

JAN 17 2020

A BILL FOR AN ACT

RELATING TO COLLECTIVE MEDIATION BY PHYSICIANS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to title 36 to be appropriately designated
3 and to read as follows:

4 "CHAPTER

5 COLLECTIVE MEDIATION BY PHYSICIANS

6 § -1 **Findings and purpose.** The State finds that
7 permitting competing physicians to engage in collective
8 mediation of certain terms and conditions of contracts with a
9 health benefit plan will benefit competition; provided that the
10 parties do not engage in an express or implied threat of
11 retaliatory collective action, including boycotts or strikes.

12 The State further finds that permitting physicians to
13 engage in collective mediation over fee-related terms may in
14 some circumstances yield anti-competitive effects. There are,
15 however, instances in which a health benefit plan dominates the
16 market to the degree that the negotiations between physicians
17 and the health benefit plan are not possible in the absence of



1 joint action on behalf of physicians. Without such joint
2 action, the health benefit plan can virtually dictate the terms
3 of the contracts that it offers to physicians.

4 The State further finds that it is appropriate and
5 necessary to authorize collective mediation between competing
6 physicians and health benefit plans when the imbalances in
7 bargaining capacity described in this section exist.

8 The purpose of this chapter is to authorize physicians to
9 engage in collective mediation with health benefit plans.

10 § -2 Definitions. As used in this chapter, unless the
11 context indicates otherwise:

12 "Authorized third party" means a person authorized by the
13 physicians to negotiate on their behalf with a health benefit
14 plan under this chapter.

15 "Geographic service area" means the geographic area of the
16 physicians seeking to jointly negotiate.

17 "Health benefit plan" means an accident or health insurer
18 covered under article 10A of chapter 431, a mutual benefit
19 society covered under article 1 of chapter 432, or a health



1 maintenance organization covered under chapter 432D, but does
2 not include a self-insured health benefit plan.

3 "Provider" means "health care professional," as defined in
4 section 451D-2.

5 § -3 Collective action by competing physicians. (a)

6 Competing physicians may meet and communicate in order to
7 collectively mediate with a health benefit plan concerning any
8 of the contract terms and conditions described in this
9 subsection, but may not negotiate the exclusion of providers who
10 are nonphysicians from direct reimbursement by the health
11 benefit plan or the setting in which providers who are
12 nonphysicians deliver services. Competing physicians may not
13 engage in a boycott related to these terms and conditions.

14 Competing physicians may meet and communicate concerning:

- 15 (1) Physician clinical practice guidelines and coverage
16 criteria;
- 17 (2) The respective liability of physicians and the health
18 benefit plan for the treatment or lack of treatment of
19 insured or enrolled persons;



- 1 (3) Administrative procedures, including methods and
- 2 timing of the payment of services to physicians;
- 3 (4) Procedures for the resolution of disputes between the
- 4 health benefit plan and physicians;
- 5 (5) Patient referral procedures;
- 6 (6) The formulation and application of payment fees and
- 7 methodology;
- 8 (7) Quality assurance programs;
- 9 (8) Health service utilization review procedures; and
- 10 (9) Criteria to be used by health benefit plans for the
- 11 selection and termination of physicians, including
- 12 whether to engage in selective contracting.
- 13 (b) An authorized third party that intends to negotiate
- 14 under subsection (a) shall provide the attorney general with
- 15 written notice of the intended negotiations before the
- 16 negotiations begin.
- 17 (c) In exercising the collective rights established under
- 18 subsection (a):



- 1 (1) Physicians may communicate with each other with
2 respect to the contractual terms and conditions to be
3 negotiated with the health benefit plan;
- 4 (2) Physicians may communicate with an authorized third
5 party regarding the terms and conditions of contracts
6 allowed under this section;
- 7 (3) The authorized third party shall be the sole party
8 authorized to negotiate with the health benefit plan
9 on behalf of a defined group of physicians;
- 10 (4) Physicians shall be bound by the terms and conditions
11 negotiated by the authorized third party that
12 represents their interests;
- 13 (5) A health benefit plan communicating and negotiating
14 with the authorized third party may contract with, or
15 offer different contract terms and conditions to,
16 individual competing physicians;
- 17 (6) An authorized third party may not represent physicians
18 if the health benefit plan has less than a five per
19 cent market share as determined by the number of
20 covered lives as reported by the insurance



1 commissioner for the most recently completed calendar
2 year or by the actual number of consumers of prepaid
3 comprehensive health services; provided that in this
4 paragraph, "covered lives" means the total number of
5 individuals who are entitled to benefits under the
6 health benefit plan; and

7 (7) Any authorized third party shall comply with
8 subsection (d).

9 (d) A person acting or proposing to act as an authorized
10 third party under this section, before engaging in collective
11 mediation with the health benefit plan, shall file with the
12 attorney general the information that identifies the authorized
13 third party, the physicians represented by the third party, the
14 authorized third party's plan of operation, and the authorized
15 third party's procedures to ensure compliance with this section.

16 (e) Parties shall furnish to the attorney general, for the
17 attorney general's approval, a brief report that identifies the
18 proposed subject matter of the negotiations or discussions and
19 contains an explanation of the efficiencies or benefits that are
20 expected to be achieved through the collective mediation:



1 (1) The attorney general shall review whether the group of
2 physicians represented is appropriate to present the
3 interests involved in the mediation. The attorney
4 general shall not approve the report if the group of
5 physicians is not appropriate to represent the
6 interests involved in the mediation or if the proposed
7 mediation exceeds the authority granted in this
8 chapter and, if the group is not appropriate or the
9 mediation exceeds the granted authority, shall enter
10 an order prohibiting any further collective mediation.
11 The authorized third party shall provide supplemental
12 information to the attorney general as new information
13 becomes available that indicates that the subject
14 matter of mediation with the health benefit plan has
15 changed or will change;

16 (2) The group of physicians or their authorized third
17 party, as the case may be, within fourteen days after
18 receiving a health benefit plan's decision to decline
19 to mediate or to terminate mediation, or within
20 fourteen days after requesting mediation with a health



1 benefit plan that fails to respond within that time
2 period, shall report to the attorney general that
3 mediation has ended or has been declined;

4 (3) During the mediation process, the group of physicians
5 or their authorized third party, as the case may be,
6 shall provide the attorney general upon the attorney
7 general's request with a copy of all written
8 communications that are between the physicians and the
9 health benefit plan, that are relevant to the
10 mediation, and that are in the possession of any
11 authorized third party; and

12 (4) The authorized third party, before reporting the
13 results of mediation with the health benefit plan and
14 before giving the physicians an evaluation of any
15 offer made by a health benefit plan, shall provide to
16 the attorney general for the attorney general's
17 approval a copy of all communications to be made to
18 physicians related to the mediation, discussions, and
19 health benefit plan offers.



1 (e) The attorney general shall either approve or
2 disapprove the contract that was the subject of the collective
3 negotiation within sixty days after receiving the reports
4 required under subsection (d). If the contract is disapproved,
5 the attorney general shall furnish a written explanation of any
6 deficiencies along with a statement of specific remedial
7 measures that would correct any identified deficiencies. An
8 authorized third party who fails to obtain the attorney
9 general's approval is considered to be acting outside the
10 authority of this section.

11 (f) The attorney general shall approve the collective
12 mediation contract if:

13 (1) The competitive and other benefits of the contract
14 terms outweigh any anticompetitive effects; and

15 (2) The contract terms are consistent with other
16 applicable laws and rules.

17 (g) A collective mediation contract shall include terms
18 relating to the following:

19 (1) Restoration of the competitive balance in the market
20 for healthcare services;



- 1 (2) Protections for access to quality patient care;
- 2 (3) Promotion of healthcare infrastructure and medical
- 3 advancement; and
- 4 (4) Improved communications between healthcare providers
- 5 and healthcare insurers.

6 (h) When weighing anticompetitive effects of contract
7 terms, the attorney general shall consider whether the terms:

- 8 (1) Provide for excessive payments; or
- 9 (2) Contribute to unreasonable escalation of the cost of
- 10 providing healthcare services.

11 (i) This section does not authorize competing physicians
12 to act in concert in response to a report issued by an
13 authorized third party related to the authorized third party's
14 decision or mediation with the health benefit plan. The
15 authorized third party shall advise the physicians of the
16 subject matter of this section and shall warn them of the
17 potential for legal action against those who violate state or
18 federal antitrust laws by exceeding the authority granted under
19 this section.



1 (j) A contract allowed under this section may not exceed
2 the term of five years.

3 (k) The documents relating to a collective negotiation
4 described under this section that are in the possession of the
5 department of the attorney general are confidential and shall
6 not be open to public inspection under chapter 92F.

7 (l) Nothing in this section shall be construed to exempt
8 the conduct of health care professionals or negotiations or
9 agreements between health care professionals and a health
10 benefit plan from the antitrust laws if the purpose or effect of
11 the conduct, negotiations, or agreement would be, directly or
12 indirectly, to exclude, limit the participation or reimbursement
13 of, or otherwise limit the scope of services to be provided by
14 separate or competing classes of health care professionals who
15 practice or seek to practice within the scope of the
16 occupational licenses held by the health care professionals.

17 **§ -4 Fee for registration of authorized parties.** (a)
18 The attorney general shall adopt rules pursuant to chapter 91
19 that establish the amount and manner of payment of a
20 registration fee for an authorized third party. The attorney



1 general shall establish the fee level so that the total amount
2 of fees collected from authorized third parties approximately
3 equals the actual regulatory costs for the oversight of joint
4 negotiations between physicians and health benefit plans. The
5 attorney general shall annually review the fee level to
6 determine whether the regulatory costs are approximately equal
7 to the fee revenues. If the review indicates that the fee
8 revenues and regulatory costs are not approximately equal, the
9 attorney general shall calculate fee adjustments and adopt rules
10 pursuant to chapter 91 to implement the adjustments. In January
11 of each year, the attorney general shall report on the fee level
12 and revisions from the previous year to the governor.

13 (b) As used in this section, "regulatory costs" means
14 costs of the department of the attorney general that are
15 attributable to oversight of joint negotiations between
16 physicians and health benefit plans.

17 § -5 Rules. Notwithstanding section -4, the attorney
18 general may adopt rules in accordance with chapter 91 as
19 necessary to implement this chapter."



S.B. NO. 2540

1 SECTION 2. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 3. This Act shall take effect upon its approval.
5

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S.B. NO. 2540

Report Title:

Physicians; Collective Mediation; Health Benefit Plans

Description:

Authorizes physicians to engage in collective mediation with health benefit plans.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

