

New Mandatory Reporting Obligations

There are now more circumstances where an employer, partner or associate of a regulated health professional or a facility offering privileges to one has to make a mandatory report to a health regulatory College. Not only must a report be made when there is termination of the relationship, but a mandatory report must also be made where there are any restrictions in the practice or privileges of the regulated health professional. In addition, other criteria for when such a report has to be made have been both expanded and clarified.

The goal of the changes is to ensure that *Regulated Health Professions Act (RHPA)* Colleges are aware of all potentially relevant misconduct, incompetence and incapacity concerns. The discretion that used to exist for employers, partners, associates or facilities on whether to make such a mandatory report has been removed. It is now up to the Colleges to determine whether action should be taken.

Who has to make the mandatory report?

Every employer, partner or associate of a regulated health professional (i.e., a person registered with an *RHPA* College) or a facility offering privileges to them is covered by the duty to make such reports. The employer, partner, associate or facility does not need to be registered with an *RHPA* College to be required to make a report. The term “associate” is a broad one and covers any person who practises in any kind of business relationship with a regulated health professional.

The only exception is that a patient who employs a regulated health professional directly does not need to make a report.

What are the criteria for making a report?

There are two conditions that have to be met before a report must be made:

1. **Termination / Restriction.** There must be a termination of the relationship, the relinquishment of privileges or a restriction in the regulated health professional’s practice or privileges. This termination, relinquishment or restriction can either have been imposed on the regulated health professional, he or she could have agreed to it, or he or she could unilaterally do it. The source of the termination, relinquishment or restriction does not matter.

2. **Conduct / Competence / Capacity.** The termination / restriction must be related to the professional misconduct, competence or incapacity of the regulated health professional. For example, where there are reasonable grounds to believe that the regulated health professional voluntarily terminated / restricted his or her practice or privileges because of conduct / competence / capacity concerns, the report has to be made. Similarly, if the regulated health professional voluntarily terminated / restricted his or her practice or privileges during the course of or as a result of an investigation into his or her conduct / competence / capacity, a report must be made.

Where those two conditions are met, a mandatory report must be made.

What is a “restriction” of practice or privileges?

Any limitation on the health care professional’s practice would be included in this phrase. Examples include:

- Practising under some form of supervision or mentoring.
- Limiting the activities or procedures that the health care professional can perform (e.g., refraining from performing certain surgeries, not prescribing or dispensing certain drugs, not seeing a certain category of patients such as children or women, not treating certain conditions).
- Practising only where the health care practitioner remains in treatment for an addiction or impairing mental illness.
- A location limitation, such as not performing any home visits.

Some interventions may or may not be a restriction depending on the circumstances. For example, an agreement by the health care professional to take certain courses may not be a restriction if he or she has no limitations on his or her practice in the meantime. However, a limitation (e.g., to review treatment plans with a colleague until the course is successfully completed) would be a restriction of practice.

What are “reasonable grounds”?

Reasonable grounds exist where there is more than mere suspicion that the termination / restriction is related to the event. For example, an unanticipated retirement by the health care professional when a concern is raised about his or her conduct / competence / capacity would generally constitute reasonable grounds. It does not take a lot of information to trigger “reasonable grounds”. This wording falls well short of the “balance of probabilities” that is required to prove allegations at a discipline hearing.

While the entire phrase, which reads “reasonable grounds to believe”, refers to a person’s belief, this is an objective test. For example, where reasonable people would assume that the termination / restriction was related to the conduct / competence / capacity concern, a report

must still be made even though the health care practitioner denies the connection. Similarly a report must be made even though the person who should be making the report does not believe that the health care practitioner actually did anything wrong. Subjective opinions no longer have a place in determining whether a report should be made.

What does “related to” mean?

Where the termination / restriction is “related to” the conduct / competence / capacity of the health care practitioner, a report must be made. The phrase is broad and indicates that the conduct / competence / capacity concern does not have to be the sole reason for the termination

/ restriction. So long as the conduct / competence / capacity concern reasonably appears to be a material factor in the termination / restriction decision or action, a report must be made.

What is “professional misconduct, incompetence or incapacity”?

Professional misconduct refers to any inappropriate act or omission that would potentially result in disciplinary action. Professional misconduct includes dishonesty, failure to maintain standards of practice, sexual abuse, failure to fulfill a professional obligation or anything else that would be considered unprofessional. All *RHPA* Colleges have regulations defining professional misconduct. Those definitions are remarkably similar and most people involved in the health care sector have a fairly good idea of what constitutes professional misconduct. If in doubt, one can always contact the relevant College for guidance.

Issues that are primarily operational and do not reflect on the suitability of the regulated health professional to practise the profession are generally not considered to be professional misconduct. For example, an employee who arrives for work late or leaves early when there is no work to do is probably not engaging in professional misconduct (unless patient care is jeopardized).

Incompetence is a defined term¹. It refers to a lack of knowledge, skill or judgment in respect of a patient that would likely involve regulatory intervention if known by the College.

Incapacity is also a defined term². It typically refers to an illness that has the potential to affect a regulated health professional’s judgment, such as an addiction or certain mental illnesses.

¹ Incompetence

52. (1) A panel shall find a member to be incompetent if the member’s professional care of a patient displayed a lack of knowledge, skill or judgment of a nature or to an extent that demonstrates that the member is unfit to continue to practise or that the member’s practice should be restricted.

² Interpretation

1. (1) In this Code, ...

“incapacitated” means, in relation to a member, that the member is suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the member’s certificate of registration be subject to terms, conditions or limitations, or that the member no longer be permitted to practise; (“frappé d’incapacité”)

What is an “investigation”?

An investigation is any inquiry, review, audit or examination by or on behalf of an employer, partner, associate or facility to assess whether there are concerns related to conduct / competence / capacity of a regulated health professional. There is no formality implied by the term. There does not need to be an official complaint. The investigation does not need to be authorized by legislation.

For example, if an employer is concerned that a regulated health professional may have inadequately assessed patients and does an informal chart audit to assess whether this concern is valid, that employer is conducting an investigation. Should the regulated health professional resign from his or her position during the audit, a mandatory report is required.

How is this mandatory reporting requirement different from before?

There are two major differences in the provision as reworded:

1. Now restrictions in practice or privileges must be reported. Previously only terminations of the relationship were reportable.
2. Now the criteria for reporting are objective. Previously there was an element of judgment or intent (e.g., as to whether the employer, partner, associate or facility intended to terminate the relationship). Now, a report must be made whenever there are, objectively speaking, reasonable grounds for making the report.

See the end of this document for the precise wording of the previous provision and its changed wording.

What about the other mandatory reporting provisions?

The other mandatory reporting provisions under the *RHPA* remain in place. These include (this is not an exhaustive list):

- The duty on regulated health professionals and facilities to report sexual abuse.
- The duty on the operator of a facility to report incompetence or incapacity even if no restrictions are imposed.
- The duty on regulated health professionals to self-report a court finding that he or she committed an offence.
- The duty on regulated health professionals to self-report a court finding of professional negligence or malpractice.

These requirements are unchanged.

Similarly, mandatory reporting requirements in other legislation (e.g., children in need of protection, infectious diseases) or under case law (e.g., duty to warn where one learns of a significant risk of serious bodily harm) remain in place.

Who do I send the report to?

The report needs to be sent in writing to the Registrar of the *RHPA* College that has registered the health care professional. If the health care professional is registered with more than one College, the report should probably be sent to all of the Registrars.

The contact information for all RHPA Colleges can be obtained from:

www.regulatedhealthprofessions.on.ca

What do I need to include in the report?

The written report must contain your name and contact information, the name of the regulated health professional and the basis of the concerns underlying your report. You are encouraged to provide copies of relevant documents.

What is the timing of the mandatory report?

The report must be made within 30 days of the termination, relinquishment or restriction.

What will the College do with the report?

The College will review the report and consider whether it should initiate an investigation. In doing so the College may approach you for additional information. In some cases the College will choose to simply keep the information on file in case additional concerns arise in the future. In other cases the concerns may already be in the process of being addressed. Sometimes a full investigation will be initiated.

The College process is confidential and you will not necessarily be advised of the outcome of your report. However, if there is a regulatory reason to do so (e.g., the College needs additional information from you) or there is a public interest in disclosing the information to you, you may be updated. In addition, the public register will, in some cases, record under the name of the regulated health professional the outcome of the College's handling of the report.

Do I have any protection for making the report?

Yes there is considerable protection for people who make mandatory reports. The *RHPA* provides protection against being sued for damages or for retaliation at work for anyone making a report in good faith.

If you believe that you are the subject of retaliation by the regulated health practitioner you are reporting, please advise the College.

What are some examples of when this kind of mandatory report is required?

A patient in her seventies reports to you that Dero, a regulated health professional, was rough with her to the point of causing a bruise on her arm. You see a fading bruise but it is unclear whether it was the result of rough handling. Dero denies touching her roughly but is just a year from his anticipated retirement. He offers to retire if the matter is dropped. The patient would be satisfied with an apology from Dero and his retirement. Dero retires. Is a mandatory report necessary?

Yes. The alleged conduct is professional misconduct. There are reasonable grounds (a detailed report from the patient and bruising that is somewhat consistent with the report). The retirement by Dero is a termination of the relationship. The retirement is, at least in part, related to the report made by the patient.

Upeksha has done poorly on her performance reviews. The main concerns are that her assessments do not appear to be thorough and her record keeping is not up to date. She has been given additional assistance in addressing these concerns but there is little improvement. In fact, during the last review some records were weeks behind. The outcome is an agreement between Upeksha and her manager that Upeksha will not take on any new patients until her record keeping is up to date and she has successfully completed an assessment mentoring program at the facility. Is a mandatory report necessary?

Yes. Upeksha's practice has been restricted in that she cannot see patients until certain objectives have been achieved. The restriction is related to either professional misconduct (failing to maintain the standard of practice of the profession) or even incompetence (a lack of knowledge, skill and judgment that might, unless addressed, require regulatory action). It may be that the College will await the outcome of the remediation before deciding whether or not to look into the matter, but that is a decision for the College, not the employer, to make.

Sargon consistently fails to record his activities in the facility's time management database. This makes it impossible for the facility to accurately manage the workload in his department. After a series of progressive discipline Sargon is suspended for two days without pay. Is a mandatory report necessary?

Probably not. While a restriction was imposed on Sargon's practice, it appears related to employment issues rather than professional misconduct, incompetence or incapacity.

Irena shares space with you. Your shared receptionist reports to you that Irena appears to be intoxicated while with a patient. You step into Irena's office and determine that Irena smells strongly of alcohol and is unsteady. You gently escort Irena out of the office and take over the treatment of the patient while the receptionist gets Irena a taxi. The next day Irena apologizes but says she does not have a problem. She simply exercised bad judgment when having lunch with a school buddy. However, when you tell Irena that you will terminate your space sharing agreement unless Irena enters a substance abuse treatment program and has her specialist send you regular reports of her progress, she agrees. Is a mandatory report necessary?

Yes. You have a professional association with Irena even though she is not your employee or partner. The demand that she go into treatment if she is to remain in association with you is a restriction in Irena's practice. This situation identifies a concern about the capacity of Irena. Thus the new provision makes this conduct reportable.

In addition, another mandatory reporting requirement for facility operators also applies. Your office would appear to constitute a "facility" which you operate. The duty of facility operators is to report incapacity concerns, even if no restrictions are imposed, also applies on these facts.

Wording of the Duty

The previous wording of the mandatory reporting obligation was as follows:

Reporting by employers, etc.

85.5 (1) A person who terminates the employment or revokes, suspends or imposes restrictions on the privileges of a member or who dissolves a partnership, a health profession corporation or association with a member for reasons of professional misconduct, incompetence or incapacity shall file with the Registrar within thirty days after the termination, revocation, suspension, imposition or dissolution a written report setting out the reasons. 1993, c. 37, s. 23; 2000, c. 42, Sched., s. 36.

Same

(2) If a person intended to terminate the employment of a member or to revoke the member's privileges for reasons of professional misconduct, incompetence or incapacity but the person did not do so because the member resigned or voluntarily relinquished his or her privileges, the person shall file with the Registrar within thirty days after the resignation or relinquishment a written report setting out the reasons upon which the person had intended to act. 1993, c. 37, s. 23.

Application

(3) This section applies to every person, other than a patient, who employs or offers privileges to a member or associates in partnership or otherwise with a member for the purpose of offering health services. 1993, c. 37, s. 23.

Subsection (2), which is highlighted above, is now replaced with the following new wording:

Same

(2) Where a member resigns, or voluntarily relinquishes or restricts his or her privileges or practice, and the circumstances set out in paragraph 1 or 2 apply, a person referred to in subsection (3) shall act in accordance with those paragraphs:

1. Where a person referred to in subsection (3) has reasonable grounds to believe that the resignation, relinquishment or restriction, as the case may be, is related to the member's professional misconduct, incompetence or incapacity, the person shall file with the Registrar within 30 days after the resignation, relinquishment or restriction a written report setting out the grounds upon which the person's belief is based.
- 2.
3. Where the resignation, relinquishment or restriction, as the case may be, takes place during the course of, or as a result of, an investigation conducted by or on behalf of a person referred to in subsection (3) into allegations related to professional misconduct, incompetence or incapacity on the part of the member, the person referred to in subsection (3) shall file with the Registrar

within 30 days after the resignation, relinquishment or restriction a written report setting out the nature of the allegations being investigated. 2014, c. 14, Sched. 2, s. 12.