AMENDED IN SENATE APRIL 19, 2022

AMENDED IN SENATE APRIL 7, 2022

SENATE BILL No. 1436

Introduced by Senator Roth

February 18, 2022

An act to amend Sections *2860,* 3710, 3716, 3758~~, and 3758.6~~ *3758.6, and 3765* of the Business and Professions Code, relating to respiratory therapy.

LEGISLATIVE COUNSEL'S DIGEST

SB 1436, as amended, Roth. Respiratory~~ therapists: suspension or termination for cause: reporting.~~ *therapy.*

(1) Existing law, the Respiratory Care Practice Act,~~ provides for~~ *establishes the Respiratory Care Board of California for* the licensure and regulation of respiratory therapy~~ practitioners by the Respiratory Care Board of California,~~ *practitioners. Existing law* makes a violation of that act a~~ crime,~~ *crime* and repeals the act on January 1, 2023.~~ Existing law requires the employer of a respiratory care practitioner to report to the board the suspension or termination for cause of any practitioner in their employ. Existing law defines suspension or termination for cause to mean suspension or termination from employment for specified reasons, including gross incompetence or negligence, falsification of medical records, and the use of controlled substances or alcohol to the extent that it impairs the ability to safely practice respiratory care.~~

This bill would extend the operation of the act to January 1, 2027. ~~The~~ *By extending the operation of the act, a violation of which would be a crime, the bill would impose a state-mandated local program.*

(2) Existing law requires the employer of a respiratory care practitioner to report to the board the suspension or termination for

cause of any practitioner in their employ. Existing law defines suspension or termination for cause to mean suspension or termination from employment for specified reasons, including gross incompetence or negligence, falsification of medical records, and the use of controlled substances or alcohol to the extent that it impairs the ability to safely practice respiratory care.

This bill would additionally require an employer of a respiratory care practitioner to report to the board the leave or resignation for cause of a practitioner whom they employ. The bill would define "leave, resignation, suspension, or termination for cause" for these purposes to include administrative leave, employee leave, resignation, suspension, or termination from employment for specified reasons that would additionally include suspected acts, such as suspected or actual gross incompetence or negligence, suspected or actual falsification of medical records, and the suspected or actual use of controlled substances or alcohol to such an extent that it impairs the ability to safely practice respiratory care. The bill would also require an owner, director, partner, or manager of a registry or agency that places one or more practitioners at a facility to practice respiratory care to report those specified suspected or actual acts to the board under specified circumstances. Because a violation of these requirements would be a crime, the bill would impose a state-mandated local program. The bill would also make conforming changes.

(3) Existing law, the Respiratory Care Practice Act, prohibits a person from engaging in the practice of respiratory care unless the person is a licensed respiratory care practitioner, except for specified acts, including, among others, the performance of respiratory care services in case of an emergency, including an epidemic or public disaster.

Under this bill, the temporary performance of respiratory care services as identified and authorized by the board in the event of an epidemic, pandemic, public disaster, or emergency would not violate the Respiratory Care Practice Act.

(4) Existing law, the Vocational Nursing Practice Act, until January 1, 2025, establishes the Board of Vocational Nursing and Psychiatric Technicians of the State of California to license and regulate vocational nurses and psychiatric technicians. Existing law authorizes a licensed vocational nurse to withdraw blood, administer medications, and start and superimpose intravenous fluids, as described, when directed by a licensed physician and surgeon.

This bill would provide that a licensed vocational nurse is authorized to perform respiratory tasks and services that do not require a respiratory assessment and only require manual, technical skills, or data collection, as identified by the Respiratory Care Board of California, if the licensed vocational nurse has received training satisfactory to their employer and when directed by a physician and surgeon. The bill would also provide that a licensed vocational nurse who is employed by a licensed home health agency who performs respiratory tasks or services identified by the Respiratory Care Board of California does not violate the Respiratory Care Practice Act if, before January 1, 2025, the licensed vocational nurse has completed patient-specific training satisfactory to their employer, and, on or after January 1, 2025, the licensed vocational nurse has completed patient-specific training by the employer pursuant to guidelines that the bill would require the Respiratory Care Board of California to promulgate in collaboration with the Board of Vocational Nursing and Psychiatric Technicians of the State of California.

~~(2)~~

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 2860 of the Business and Professions*
2 *Code is amended to read:*
3 2860. *(a)* This chapter confers no authority to practice
4 medicine or ~~surgery~~ *surgery, to provide respiratory care services*
5 *and treatment,* or to undertake the prevention, ~~treatment~~ *treatment,*
6 or cure of disease, pain, injury, deformity, or mental or physical
7 condition in violation of any provision of law.
8 *(b) Notwithstanding subdivision (a), a licensed vocational nurse*
9 *who has received training satisfactory to their employer may, when*
10 *directed by a physician and surgeon, perform respiratory tasks*
11 *and services expressly identified by the Respiratory Care Board*
12 *of California pursuant to subdivision (a) of Section 3702.5.*

1 ~~SECTION 1.~~
2 *SEC. 2.* Section 3710 of the Business and Professions Code is
3 amended to read:
4 3710. (a) The Respiratory Care Board of California, hereafter
5 referred to as the board, shall enforce and administer this chapter.
6 (b) This section shall remain in effect only until January 1, 2027,
7 and as of that date is repealed. Notwithstanding any other law, the
8 repeal of this section renders the board subject to review by the
9 appropriate policy committees of the Legislature.
10 ~~SEC. 2.~~
11 *SEC. 3.* Section 3716 of the Business and Professions Code is
12 amended to read:
13 3716. (a) The board may employ an executive officer exempt
14 from civil service and, subject to the provisions of law relating to
15 civil service, clerical assistants and, except as provided in Section
16 159.5, other employees as it may deem necessary to carry out its
17 powers and duties.
18 (b) This section shall remain in effect only until January 1, 2027,
19 and as of that date is repealed.
20 ~~SEC. 3.~~
21 *SEC. 4.* Section 3758 of the Business and Professions Code is
22 amended to read:
23 3758. (a) Any employer of a respiratory care practitioner shall
24 report to the Respiratory Care Board of California any leave,
25 resignation, suspension, or termination for cause of any practitioner
26 in their employ. The reporting required herein shall not act as a
27 waiver of confidentiality of medical records. The information
28 reported or disclosed shall be kept confidential except as provided
29 in subdivision (c) of Section 800, and shall not be subject to
30 discovery in civil cases.
31 (b) For purposes of the section, "leave, resignation, suspension,
32 or termination for cause" is defined to mean any administrative
33 leave, employee leave, resignation, suspension, or termination
34 from employment for any of the following reasons:
35 (1) Suspected or actual use of controlled substances or alcohol
36 to such an extent that it impairs the ability to safely practice
37 respiratory care.
38 (2) Suspected or actual unlawful sale of controlled substances
39 or other prescription items.

1 (3) Suspected or actual patient neglect, physical harm to a
2 patient, or sexual contact with a patient.
3 (4) Suspected or actual falsification of medical records.
4 (5) Suspected or actual gross incompetence or negligence.
5 (6) Suspected or actual theft from patients, other employees, or
6 the employer.
7 (c) An owner, director, partner, or manager of a registry or
8 agency that places one or more respiratory care practitioners at
9 any facility to practice respiratory care shall report to the
10 Respiratory Care Board of California pursuant to subdivision (a)
11 if either of the following apply:
12 (1) The owner, director, partner, or manager is aware that a
13 respiratory care practitioner is no longer employed at the facility
14 they were placed at by the registry or agency for any behavior
15 described in subdivision (b).
16 (2) The owner, director, partner, or manager is asked to place
17 the practitioner on a "do not call" list or other status indicating the
18 facility does not want that practitioner placed at their facility for
19 any behavior described in subdivision (b).
20 (d) Failure of an employer to make a report required by this
21 section is punishable by an administrative fine not to exceed ten
22 thousand dollars ($10,000) per violation.
23 ~~SEC. 4.~~
24 *SEC. 5.* Section 3758.6 of the Business and Professions Code
25 is amended to read:
26 3758.6. (a) In addition to the reporting required under Section
27 3758, an employer shall also report to the board the name,
28 professional licensure type and number, and title of the person
29 supervising the licensee who has been subject to leave, resignation,
30 suspension, or termination for cause, as defined in subdivision (b)
31 of Section 3758. If the supervisor is a licensee under this chapter,
32 the board shall investigate whether due care was exercised by that
33 supervisor in accordance with this chapter. If the supervisor is a
34 health professional, licensed by another licensing board under this
35 division, the employer shall report the name of that supervisor and
36 any and all information pertaining to the leave, resignation,
37 suspension, or termination for cause of the person licensed under
38 this chapter to the appropriate licensing board.

1 (b) The failure of an employer to make a report required by this
2 section is punishable by an administrative fine not to exceed ten
3 thousand dollars ($10,000) per violation.
4 *SEC. 6. Section 3765 of the Business and Professions Code is*
5 *amended to read:*
6 3765. This act does not prohibit any of the following activities:
7 (a) The performance of respiratory care that is an integral part
8 of the program of study by students enrolled in approved
9 respiratory therapy training programs.
10 (b) Self-care by the patient or the gratuitous care by a friend or
11 member of the family who does not represent or hold ~~himself or~~
12 ~~herself~~ *themselves* out to be a respiratory care practitioner licensed
13 under the provisions of this chapter.
14 (c) The respiratory care practitioner from performing advances
15 in the art and techniques of respiratory care learned through formal
16 or specialized training.
17 (d) The performance of respiratory care in an emergency
18 situation by paramedical personnel who have been formally trained
19 in these modalities and are duly licensed under the provisions of
20 an act pertaining to their specialty.
21 (e) ~~Respiratory~~ *Temporary performance, by other health care*
22 *personnel, students, or groups, of respiratory* care ~~services in case~~
23 ~~of an emergency. "Emergency," as used in this subdivision,~~
24 ~~includes an epidemic or public disaster.~~ *services, as identified and*
25 *authorized by the board, in the event of an epidemic, pandemic,*
26 *public disaster, or emergency.*
27 (f) Persons from engaging in cardiopulmonary research.
28 (g) Formally trained licensees and staff of child day care
29 facilities from administering to a child inhaled medication as
30 defined in Section 1596.798 of the Health and Safety Code.
31 (h) The performance by a person employed by a home medical
32 device retail facility or by a home health agency licensed by the
33 State Department of Public Health of specific, limited, and basic
34 respiratory care or respiratory care related services that have been
35 authorized by the board.
36 *(i) The performance, by a vocational nurse licensed by the Board*
37 *of Vocational Nursing and Psychiatric Technicians of the State of*
38 *California who is employed by a home health agency licensed by*
39 *the State Department of Public Health, of respiratory tasks and*

1 *services identified by the board, if the licensed vocational nurse*
2 *complies with the following:*
3 *(1) Before January 1, 2025, the licensed vocational nurse has*
4 *completed patient-specific training satisfactory to their employer.*
5 *(2) On or after January 1, 2025, the licensed vocational nurse*
6 *has completed patient-specific training by the employer in*
7 *accordance with guidelines that shall be promulgated by the board*
8 *no later than January 1, 2025, in collaboration with the Board of*
9 *Vocational Nursing and Psychiatric Technicians of the State of*
10 *California.*
11 ~~(i)~~
12 *(j)* The performance of pulmonary function testing by persons
13 who are currently employed by Los Angeles County hospitals and
14 have performed pulmonary function testing for at least 15 years.
15 ~~SEC. 5.~~
16 *SEC. 7.* No reimbursement is required by this act pursuant to
17 Section 6 of Article XIII B of the California Constitution because
18 the only costs that may be incurred by a local agency or school
19 district will be incurred because this act creates a new crime or
20 infraction, eliminates a crime or infraction, or changes the penalty
21 for a crime or infraction, within the meaning of Section 17556 of
22 the Government Code, or changes the definition of a crime within
23 the meaning of Section 6 of Article XIII B of the California
24 Constitution.

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Board of Vocational Nursing and Psychiatric Technicians
Legislative Analysis

BILL NUMBER:	Senate Bill 1436
SUBJECT:	Respiratory Care Practice Act
AMENDED DATE:	April 19, 2022
AUTHOR:	Senator Richard Roth
SPONSOR:	Author

DESCRIPTION OF PROPOSED LEGISLATION:

SB 1436 is the Sunset Review bill for the Respiratory Care Board of California (RCB). This analysis pertains **only** to the language in the bill related to the authorization and training of Licensed Vocational Nurses to provide limited respiratory tasks and services.

STAFF POSITION/RECOMMENDATION:

NEUTRAL AND SEEK CLARIFYING AMENDMENTS

BACKGROUND:

Respiratory Care Professionals (RCPs) are skilled health care professionals who generally work under the direction of a medical doctor and specialize in providing evaluation of, and treatment to, patients with breathing difficulties as a result of heart, lung, and other disorders, as well as providing diagnostic, educational, and rehabilitation services. There are approximately 24,000 respiratory care professionals in California.

Thousands of patients in California require nursing that encompasses respiratory care, including mechanical ventilation, especially in home health and residential care settings. This limited respiratory care is mostly provided by Licensed Vocational Nurses (LVNs) and in some settings, by Psychiatric Technicians (PTs), and is a part of the total patient care. There are approximately 140,000 LVNS and PTs licensed in California.

The RCB and the BVNPT are conflicted over the appropriateness of LVNs and PTs providing this limited care. There are a very few instances where patients suffered and died because an inadequately trained LVN failed to provide the correct care or take the appropriate action. In seeking a solution to these concerns, the BVNPT and the RCB convened stakeholder discussions. The BVNPT sought stakeholder input on a standardized post-licensure certification requirement for all LVNs and PTs who provide bedside care to patients who depend upon mechanical ventilation equipment. The COVID-19 pandemic interrupted this process.

Over the years, many home health care employers launched their own training programs for their LVNs and other patient care employees. Generally, these programs are designed and administered by a combination of licensed respiratory care practitioners, nurses, and physicians, and are both scope-appropriate and specific to patient needs. While this approach meets much of the need, it leaves potential risks to patient safety.

SB 1436, as amended on April 19, 2022, would make the following two statutory changes:

Section 2860 of the Business and Professions Code is amended to read:
(a) This chapter confers no authority to practice medicine or ~~surgery~~ *surgery, to provide respiratory care services and treatment,* or to undertake the prevention, ~~treatment~~ *treatment,* or cure of disease, pain, injury, deformity, or mental or physical condition in violation of any provision of law.
(b) Notwithstanding subdivision (a), a licensed vocational nurse who has received training satisfactory to their employer may, when directed by a physician and surgeon, perform respiratory tasks and services expressly identified by the Respiratory Care Board of California pursuant to subdivision (a) of Section 3702.5.

Section 3765 of the Business and Professions Code is amended to read:
This act does not prohibit any of the following activities:
(i) The performance, by a vocational nurse licensed by the Board of Vocational Nursing and Psychiatric Technicians of the State of California who is employed by a home health agency licensed by the State Department of Public Health, of respiratory tasks and services identified by the board, if the licensed vocational nurse complies with the following:
(1) Before January 1, 2025, the licensed vocational nurse has completed patient-specific training satisfactory to their employer.
(2) On or after January 1, 2025, the licensed vocational nurse has completed patient-specific training by the employer in accordance with guidelines that shall be promulgated by the board no later than January 1, 2025, in collaboration with the Board of Vocational Nursing and Psychiatric Technicians of the State of California.

Concerns with current version of the bill:

1. There is not a statewide requirement for all care facilities to provide training, or for the employers to require specific training on patient respiratory needs as a condition of employment. This language may also require new regulations from the California Department of Public Health.
2. The current standards for the training are not uniform or certified by either the RCB or the BVNPT, and the bill language does not establish these, or any sort of accountability measures.
3. The regulation and enforcement for employers, facilities and practitioners is not coordinated, and possible delays in enforcement creates a risk to patients if unsafe practitioners are not subjected to appropriate and efficient disciplinary actions.
4. Basic respiratory care is included in the prelicensure training programs, and students often observe and participate in this area during clinical placements. It is wholly within the scope of practice to gather patient information and perform basic care procedures, regardless of where the nurse is employed.
5. The BVNPT supports the need for standardized training for home health care, residential care facilities, skilled nursing facilities and other settings. We have particular concerns about respiratory care in rural areas and the school nursing and student transport services.
6. Notwithstanding #5 above, the BVNPT unequivocally agrees that any training program created by this, or other legislation does not equip an LVN or PT to provide the full scope of respiratory care that an RCP does. This training should be specifically aimed to equip LVNs and PTs to care for their patients and respond quickly and appropriately in an emergency.

ANALYSIS:

It is unarguable that the skills and training of a Respiratory Care Practitioner (RCP) eclipse those of an LVN or a PT in terms of specific care for patients with respiratory conditions, especially in acute cases.

It is also true that thousands of patients depend on mechanical ventilators as part of their overall nursing needs. There is a basic shortage of patient care delivery professionals in all areas, and this shortage has been exacerbated by the COVID-19 pandemic. The workforce shortage goes beyond home health care, although this is a sizable percentage of the most critical need.

For example, LVNs provide transport support for patients so that they can attend school and are often employed as school nurses. In addition, facilities in rural areas depend on LVNs. Last, while skilled nursing facilities are likely to have RCPs as part of the staff, it is not certain whether they would have 24/7 onsite coverage, while the LVNs providing bedside care would provide that 24/ onsite coverage. These are areas that should absolutely require this special training for patients with ongoing respiratory needs.

Another issue relates to Durable Medical Equipment (DME) providers training familial caregivers. DME representatives have traditionally trained family members to operate the mechanical ventilators for their family members, few of whom have any medical training. Training a licensed professional in these same capacities would seem efficient.

The BVNPT is also aware that a number of hospitals and acute care facilities are researching and testing the utilization of LVNs in new capacities. The paramount goal of the state’s patient care professionals should be to cooperate to ensure the maximum public safety.

Summary of Issues of Concern:

1. As stated above, the need for training extends beyond home health care, and should include PTs as well.
2. The onus for ensuring that nurses are trained, and that training is appropriate, specific, and ongoing is on the employers. There should be a means of assessing the efficacy of the training or establishing accountability measures for employers and both boards.
3. The regulatory authority is not clear. The BVNPT would recommend the statute authorize the RCB to control the initial review and response and refer cases to the BVNPT for subsequent disciplinary action on licenses.

The BVNPT believes that SB 1436 is a good starting place but is not a full solution. We strongly urge the Legislature to consider the amending the bill to address the following possibilities:

1. Informational hearing(s) with both the RCB and the BVNPT on the issue of care for patients on assisted ventilation, and Medi-Cal funding for care.
2. Research and analysis on patient respiratory care needs beyond home health care, including survey of other states. This should Involve RCB, BVNPT, BRN, CDPH, and DSS.
3. Establish in statute clearly defined roles and responsibilities of the RCB and the BVNPT in terms of developing and promulgating scope-specific training.

4. Research and provide information on different training models, such as continuing education or post licensure certifications, as well as requirements for training refresh and requirements for employers.

Given the short amount of time left in this legislative session, the best solution may be to separate this issue from the rest of RCB's sunset legislation with an eye toward a joint bill next year.

FISCAL IMPACT

The BVNPT's costs for implementing SB 1436 would be absorbed internally, but the estimated impact is provided in the interest of transparency.

Stakeholder and school outreach
The BVNPT would, in cooperation with the RCB, share information with stakeholders including home health providers and seek input through webinars and virtual town hall meetings, to lead up to the launch of the guidelines. In addition, the BVNPT would share the guidelines with the LVN and PT schools/programs to ensure that the basic licensure curriculum is consistent. Estimated cost: Fiscal Year 2023-24, 100 combined NEC/SNEC hours (that is, more than one person) @$95/hour = $9500.00. This includes outreach and coordination of sessions.

Development of training guidelines
It is not yet clear what form the training will take; an employer-based program based on guidelines from the RCB, Continuing Education course(s), or post-licensure certification. It's also not clear whether such training can be taken once or should be renewed bi-annually. The BVNPT needs to be an integral part in the development of guidelines and curriculum, especially regarding the scope of functions. Estimated Costs: In 2023-24, 100 combined NEC/SNEC hours (that is, more than one person) @$95/hour = $9500.00. This includes work with the RCB, employers, schools, and other stakeholders.

Administration of training and necessary rulemaking
If the training takes the form of Continuing Education (CE) or Post-licensure certification (PLC), there are regulated requirements for approval as a provider, and then tracking for licensees. Establishing our regulations would require about 25% of our Legislation and Regulations Specialist's time for about a year, costing approximately $25,000, and 50% of an Education Analyst's time, costing approximately $40,000. The ongoing management of both provider and licensee data would increase the ongoing workload of one Program Technician I by ten percent, costing approximately $5000. Time from both general and regulatory counsel would be needed, which is funded by our pro rata, and adds to their existing workload.

BreEZe
Assuming that the training was either a CE or PLC, BreEZe would need to be updated to create a new field for these requests, so they can be tracked, in a manner similar to current inquiries. DCA Office of Information Security (OIS) would carry the costs for this, but the Board's user expenses would increase. Alternately, the Board would need to create and utilize a separate tracking system at an unknown cost.

Cooperation in Investigations and cross training for Board staff

Perhaps not germane to this specific legislation is the need for clearer standards to regulate and discipline LVNs and PTs if issues arise in this area of care. The BVNPT suggests the development and implementation of a memorandum of understanding for information sharing and cross-training between the RCB and the BVNPT.

In order to ensure swift and appropriate reporting and actions on LVNs and PTs operating out of their scope, the BVNPT recommends an annual Memorandum of Understanding between the two boards regarding information sharing and investigation procedures. Further, a regular program of cross training for Investigation staff and/or contracts for Expert Witnesses would be beneficial. Estimated costs: (1) In 2023-24, approximately 100 total hours (BVNPT Enforcement Chief, Supervising Nursing Education Consultant and Supervising Special Investigator), in conjunction with the RCB, at $95/hour = $9500. (2) MOU: Legal Counsel(s): part of pro rata but would add perhaps ten hours of work. (3) Ongoing annual cross training for Enforcement, Education and Licensing Units: unknown

SUPPORT:

The Respiratory Care Board of California

OPPOSITION:

None on record

SENATE COMMITTEE ON
BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT
Senator Richard Roth, Chair
2021 - 2022 Regular

Bill No:	SB 1436	**Hearing Date:**	April 18, 2022
Author:	Roth		
Version:	April 7, 2022		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Alexandria Smith Davis		

Subject: Respiratory therapists: suspension or termination for cause: reporting

SUMMARY: Extends until January 1, 2027, the provisions establishing the Respiratory Care Board (Board) and revises mandatory reporting requirements.

Existing law:

1) Establishes the Respiratory Care Board of California (Board) to administer and enforce the Respiratory Care Practice Act (Act) until January 1, 2023. (Business and Professions Code (BPC) §§ 3700 and 3710)

2) Defines "respiratory care" as a health care profession performed under the supervision of a medical director in the therapy, management, rehabilitation, diagnostic evaluation, and care of patients with deficiencies and abnormalities which affect the pulmonary system and associated aspects of cardiopulmonary and other systems functions. (BPC § 3702)

3) Specifies activities that are not prohibited by the Respiratory Care Act including:

   a) The performance of respiratory care that is an integral part of the program of study by students enrolled in approved respiratory therapy training programs;

   b) Self-care by the patient or the gratuitous care by a friend or member of the family who does not represent or hold himself or herself out to be a respiratory care practitioner;

   c) The respiratory care practitioner from performing advances in the art and techniques of respiratory care learned through formal or specialized training;

   d) The performance of respiratory care in an emergency situation by paramedical personnel who have been formally trained in these modalities and are duly licensed;

   e) Respiratory care services in case of an emergency; "emergency" includes an epidemic or public disaster;

   f) Persons from engaging in cardiopulmonary research;

g) Formally trained licensees and staff of child day care facilities from administering to a child inhaled medication; and

f) The performance by a person employed by a home medical device retail facility or by a home health agency licensed by the State Department of Health Services of specific, limited, and basic respiratory care or respiratory care related services that have been authorized by the Board. (BPC § 3765)

4) Requires any employer of a Respiratory Care Practitioner (RCP) to report to the Board the suspension or termination for cause. (BPC § 3758 (a))

5) Defines "suspension of termination for cause" as suspension or termination from employment for any of the following reasons:

   a) Use of controlled substances or alcohol to such an extent that it impairs the ability to safely practice respiratory care.

   b) Unlawful sale of controlled substances or other prescription items.

   c) Patient neglect, physical harm to a patient, or sexual contact with a patient.

   d) Falsification of medical records.

   e) Gross incompetence or negligence.

   f) Theft from patients, other employees, or the employer. (BPC § 3758 (b))

This bill:

1) Extends the sunset date of the Board until January 1, 2027.

2) Adds leave and resignation to the list of mandated reporting requirements for a RCP employer. Defines "leave, resignation, suspension, or termination for cause" any administrative leave, employee leave, resignation, suspension, or termination from employment for any of the following reasons:

   a) Suspected or actual use of controlled substances or alcohol to such an extent that it impairs the ability to safely practice respiratory care.

   b) Suspected or actual unlawful sale of controlled substances or other prescription items.

   c) Suspected or actual patient neglect, physical harm to a patient, or sexual contact with a patient.

   d) Suspected or actual falsification of medical records.

   e) Suspected or actual gross incompetence or negligence.

   f) Suspected or actual theft from patients, other employees, or the employer.

3) Requires an owner, director, partner, or manager of a registry or agency that places one or more RCPs to report to the Board if either of the following apply:

   a) The owner, director, partner, or manager is aware that a RCP is no longer employed at the facility they were placed at by the registry or agency for any behavior outlined in 2); or

   b) The owner, director, partner, or manager is asked to place the RCP on a “do not call” list or other status indicating the facility does not want that practitioner placed at their facility for any behavior outlined in 2).

FISCAL EFFECT: Unknown. This bill is keyed fiscal by Legislative Counsel.

COMMENTS:

1. **Purpose.** This bill is one of five sunset bills sponsored by the author. According to the Author, “this bill is necessary to make changes to the Board’s improve oversight of respiratory care professionals (RCPs) and services.”

2. **Oversight Hearings and Sunset Review of Licensing Boards and Programs.** In early 2022, the Senate Business, Professions and Economic Development Committee and the Assembly Committee on Business and Professions (Committees) began their comprehensive sunset review oversight of 10 regulatory entities including the Board. The Committees conducted three oversight hearings in March of this year. This bill and the accompanying sunset bills are intended to implement legislative changes as recommended by staff of the Committees and which are reflected in the Background Papers prepared by Committee staff for each agency and program reviewed this year.

3. **Background on Respiratory Care Board.** RCPs were established in 1982 and were originally licensed by Respiratory Care Examining Committee and has since become the Board. The Board is within the DCA. The Board is tasked with oversight of all RCPs including initial licensure, renewal, and discipline for violations of the Respiratory Care Practice Act.

   RCPs work bedside with patients and under the director of a medical director and specialize in providing evaluation of, and treatment to, patients with breathing difficulties as a result of heart, lung, and other disorders, as well as providing diagnostic, educational, and rehabilitation services. RCPs are utilized in virtually all health care settings. RCPs provide services to patients ranging from premature infants to older adults. RCPs provide treatments for patients who have breathing difficulties and care for those who are dependent upon life support and cannot breathe on their own. RCPs treat patients with acute and chronic diseases including chronic obstructive pulmonary disease (COPD), trauma victims, and surgery patients. Common RCP patients include individuals suffering from:

   - Asthma Bronchitis
   - Heart attack
   - Cystic fibrosis

- Emphysema Stroke
- Lung cancer
- Premature infants and infants with birth defects
- High-risk influenza/COVID-19

4. **Review of Respiratory Care Board.** The following are some of the issues pertaining to the Board along with background information concerning the particular issue. Recommendations were made by Committee staff regarding the particular issue areas that needed to be addressed.

a) **Issue 6: Mandatory Reporting Requirements**.

Background: RCPs are not reported by facilities in instances where they were advised to resign instead of face termination. Facilities rightfully claim they do not have to report RCPs who were employed by registries. Instead, facilities using registry employees notify the registry that they do not want the employee assigned to their facility ever again. And while in most instances the registry is made aware of the reason the facility refuses assignments by certain RCPs, the registry (nor the facility) is obligated to inform the Board, even in those cases of serious violations as outlined in BPC Section 3758. As a result of this gap within mandatory reporting, RCPs are able to continue to work without discipline.

Recommendation and Proposed Statutory Change: The Committees suggested that the Act should be amended to update the reporting requirements to ensure all violations are reported to the Board. Accordingly, this bill updates required reporting requirements for a RCP by including leave and resignation to the list of mandated reporting requirements for a RCP employer.

b) **Issue 5: Ventilator Care.**

Background. Dating back to May 1, 1996, LVNs and RCPs have struggled to determine the appropriate scope of practice for administering respiratory services such as managing patients. The Board contends LVNs should not be administering any ventilator services. The BVNPT issued guidance to licensees permitting LVNs to adjust ventilator settings and the Board has maintained this guidance to LVNs is a misinterpretation of the regulations. BVNPT has cited CCR 2518.5 for the basis of allowing LVNs to manage ventilator patients. CCR 2518.5 specifies LVNs can use and practice basic assessment, participate in planning, execute interventions in accordance with the care plan or treatment plan, and contribute to evaluation of individualized interventions related to the care plan or treatment plan. An LVN may also administer medications. In a legal opinion from the Attorney General's office, a Deputy Attorney General wrote,

"*'Basic assessment or data collection' does not anticipate the independent assessment of breath sounds and is therefore outside [the] scope of practice of an LVN. Clearly respiratory care therapist[s] can interpret breath sounds in the scope of their practice under Business and Professions Code section 3702...." "While a respiratory care therapist and a physician can assess a patient's*

respiratory status and alter the ventilator setting, in my opinion, an LVN who does so acts outside their scope of practice"

The Board has made numerous requests throughout the last 25 years to rescind the policy, but BVNPT has not revoked any policy regarding respiratory services and continues to take the position that LVNs should be able to adjust ventilators. Currently, LVNs are required to take 1,530 hours for including theory, clinical, and pharmacology. LVNs' required theory courses do not include respiratory care. RCPs must complete a respiratory care program approved by the Board. The respiratory care Board has the expertise to determine an acceptable program to ensure patient safety.

The two boards began to work collaboratively in 2019 and issued a joint statement clarifying RCP and LVN roles relating to patient care on mechanical ventilators. After feedback from various types of facilities and organizations, there was expressed desire to further clarify its respective regulations regarding patient care. The boards hosted a stakeholder meeting to further discuss the joint statement and concerns grew about expanding places LVNs can conduct ventilator services to home based settings as well. The July 2019 published agreement state that both boards agreed BPC 3702.7 provides that the education of health care professional about respiratory care, including clinical instruction and the operation or application of respiratory care equipment and application is within the respiratory care scope of practice and would require licensure as an RCP. The statement further laid out permissible functions an LVN cannot perform. The joint statement allowed clarity for licensees and providers. However, according to the Board, BVNPT backed out of the agreement and began exploring CE to train LVNs to perform ventilator services in more settings. Without the agreement, LVNs are not permitted to perform any respiratory services. The Board has asked the Legislature to step in and clarify what services a LVN may or may perform. As COVID-19 showed, quality respiratory services are vital for patients and access is imperative. As such, permitting LVNs to perform basic respiratory services while maintaining appropriate training for LVNs is appropriate. As outlined above, the Board is most equipped to ensure training is appropriate while BVNPT maintains collaboration given their expertise in nursing duties and functions.

<u>Recommendation and Proposed Statutory Change</u>: The Committees requested the Board to advise on an agreed upon solutions from both boards and stakeholder including statutory changes.

c) **Issue 9: Impacts of the COVID-19 Pandemic.**

<u>Background.</u> In March 2020, Governor Newsom issued an emergency proclamation allowing Departments to waive statutory requirements to help ease worker shortages and aid COVID-19 recovery efforts. Early on during the state of emergency, the Board identified statutory fixes that could help in this current state of emergency and future state of emergency. Current law is vague and states that the Act does not respiratory care services in the case of emergency. This language is vague and could be expanded and clarified to be more nimble for future emergencies.

Recommendation and Proposed Statutory Change: The Committees requested an update on the impact to licensees and patients stemming from the pandemic and potential challenges for future RCPs; and asked the Board to discuss the impact of waivers on patient safety and note any statutory changes that are warranted as a result of the pandemic.

5. **Related Legislation.** SB 1474 (Committee on Business, Professions and Economic Development, Chapter 312, Statutes of 2021) Extended by one year the sunset date of the Board from January 1, 2022 to January 1, 2023.

   SB 1003 (Roth, Chapter 180, Statutes of 2018) Prohibits any state agency other than the Board from defining or interpreting the practice of respiratory care for those licensed pursuant to the Act, or developing standardized procedures or protocols pursuant to the Act, unless authorized by the Act or specifically required by state or federal statute.

   AB 1972 (Jones, Chapter 179, Statues of 2014) Required all applicants to pass the advanced level of the national competency exam to qualify for RCP licensure

   SB 1955 (Figueroa, Chapter 1150, Statutes of 2002) Mandated a formal 10-month respiratory care educational program.

6. **Arguments in Support:** According the Respiratory Care Board of California, "SB 1436 is in line with the Board's consumer protection mandate by ensuring mandatory reporting is completed on all RCPs for suspected or actual 1) use of controlled substances or alcohol to such an extent that it impairs the ability to safely practice respiratory care, 2) sale of controlled substances or other prescription items, 3) patient neglect, physical harm to a patient, or sexual contact with a patient, 4) falsification of medical records, 5) gross incompetence or negligence, and 6) theft from patients, other employees, or the employer."

7. **Proposed Author's Amendments.** In order to address additional issues outlined above and discussed in the Background Paper and at the Board's sunset review oversight hearing, the Author is proposing amendments.

   Emergency respiratory care services. In order to clarify the existing allowance for other health professionals to perform respiratory services during a declared emergency, the Author proposes to amend the bill to clarify and expand respiratory care services permitted during a declared state of emergency to include the temporary performance, by other healthcare personnel, students or groups, of respiratory care services identified and authorized by the Board, in the event of an epidemic, pandemic, or public disaster or emergency.

   Unlicensed professionals performing respiratory care services. While LVNs provide critical care in multiple settings throughout the health care delivery system in this state, RCPs remain the most trained in respiratory care, with specific authority in this unique space to reflect appropriate training and clinical education. While LVNs may have the capability of providing basic services to patients who also receive services from a RCP, like those using ventilators, they do not have specific skills

training comparable to that of RCPs in this area. However, patient access to care remains essential and it is clear LVNs may be able to provide certain services according to certain, clear parameters. To maintain and ensure access to quality, safe care, the Author is proposing to amend the bill to clarify that licensed LVNs can legally perform basic respiratory tasks and services if they receive training satisfactory to their employer, and when directed by a physician and surgeon, so long as those tasks and services do not require a respiratory assessment and are limited to necessitating only manual and technical skills, or data collection.

The Author also proposes to amend the bill to permit LVNs employed by a home health agency licensed by the California Department of Public Health to perform respiratory tasks and services identified by the Board if the LVN has competed either, before January 1, 2025, patient-specific training satisfactory to their employer or on or after January 1, 2025, patient-specific training by the employer in accordance with guidelines that promulgated by the Board no later than January 1, 2025, in collaboration with the Board of Vocational Nursing and Psychiatric Technicians.

SUPPORT AND OPPOSITION:

Support:

Respiratory Care Board of California

Opposition:

None received

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SENATE COMMITTEE ON APPROPRIATIONS
Senator Anthony Portantino, Chair
2021 - 2022 Regular Session

SB 1436 (Roth) - Respiratory therapy

Version: April 19, 2022
Urgency: No
Hearing Date: May 9, 2022

Policy Vote: B., P. & E.D. 12 - 0
Mandate: Yes
Consultant: Janelle Miyashiro

Bill Summary: SB 1436 is the sunset bill for the Respiratory Care Board of California and is intended to make changes to the Respiratory Care Practice Act recommended during the joint sunset review of the Board.

Fiscal Impact: Annual cost of approximately $3.98 million (Respiratory Care Fund) and 17.4 positions to support the continued operation of the Respiratory Care Board of California's licensing and enforcement activities.

Background: Respiratory care practitioners (RCPs) were established in 1982 and were originally licensed by the Respiratory Care Examining Committee, which has since become the Respiratory Care Board of California. The Board is within the Department of Consumer Affairs and is tasked with oversight of all RCPs including initial licensure, renewal, and discipline for violations of the Respiratory Care Practice Act.

In early 2022, the Senate Business, Professions and Economic Development Committee and the Assembly Committee on Business and Professions (Committees) began their comprehensive sunset review oversight of 10 regulatory entities including the Board. The Committees conducted three oversight hearings in March of this year. This bill and the accompanying sunset bills are intended to implement legislative changes as recommended by staff of the Committees and which are reflected in the Background Papers prepared by Committee staff for each agency and program reviewed this year.

Proposed Law:

- Extends the sunset date of the board until January 1, 2027.
- Adds leave and resignation to the list of mandated reporting requirements for a RCP employer. Defines "leave, resignation, suspension, or termination for cause" any administrative leave, employee leave, resignation, suspension, or termination from employment for any of the following reasons:
    - Suspected or actual use of controlled substances or alcohol to such an extent that it impairs the ability to safely practice respiratory care.
    - Suspected or actual unlawful sale of controlled substances or other prescription items.
    - Suspected or actual patient neglect, physical harm to a patient, or sexual contact with a patient.

  - Suspected or actual falsification of medical records.
  - Suspected or actual gross incompetence or negligence.
  - Suspected or actual theft from patients, other employees, or the employer.

- Requires an owner, director, partner, or manager of a registry or agency that places one or more RCPs to report to the board if either of the following apply:
  - The owner, director, partner, or manager is aware that a RCP is no longer employed at the facility they were placed at by the registry or agency for any behavior outlined above; or
  - The owner, director, partner, or manager is asked to place the RCP on a "do not call" list or other status indicating the facility does not want that practitioner placed at their facility for any behavior outlined above.

- Recasts the authorization for health care personnel, students, or groups to perform respiratory care services in the event of an emergency to additionally include pandemics or other emergency.

- Authorizes a licensed vocational nurse (LVN) employed by a home health agency to perform respiratory tasks and services identified by the board if:
  - Before January 1, 2025, the LVN has completed patient-specific training satisfactory to their employer.
  - After January 1, 2025, the LVN has completed patient-specific training by the employer in accordance with guidelines promulgated by the board. Requires the board, in consultation with the Board of Vocational Nursing and Psychiatric Technicians of the State of California, to promulgate the guidelines by January 1, 2025.

- Authorizes a LVN, who has received training satisfactory to their employer and when directed by a physician and surgeon, to perform respiratory tasks and services expressly identified by the board.

Related Legislation: SB 1433 (Roth, 2022) is the Bureau for Private Postsecondary Education sunset bill. SB 1433 is pending in this committee.

SB 1434 (Roth, 2022) is the State Board of Chiropractic Examiners sunset bill. SB 1434 is pending in this committee.

SB 1438 (Roth, 2022) is the Physical Therapy Board of California sunset bill. SB 1438 is pending in this committee.

SB 1443 (Roth, 2022) extends the operative date for specified programs under the Department of Consumer Affairs. SB 1443 is pending in this committee.

Staff Comments: The boards and bureaus within the Department of Consumer Affairs are special fund agencies whose activities are funded by regulatory and license fees

and generally receive no support from the General Fund. New legislative mandates, even those modest in scope, may in totality create new cost pressures and impact the entity’s operating costs, future budget requests, or license fees.

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