

# SB0171S01 compared with SB0171

~~{deleted text}~~ shows text that was in SB0171 but was deleted in SB0171S01.

inserted text shows text that was not in SB0171 but was inserted into SB0171S01.

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Senator Kirk A. Cullimore proposes the following substitute bill:

## HEALTH CARE PRACTITIONER LIABILITY AMENDMENTS

2023 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Kirk A. Cullimore**

House Sponsor: \_\_\_\_\_

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### LONG TITLE

#### General Description:

This bill modifies a health care provider's liability under certain circumstances.

#### Highlighted Provisions:

This bill:

- ▶ ~~{provides immunity}~~ modifies the duty of care, under certain circumstances, for a health care provider who deviates from medical norms or established practices;
- ▶ prohibits the Division of Professional Licensing from sanctioning a health care provider's license for deviating from medical norms or established practices under certain circumstances;
- ▶ allows a health care provider who deviates from medical norms or established practices to advertise if certain criteria are met; and
- ▶ makes technical changes.

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### Money Appropriated in this Bill:

None

### Other Special Clauses:

None

### Utah Code Sections Affected:

#### AMENDS:

**58-1-501**, as last amended by Laws of Utah 2020, Chapters 289, 339

**58-17b-502**, as last amended by Laws of Utah 2022, Chapter 465

#### ENACTS:

**78B-3-428**, Utah Code Annotated 1953

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **58-1-501** is amended to read:

**58-1-501. Unlawful and unprofessional conduct.**

(1) "Unlawful conduct" means conduct, by any person, that is defined as unlawful under this title and includes:

(a) practicing or engaging in, representing oneself to be practicing or engaging in, or attempting to practice or engage in any occupation or profession requiring licensure under this title if the person is:

(i) not licensed to do so or not exempted from licensure under this title; or

(ii) restricted from doing so by a suspended, revoked, restricted, temporary, probationary, or inactive license;

(b) (i) impersonating another licensee or practicing an occupation or profession under a false or assumed name, except as permitted by law; or

(ii) for a licensee who has had a license under this title reinstated following disciplinary action, practicing the same occupation or profession using a different name than the name used before the disciplinary action, except as permitted by law and after notice to, and approval by, the division;

(c) knowingly employing any other person to practice or engage in or attempt to practice or engage in any occupation or profession licensed under this title if the employee is not licensed to do so under this title;

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(d) knowingly permitting the person's authority to practice or engage in any occupation or profession licensed under this title to be used by another, except as permitted by law;

(e) obtaining a passing score on a licensure examination, applying for or obtaining a license, or otherwise dealing with the division or a licensing board through the use of fraud, forgery, or intentional deception, misrepresentation, misstatement, or omission;

(f) (i) issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device to a person located in this state:

(A) without prescriptive authority conferred by a license issued under this title, or by an exemption to licensure under this title; or

(B) with prescriptive authority conferred by an exception issued under this title or a multistate practice privilege recognized under this title, if the prescription was issued without first obtaining information, in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify underlying conditions, and to identify contraindications to the proposed treatment; and

(ii) Subsection (1)(f)(i) does not apply to treatment rendered in an emergency, on-call or cross coverage situation, provided that the person who issues the prescription has prescriptive authority conferred by a license under this title, or is exempt from licensure under this title; or

(g) aiding or abetting any other person to violate any statute, rule, or order regulating an occupation or profession under this title.

(2) (a) "Unprofessional conduct" means conduct, by a licensee or applicant, that is defined as unprofessional conduct under this title or under any rule adopted under this title and includes:

~~(a)~~ (i) violating any statute, rule, or order regulating an occupation or profession under this title;

~~(b)~~ (ii) violating, or aiding or abetting any other person to violate, any generally accepted professional or ethical standard applicable to an occupation or profession regulated under this title;

~~(c)~~ (iii) subject to the provisions of Subsection (4), engaging in conduct that results in conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere that is held in abeyance pending the successful completion of probation with respect to a crime of moral

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turpitude or any other crime that, when considered with the functions and duties of the occupation or profession for which the license was issued or is to be issued, bears a substantial relationship to the licensee's or applicant's ability to safely or competently practice the occupation or profession;

~~[(d)]~~ (iv) engaging in conduct that results in disciplinary action, including reprimand, censure, diversion, probation, suspension, or revocation, by any other licensing or regulatory authority having jurisdiction over the licensee or applicant in the same occupation or profession if the conduct would, in this state, constitute grounds for denial of licensure or disciplinary proceedings under Section 58-1-401;

~~[(e)]~~ (v) engaging in conduct, including the use of intoxicants, drugs, narcotics, or similar chemicals, to the extent that the conduct does, or might reasonably be considered to, impair the ability of the licensee or applicant to safely engage in the occupation or profession;

~~[(f)]~~ (vi) practicing or attempting to practice an occupation or profession regulated under this title despite being physically or mentally unfit to do so;

~~[(g)]~~ (vii) practicing or attempting to practice an occupation or profession regulated under this title through gross incompetence, gross negligence, or a pattern of incompetency or negligence;

~~[(h)]~~ (viii) practicing or attempting to practice an occupation or profession requiring licensure under this title by any form of action or communication which is false, misleading, deceptive, or fraudulent;

~~[(i)]~~ (ix) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's competency, abilities, or education;

~~[(j)]~~ (x) practicing or attempting to practice an occupation or profession regulated under this title beyond the scope of the licensee's license;

~~[(k)]~~ (xi) verbally, physically, mentally, or sexually abusing or exploiting any person through conduct connected with the licensee's practice under this title or otherwise facilitated by the licensee's license;

~~[(l)]~~ (xii) acting as a supervisor without meeting the qualification requirements for that position that are defined by statute or rule;

~~[(m)]~~ (xiii) issuing, or aiding and abetting in the issuance of, an order or prescription for a drug or device;

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[(†)] (A) without first obtaining information in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify conditions, and to identify contraindications to the proposed treatment; or

[(††)] (B) with prescriptive authority conferred by an exception issued under this title, or a multi-state practice privilege recognized under this title, if the prescription was issued without first obtaining information, in the usual course of professional practice, that is sufficient to establish a diagnosis, to identify underlying conditions, and to identify contraindications to the proposed treatment;

[(††)] (xiv) violating a provision of Section 58-1-501.5; or

[(††)] (xv) violating the terms of an order governing a license.

(b) "Unprofessional conduct" does not include:

(i) a health care provider, as defined in Section 78B-3-403 and who is licensed under this title, deviating from medical norms or established practice ~~in accordance with Section 78B-3-428; or~~

if the health care provider:

(A) does not deviate outside of the health care provider's scope of practice and possesses the education, training, and experience to competently and safely administer the alternate medical treatment or therapy;

(B) does not provide a health care service that is otherwise contrary to any state law;

(C) has evidence that the treatment, procedure, or therapy has reasonable potential to be of benefit to the patient to whom the therapy or treatment is to be given;

(D) has evidence that the potential benefit of the treatment, procedure, or therapy outweighs the known harms or side effects of the treatment, procedure, or therapy;

(E) after diagnosis but before providing treatment, educates the patient on the treatments and therapies that are within the medical norms and established practices;

(F) after diagnosis but before providing treatment, provides to the patient a written notice that the health care provider is recommending treatment that deviates from medical norms and established practices;

(G) after diagnosis but before providing treatment, discusses the rationale for deviating from medical norms and established practices with the patient;

(H) after diagnosis but before providing treatment, discloses any known harms other

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patients have suffered related to the deviation from medical norms and established practices:

(I) after diagnosis but before providing treatment, obtains from the patient a written acknowledgment that the patient understood that the health care provider is deviating from medical norms or established practices in the provider's recommendation for the patient's treatment;

(J) after diagnosis but before providing treatment, the health care provider documents in the patient's medical record the health care provider's rationale regarding the reason for the deviation; and

(K) before providing treatment, the health care provider discloses to the patient that the patient may enter into an agreement describing what would constitute the health care provider's negligence related to the deviation; and

(ii) notwithstanding Section 58-1-501.6, a health care provider ~~who~~ ~~advertises~~ advertising that the health care provider deviates from medical norms or established practices, including the maladies the health care provider treats, if the health care provider:

(A) does not guarantee any results regarding any treatment;

(B) fully discloses on the health care provider's website that the health care provider deviates from medical norms or established practices with a conspicuous statement; and

(C) includes the health care provider's contact information on the website.

(3) Unless otherwise specified by statute or administrative rule, in a civil or administrative proceeding commenced by the division under this title, a person subject to any of the unlawful and unprofessional conduct provisions of this title is strictly liable for each violation.

(4) The following are not evidence of engaging in unprofessional conduct under Subsection ~~[(2)(c)]~~ (2)(a)(iii):

(a) an arrest not followed by a conviction; or

(b) a conviction for which an individual's incarceration has ended more than seven years before the date of the division's consideration, unless:

(i) after the incarceration the individual has engaged in additional conduct that results in another conviction, a plea of nolo contendere, or a plea of guilty or nolo contendere that is held in abeyance pending the successful completion of probation; or

(ii) the conviction was for:

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(A) a violent felony as defined in Section 76-3-203.5;

(B) a felony related to a criminal sexual act pursuant to Title 76, Chapter 5, Part 4, Sexual Offenses, or Title 76, Chapter 5b, Sexual Exploitation Act; or

(C) a felony related to criminal fraud or embezzlement, including a felony pursuant to Title 76, Chapter 6, Part 5, Fraud, or Title 76, Chapter 6, Part 4, Theft.

Section 2. Section **58-17b-502** is amended to read:

### **58-17b-502. Unprofessional conduct.**

(1) "Unprofessional conduct" includes:

(a) willfully deceiving or attempting to deceive the division, the board, or their agents as to any relevant matter regarding compliance under this chapter;

(b) except as provided in Subsection (2):

(i) paying or offering rebates to practitioners or any other health care providers, or receiving or soliciting rebates from practitioners or any other health care provider; or

(ii) paying, offering, receiving, or soliciting compensation in the form of a commission, bonus, rebate, kickback, or split fee arrangement with practitioners or any other health care provider, for the purpose of obtaining referrals;

(c) misbranding or adulteration of any drug or device or the sale, distribution, or dispensing of any outdated, misbranded, or adulterated drug or device;

(d) engaging in the sale or purchase of drugs or devices that are samples or packages bearing the inscription "sample" or "not for resale" or similar words or phrases;

(e) except as provided in Section 58-17b-503, accepting back and redistributing any unused drug, or a part of it, after it has left the premises of a pharmacy;

(f) an act in violation of this chapter committed by a person for any form of compensation if the act is incidental to the person's professional activities, including the activities of a pharmacist, pharmacy intern, or pharmacy technician;

(g) violating:

(i) the federal Controlled Substances Act, Title II, P.L. 91-513;

(ii) Title 58, Chapter 37, Utah Controlled Substances Act; or

(iii) rules or regulations adopted under either act;

(h) requiring or permitting pharmacy interns or technicians to engage in activities outside the scope of practice for their respective license classifications, as defined in this

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chapter and division rules made in collaboration with the board, or beyond their scope of training and ability;

(i) administering:

(i) without appropriate training, as defined by rule;

(ii) without a physician's order, when one is required by law; and

(iii) in conflict with a practitioner's written guidelines or written protocol for administering;

(j) disclosing confidential patient information in violation of the provisions of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, as amended, or other applicable law;

(k) engaging in the practice of pharmacy without a licensed pharmacist designated as the pharmacist-in-charge;

(l) failing to report to the division any adverse action taken by another licensing jurisdiction, government agency, law enforcement agency, or court for conduct that in substance would be considered unprofessional conduct under this section;

(m) as a pharmacist or pharmacy intern, compounding a prescription drug in a dosage form which is regularly and commonly available from a manufacturer in quantities and strengths prescribed by a practitioner;

(n) failing to act in accordance with Title 26, Chapter 64, Family Planning Access Act, when dispensing a self-administered hormonal contraceptive under a standing order;

(o) violating the requirements of Title 26, Chapter 61a, Utah Medical Cannabis Act; or

(p) falsely making an entry in, or altering, a medical record with the intent to conceal:

(i) a wrongful or negligent act or omission of an individual licensed under this chapter or an individual under the direction or control of an individual licensed under this chapter; or

(ii) conduct described in Subsections (1)(a) through (o) or Subsection 58-1-501(1).

(2) Subsection (1)(b) does not apply to:

(a) giving or receiving a price discount based on purchase volume;

(b) passing along a pharmaceutical manufacturer's rebate; or

(c) providing compensation for services to a veterinarian.

(3) "Unprofessional conduct" does not include[;]:

(a) ~~(a)~~ in accordance with Title 26, Chapter 61a, Utah Medical Cannabis Act:



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~~(a)~~ (i) when registered as a pharmacy medical provider, as that term is defined in Section 26-61a-102, providing pharmacy medical provider services in a medical cannabis pharmacy; or

~~(b)~~ (ii) when acting as a state central patient portal medical provider, as that term is defined in Section 26-61a-102, providing state central patient portal medical provider services~~[-]; or~~

(b) if a pharmacist reasonably believes that a prescription drug will have adverse or harmful effects on an individual and warns the individual of the potential effects, filling a prescription prescribed by a health care provider who:

(i) is operating within the health care provider's scope of practice; and

(ii) is deviating from a medical norm or established practice in accordance with Section 78B-3-428.

(4) Notwithstanding Subsection (3), the division, in consultation with the board and in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall define unprofessional conduct for a pharmacist described in Subsections (3)(a) and (b).

Section 3. Section **78B-3-428** is enacted to read:

**78B-3-428.** ~~{ Immunity from liability }~~ **Breach of duty** for deviating from established practices.

(1) A health care provider ~~{is immune from a malpractice action against a health}~~ **does not breach the duty of care the health** care provider **owes to a patient:**

(a) to the extent ~~{the claim}~~ **any alleged breach** is based on actions related to the health care provider's deviation from medical norms or established practices; and

(b) if the health care provider complied with ~~{Subsection (2)}~~.

~~(2) A health care provider seeking immunity under Subsection (1):~~

~~(a) may not deviate outside of the health care provider's scope of practice;~~

~~(b) may not provide a health care service that is otherwise contrary to any state law;~~

~~(c) shall provide the patient a written notice that the health care provider is deviating from medical norms and established practices;~~

~~(d) shall obtain from the patient a written acknowledgment that the patient understood that the health care provider was deviating from medical norms or established practices;~~

~~(e) shall document in the patient's medical record the health care provider's rationale~~

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regarding the reason for the deviation;

~~—— (f) shall share the rationale; the requirements described in Subsection 58-1-501(2)(f) with the patient before providing care that deviates from medical norms or established practices;~~

~~—— (g) shall disclose any known harms other patients have suffered related to the deviation; and~~

~~—— (h) shall disclose to the patient that the patient may enter into an agreement describing what would constitute the health care provider's negligence related to the deviation.~~

~~—— (3)(b)(i).~~

(2) A health care facility is not vicariously liable for an action or claim described in Subsection (1)(a) if the health care facility's health care provider acted in accordance with Subsection 58-1-501(2)(b)(i).