

# We Have Confirmed Diversion: Now What?

## *Options and reporting requirements when diversion happens*

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**D**rug diversion or theft by healthcare personnel is not a new phenomenon. It is well established that patients can be harmed by diversion. In the past year, over 12,000 patients across the U.S. have been notified that they may have been exposed to HIV, hepatitis B or hepatitis C as a result of some diversion scheme involving tampering and substitution.<sup>1234</sup>

Unfortunately, some of these cases involved diverters who moved freely from one job to the next after they were caught diverting.

In the wake of several publicized cases of diversion, many facilities have become concerned with the adequacy of their diversion reporting processes. There are federal regulations with which facilities must comply, and some suggested approaches from regulatory authorities. However, these do not necessarily provide sufficient guidance to facilities that want to ensure comprehensive reporting.

### **Internal reporting**

The Medicare Conditions of Participation require reporting of diversion to the director of the pharmacy and the CEO as appropriate.<sup>5</sup> This may seem fairly intuitive, but not uncommonly a nurse manager and Human Resources

choose to wrap up an inquiry into “poor practice” that is more likely a diversion, without involving the pharmacy.

In addition to other stakeholders that should be notified internally, it is important to remember to include Finance, so patient bills involved with diverted doses can be correctly rebilled. It is also highly recommended that each facility provide the Board of Directors with a high level report on diversion activity at least once annually.

### **Code of silence**

External reporting by institutions is often inadequate. Fears of civil and regulatory liability and negative publicity may prevent even basic reporting to a professional board or to the DEA. Some institutions may labor under a misconception that failing to report a former staff member is somehow protecting the individual from harm.

When contacted by a subsequent employer, most healthcare institutions only confirm dates of employment of former staff members, including those who have been caught diverting. Some may comment on whether the former employee is eligible for rehire, but in most cases even if the employee is not eligible to be hired again, additional information is not provided.

### **Professional boards**

For licensed staff caught diverting, reporting to state professional boards or a professional support program is usually required by state regulations. Many facilities provide only cryptic information when reporting to professional boards, perhaps out of fear of regulatory liability. What ensues is a protracted exchange of requests from the board, followed by minimal responses from the institution.

<sup>1</sup> [www.cnn.com/2016/02/17/health/colorado-swedish-medical-center-possible-hepatitis-hiv-exposure/](http://www.cnn.com/2016/02/17/health/colorado-swedish-medical-center-possible-hepatitis-hiv-exposure/) accessed 5/14/16

<sup>2</sup> [www.kiro7.com/news/northwest-hospital-notifies-patients-who-may-have-been-exposed-to-hepatitis-b-and-c-hiv/163773069](http://www.kiro7.com/news/northwest-hospital-notifies-patients-who-may-have-been-exposed-to-hepatitis-b-and-c-hiv/163773069) accessed 5/14/16

<sup>3</sup> <http://kutv.com/news/local/cdc-confirms-hepatitis-c-outbreak-at-mckay-dee-davis-medical> accessed 5/14/16

<sup>4</sup> [www.nj.com/atlantic/index.ssf/2016/02/patients\\_may\\_have\\_been\\_exposed\\_to\\_hiv\\_hepatitis\\_ho.html](http://www.nj.com/atlantic/index.ssf/2016/02/patients_may_have_been_exposed_to_hiv_hepatitis_ho.html) accessed 5/14/16

<sup>5</sup> 42 CFR 482.25(b)(7)

*State nurse practice acts usually require nurses to report knowledge of illegal, incompetent, or unsafe practices.*

In reality, providing the professional board with comprehensive, objective information about the case at the outset is in the best interest of everyone involved. It allows the board to conduct its own investigation, and potentially work with the former staff member to get the help he or she may need without undue delay.

There is usually a personal professional reporting requirement as well. State nurse practice acts usually require nurses to report knowledge of illegal, incompetent, or unsafe practices. Similar requirements are often in place for pharmacists.

**State abuse registries**

Many states have registries for reporting abuse of vulnerable individuals, to which it is appropriate to report diversion, particularly if fraud or patient harm has occurred. Reporting to the abuse registry is one of a few options when diverting personnel are unlicensed; it is highly recommended in those cases.

*Confirmed diversion is theft, and must be reported irrespective of the quantity.*

Generally, it is appropriate to report a suspicion of abuse, neglect, mistreatment, abandonment, or financial abuse or exploitation to such a registry. For instance, if diversion by tampering and substitution has occurred, and any of the tampered-with doses were administered, patient harm is likely and should be reported to the abuse registry for investigation.

**Drug Enforcement Administration**

Some facilities agonize over whether the known number of diverted doses is “significant” enough to warrant reporting to the DEA. While the standard for reporting *loss* involves a determination of whether the loss is “significant,”<sup>6</sup> confirmed diversion is theft, and must be reported *irrespective of the quantity*.

The DEA requires dual reporting of theft within one business day of discovery on Form 106, with a concurrent separate written communication to the DEA Field Division Office.<sup>7</sup> Most of the time, a facility will not be able to report all diverted quantities to the DEA within one business day because the investigation is ongoing.

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Facilities should go ahead and make the initial report with the information they have, and then provide regular updates to the DEA Field Division Office (every 30 days at least). Ultimately, a facility may need to supplement the original Form 106 once the investigation is complete.

**Law enforcement**

In a majority of states, reporting drug diversion to local law enforcement is not mandatory. Many facilities are reluctant to report to law enforcement for fear of negative publicity. Staff may be disinclined to report for fear of causing a colleague to be arrested and criminally prosecuted.

Reporting to law enforcement may, however, be the only way to ensure that the individuals do not go to another institution where they may cause further harm. Law enforcement dispositions may be found on a background check long before a professional licensing board disposition. If the diverter is not licensed, it may be one of the few mechanisms for prospective employers to know about the individual’s history of diversion.

In its *Pharmacist’s Manual*, the DEA offers support for reporting to law enforcement. The manual states: “the registrant should... notify local law enforcement and state regulatory agencies. Prompt notification to enforcement

<sup>7</sup> *Ibid*

<sup>6</sup> Controlled Substances Act, 21 CFR §1301.76

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