

LEGISLATURE OF NEBRASKA
ONE HUNDRED EIGHTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 351

Introduced by Wayne, 13.

Read first time January 12, 2023

Committee: Judiciary

1 A BILL FOR AN ACT relating to the Nebraska Hospital-Medical Liability
2 Act; to amend sections 44-2824, 44-2825, 44-2827, 44-2829, 44-2830,
3 44-2831, 44-2831.01, 44-2832, and 44-2833, Reissue Revised Statutes
4 of Nebraska; to increase and eliminate limits on medical malpractice
5 liability; to change provisions relating to proof of financial
6 responsibility and the Excess Liability Fund; to provide for
7 applicability; to harmonize provisions; and to repeal the original
8 sections.
9 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 44-2824, Reissue Revised Statutes of Nebraska, is
2 amended to read:

3 44-2824 (1) To be qualified under the Nebraska Hospital-Medical
4 Liability Act, a health care provider or such health care provider's
5 employer, employee, partner, or limited liability company member shall:

6 (a) File with the director proof of financial responsibility,
7 pursuant to section 44-2827 or 44-2827.01, in the amount of ten million
8 ~~five hundred thousand~~ dollars for each occurrence. In the case of
9 physicians or certified registered nurse anesthetists and their
10 employers, employees, partners, or limited liability company members an
11 aggregate liability amount of twenty ~~one~~ million dollars for all
12 occurrences or claims made in any policy year for each named insured
13 shall be provided. In the case of hospitals and their employees, an
14 aggregate liability amount of thirty ~~three~~ million dollars for all
15 occurrences or claims made in any policy year or risk-loss trust year
16 shall be provided. Such policy may be written on either an occurrence or
17 a claims-made basis. Any risk-loss trust shall be established and
18 maintained only on an occurrence basis. Such qualification shall remain
19 effective only as long as insurance coverage or risk-loss trust coverage
20 as required remains effective; and

21 (b) Pay the surcharge and any special surcharge levied on all health
22 care providers pursuant to sections 44-2829 to 44-2831.

23 (2) Subject to the requirements in subsections (1) and (4) of this
24 section, the qualification of a health care provider shall be either on
25 an occurrence or claims-made basis and shall be the same as the insurance
26 coverage provided by the insured's policy.

27 (3) The director shall have authority to permit qualification of
28 health care providers who have retired or ceased doing business if such
29 health care providers have primary insurance coverage under subsection
30 (1) of this section.

31 (4) A health care provider who is not qualified under the act at the

1 time of the alleged occurrence giving rise to a claim shall not, for
2 purposes of that claim, qualify under the act notwithstanding subsequent
3 filing of proof of financial responsibility and payment of a required
4 surcharge.

5 (5) Qualification of a health care provider under the Nebraska
6 Hospital-Medical Liability Act shall continue only as long as the health
7 care provider meets the requirements for qualification. A health care
8 provider who has once qualified under the act and who fails to renew or
9 continue his or her qualification in the manner provided by law and by
10 the rules and regulations of the Department of Insurance shall cease to
11 be qualified under the act.

12 Sec. 2. Section 44-2825, Reissue Revised Statutes of Nebraska, is
13 amended to read:

14 44-2825 (1)(a) {1} The total amount recoverable under the Nebraska
15 Hospital-Medical Liability Act from any and all health care providers and
16 the Excess Liability Fund for any occurrence resulting in any injury or
17 death of a patient may not exceed (a) five hundred thousand dollars for
18 any occurrence on or before December 31, 1984, (b) one million dollars
19 for any occurrence after December 31, 1984, and on or before December 31,
20 1992, (c) one million two hundred fifty thousand dollars for any
21 occurrence after December 31, 1992, and on or before December 31, 2003,
22 (d) one million seven hundred fifty thousand dollars for any occurrence
23 after December 31, 2003, and on or before December 31, 2014, and (e) two
24 million two hundred fifty thousand dollars for any occurrence after
25 December 31, 2014, and on or before December 31, 2023.

26 (b) There is no limit to the total amount recoverable under the
27 Nebraska Hospital-Medical Liability Act from the Excess Liability Fund
28 for any occurrence resulting in any catastrophic injury or death of a
29 patient for any occurrence after December 31, 2023.

30 (2) For any claim or cause of action arising from any occurrence
31 during the period that the act is effective with reference to a patient

1 who is covered by the act, a health care provider qualified under the act
2 shall not be liable to such patient or such patient's representative for
3 an amount in excess of the following limits: ~~A health care provider~~
4 ~~qualified under the act shall not be liable to any patient or his or her~~
5 ~~representative who is covered by the act for an amount in excess of five~~
6 ~~hundred thousand dollars for all claims or causes of action arising from~~
7 ~~any occurrence during the period that the act is effective with reference~~
8 ~~to such patient.~~

9 (a) For claims or occurrences on or before December 31, 2023, five
10 hundred thousand dollars; and

11 (b) For claims or occurrences after December 31, 2023, ten million
12 dollars.

13 (3) Subject to the overall limits from all sources as provided in
14 subsection (1) of this section, any amount due from a judgment or
15 settlement which is in excess of the total liability of all liable health
16 care providers shall be paid from the Excess Liability Fund pursuant to
17 sections 44-2831 to 44-2833.

18 Sec. 3. Section 44-2827, Reissue Revised Statutes of Nebraska, is
19 amended to read:

20 44-2827 Financial responsibility of a health care provider may be
21 established only by filing with the director proof that the health care
22 provider is insured pursuant to sections 44-2837 to 44-2839 or by a
23 policy of professional liability insurance in a company authorized to do
24 business in Nebraska. Such insurance shall be in the amount of ten
25 million ~~five hundred thousand~~ dollars per occurrence and, in cases
26 involving physicians or certified registered nurse anesthetists, but not
27 with respect to hospitals, an aggregate liability of at least twenty one ~~one~~
28 million dollars for all occurrences or claims made in any policy year
29 shall be provided. In the case of hospitals and their employees, an
30 aggregate liability amount of thirty three ~~three~~ million dollars for all
31 occurrences or claims made in any policy year shall be provided. The

1 filing shall state the premium charged for the policy of insurance.

2 Sec. 4. Section 44-2829, Reissue Revised Statutes of Nebraska, is
3 amended to read:

4 44-2829 (1) There is hereby created an Excess Liability Fund to be
5 collected and received by the director for the exclusive use and purposes
6 stated in the Nebraska Hospital-Medical Liability Act. Such fund and any
7 income from it shall be held by the State Treasurer in trust, deposited
8 in a separate account, and invested and reinvested pursuant to law.

9 (2) To create the fund, an annual surcharge shall be levied on all
10 health care providers in Nebraska who have qualified under sections
11 44-2824 and 44-2827. The surcharge for each health care provider shall be
12 determined by the director subject to the following limitations:

13 (a) The annual surcharge shall not exceed fifty percent of the
14 annual premium paid by such health care provider for maintenance of
15 current financial responsibility as provided in sections 44-2827 and
16 44-2837 to 44-2839; and

17 (b) The charge shall not exceed the amount necessary to maintain the
18 fund in the amount stated in section 44-2830.

19 (3) Such surcharge and any primary insurance premiums due under
20 sections 44-2837 to 44-2839 shall be due and payable within thirty days
21 after the health care provider has qualified in Nebraska pursuant to
22 section 44-2824 and shall be payable annually thereafter in such amounts
23 as may be determined by the director insofar as the surcharge is
24 concerned and by the risk manager insofar as primary liability coverage
25 is concerned.

26 (4) The net premiums payable for primary insurance provided by the
27 risk manager pursuant to sections 44-2837 to 44-2839 shall be deposited
28 in the fund at least annually by the risk manager.

29 (5) If the annual premium surcharge or premiums for primary
30 insurance under sections 44-2837 to 44-2839 are not paid within the time
31 specified in subsection (3) of this section, the qualification of the

1 health care provider under section 44-2824 shall be suspended until the
2 annual premiums are paid. Such suspension shall not be effective as to
3 patients claiming against the health care provider unless, at least
4 thirty days before the effective date of the suspension, a written notice
5 giving the date upon which the suspension becomes effective has been
6 provided by the director to the health care provider.

7 (6) The director ~~Director of Insurance~~, as administrator of the
8 fund, shall be responsible for legal defense of the fund. The director,
9 using money from the fund as deemed necessary, appropriate, or desirable,
10 may purchase the services of persons, firms, and corporations to aid in
11 protecting the fund against claims. The Department of Justice shall not
12 be responsible for legal defense of the fund. All expenses of collecting,
13 protecting, and administering the fund shall be paid from the fund.

14 Sec. 5. Section 44-2830, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 44-2830 If the fund shall exceed the sum of fifty four million five
17 ~~hundred thousand~~ dollars at the end of any calendar year after the
18 payment of all claims and expenses and after adding all reversions to the
19 fund, and if no reinsurance is involved, the director shall reduce the
20 surcharge required by section 44-2829 in order to maintain the fund at an
21 approximate level of sixty five million dollars. Beginning on January 1,
22 1985, and on January 1 of each succeeding year, the director shall adjust
23 the amount of the surcharge to maintain the fund at a level which is
24 sufficient to pay all anticipated claims for the next year, including
25 claims carried forward from previous years, and to maintain an adequate
26 reserve for future claims. Prior to making such an adjustment, the
27 director shall conduct a public hearing concerning the proposed
28 adjustment and shall give due regard to the size of the existing fund,
29 the number and size of potential claims against the fund, the number of
30 participating providers, changes in the cost of living, and sound
31 actuarial principles. If the fund is reinsured, the director shall

1 determine a lesser level at which the fund shall be maintained because of
2 the reinsurance carried and may reduce the surcharge to provide for the
3 reinsurance and maintain the fund at the lesser level determined by him
4 or her to be reasonable under the circumstances.

5 Sec. 6. Section 44-2831, Reissue Revised Statutes of Nebraska, is
6 amended to read:

7 44-2831 (1)(a) This subsection applies to claims and causes of
8 action arising from any occurrence after December 31, 2023.

9 (b) For any calendar year, the total amount paid from the Excess
10 Liability Fund for all claims shall not exceed thirty million dollars.

11 (c) Claims that are to be paid from the Excess Liability Fund shall
12 be paid in the order in which they are received. If there is not
13 sufficient money in the fund to pay a claim or if the limit described in
14 subdivision (1)(b) of this section has been or will be reached:

15 (i) Subject to such limit, the available money in the fund shall be
16 paid to the claimant;

17 (ii) The unsatisfied amount of the claim shall carry forward to
18 subsequent calendar years until such claim is satisfied; and

19 (iii) Available money in the fund shall be paid from the fund to the
20 claimant at the beginning of each month or as soon after as is
21 administratively possible until such claim is satisfied.

22 (2) ~~(1)~~ The director may, at any time, analyze the fund to determine
23 if the amount in such fund is inadequate to pay in full all claims
24 allowed or to be allowed during the calendar year. Upon such
25 determination, the director shall have the power to levy a special
26 surcharge on all health care providers who have qualified under the
27 Nebraska Hospital-Medical Liability Act, which special surcharge shall be
28 an amount sufficient to permit full payment of all claims allowed against
29 the fund during a calendar year. The special surcharge shall be levied
30 against all health care providers who have qualified under the Nebraska
31 Hospital-Medical Liability Act on the date of the special surcharge or at

1 any time during the preceding twelve months and shall be in an amount
2 proportionate to the surcharge each health care provider has paid to the
3 fund. Such special surcharge shall be due and payable within thirty days
4 after the same is levied.

5 ~~(3) (2)~~ The director shall have authority to cause all or any part
6 of the potential liability of the Excess Liability Fund to be reinsured,
7 if such reinsurance is available, on a fair and reasonable basis. The
8 cost of such reinsurance shall be paid by the fund and the fact of the
9 reinsurance shall be taken into account in determining the surcharge as
10 provided in sections 44-2829 and 44-2830, but in no event shall the
11 surcharge exceed fifty percent of the annual premium paid by a health
12 care provider for maintenance of current financial responsibility.

13 Sec. 7. Section 44-2831.01, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 44-2831.01 (1)(a) ~~(1)~~ Any health care provider who has furnished
16 proof of financial responsibility prior to January 1, 2005, under
17 sections 44-2824 and 44-2827 shall be qualified under section 44-2824 for
18 the remainder of the policy year or risk-loss trust year.

19 ~~(b) (2)~~ The increases in coverage requirements made by Laws 2004, LB
20 998, in sections 44-2824 and 44-2827 shall apply to policies issued or
21 renewed and risk-loss trust years which commence after January 1, 2005.

22 ~~(c) (3)~~ The changes made to sections 44-2825, 44-2832, and 44-2833
23 by Laws 2004, LB 998, apply commencing with policies issued or renewed
24 and risk-loss trust years which commence after January 1, 2005.

25 (2)(a) Any health care provider who has furnished proof of financial
26 responsibility prior to January 1, 2024, under sections 44-2824 and
27 44-2827 shall be qualified under section 44-2824 for the remainder of the
28 policy year or risk-loss trust year.

29 (b) The increases in coverage requirements made by this legislative
30 bill in sections 44-2824 and 44-2827 shall apply to policies issued or
31 renewed and risk-loss trust years which commence on or after January 1,

1 2024.

2 (c) The changes made to sections 44-2825, 44-2832, and 44-2833 by
3 this legislative bill, apply commencing with policies issued or renewed
4 and risk-loss trust years which commence on or after January 1, 2024.

5 Sec. 8. Section 44-2832, Reissue Revised Statutes of Nebraska, is
6 amended to read:

7 44-2832 (1) The Director of Administrative Services shall issue a
8 warrant drawn on the fund in the amount of each claim submitted by the
9 director. All claims against the fund shall be made on a voucher or other
10 appropriate request by the director after he or she has received:

11 (a)(i) For claims or causes of action arising from any occurrence on
12 or before December 31, 2023, a ~~(a)~~ A certified copy of a final judgment
13 or court-approved settlement in excess of five hundred thousand dollars
14 against a health care provider and in excess of the amount recoverable
15 from all health care providers; or

16 (ii) For claims or causes of action arising from any occurrence
17 after December 31, 2023, a certified copy of a final judgment or court-
18 approved settlement in excess of ten million dollars against a health
19 care provider and in excess of the amount recoverable from all health
20 care providers; or

21 ~~(b) A certified copy of a court-approved settlement in excess of~~
22 ~~five hundred thousand dollars against a health care provider and in~~
23 ~~excess of the amount recoverable from all health care providers; or~~

24 (b) ~~(c)~~ In case of claims based on primary insurance issued by the
25 risk manager under sections 44-2837 to 44-2839, a certified copy of a
26 final judgment or court-approved settlement requiring payment from the
27 fund.

28 (2) For all claims or causes of action arising from any occurrence
29 on or before December 31, 2023, the The amount paid from the fund for
30 excess liability when added to the payments by all health care providers
31 may not exceed the maximum amount recoverable pursuant to subsection (1)

1 of section 44-2825.

2 (3) The amount paid from the fund on account of a primary insurance
3 policy issued by the risk manager to a health care provider under
4 sections 44-2837 to 44-2839 may not exceed ten million ~~five hundred~~
5 ~~thousand~~ dollars for any one occurrence covered by such policy under any
6 circumstances.

7 Sec. 9. Section 44-2833, Reissue Revised Statutes of Nebraska, is
8 amended to read:

9 44-2833 (1) If the insurer of a health care provider shall agree to
10 settle its liability on a claim against its insured by payment of its
11 policy limits of ten million ~~five hundred thousand~~ dollars and the
12 claimant shall demand an amount in excess thereof for a complete and
13 final release and if no other health care provider is involved, the
14 procedures prescribed in this section shall be followed.

15 (2) A motion shall be filed by the claimant with the court in which
16 the action is pending against the health care provider or, if no action
17 is pending, the claimant shall file a complaint in one of the district
18 courts of the State of Nebraska, seeking approval of an agreed
19 settlement, if any, or demanding payment of damages from the Excess
20 Liability Fund.

21 (3) A copy of such motion or complaint shall be served on the
22 director, the health care provider, and the health care provider's
23 insurer and shall contain sufficient information to inform the parties
24 concerning the nature of the claim and the additional amount demanded.
25 The health care provider and his or her insurer shall have a right to
26 intervene and participate in the proceedings.

27 (4) The director, with the consent of the health care provider, may
28 agree to a settlement with the claimant from the Excess Liability Fund.
29 Either the director or the health care provider may file written
30 objections to the payment of the amount demanded. The agreement or
31 objections to the payment demanded shall be filed within twenty days

1 after the motion or complaint is filed.

2 (5) After the motion or complaint, agreement, and objections, if
3 any, have been filed, the judge shall set the matter for trial as soon as
4 practicable. The court shall give notice of the trial to the claimant,
5 the health care provider, and the director.

6 (6) At the trial, the director, the claimant, and the health care
7 provider may introduce relevant evidence to enable the court to determine
8 whether or not the settlement should be approved if it has been submitted
9 on agreement without objections. If the director, the health care
10 provider, and the claimant shall be unable to agree on the amount, if
11 any, to be paid out of the Excess Liability Fund, the amount of
12 claimant's damages, if any, in excess of the ten million five hundred
13 ~~thousand~~ dollars already paid by the insurer of the health care provider
14 shall be determined at trial.

15 (7) The court shall determine the amount for which the fund is
16 liable and render a finding and judgment accordingly. The amount of money
17 in the fund shall not factor into such determination. In approving a
18 settlement or determining the amount, if any, to be paid from the Excess
19 Liability Fund in such a case, the court shall consider the liability of
20 the health care provider as admitted and established by evidence.

21 (8) Any settlement approved by the court may not be appealed. Any
22 judgment of the court fixing damages recoverable in any such contested
23 proceeding shall be appealable pursuant to the rules governing appeals in
24 any other civil case.

25 Sec. 10. Original sections 44-2824, 44-2825, 44-2827, 44-2829,
26 44-2830, 44-2831, 44-2831.01, 44-2832, and 44-2833, Reissue Revised
27 Statutes of Nebraska, are repealed.