business within the State of California because the proposal will update the executive officer's authorization to issue citations and orders of abatement and levy fines in cases of unlicensed activity and the proposal should not affect businesses that hire only licensed physician assistants.

This regulatory proposal will benefit the health and welfare of California residents because authorizing the executive officer to issue citations and orders of abatement and levy fines in cases of unlicensed activity enhances consumer protection, by protecting the consumer from receiving substandard care from unlicensed individuals acting in the capacity of a licensee under the Board's jurisdiction. This proposal would also help enforce current law, provide better consumer protection, deter prospective violators, and help provide a fair and competitive environment for the Board's licensees.

This regulatory proposal could affect worker safety because this proposed regulation authorizes the board's executive officer to issue citations and orders of abatement and levy fines in the cases of unlicensed activity which could protect workers from receiving substandard care from unlicensed individuals acting in the capacity of a licensee under the Board's jurisdiction.

This regulatory proposal will not affect the State's environment because updating the executive officer's authority to issue citations and orders of abatement and levy fines in cases of unlicensed activity does not involve environmental issues.

Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not amend the regulation: This alternative was rejected because Section 1399.573 currently does not authorize the Board's executive officer to issue administrative citations to unlicensed persons who have not previously been licensed by the Board.

This weakens the Board's ability to stop violations of the law and deter unlicensed activity, which impedes the Board's efforts to protect consumers.

2. Amend the regulation: The Board determined that this alternative was the most feasible alternative to resolve the problem, which updates Section 1399.573 to authorize the Board's executive officer to issue citations for all unlicensed practice rather than limit such authorization to cases of physician assistants who have practiced with a delinquent license.