
SUBSTITUTE HOUSE BILL 1493

State of Washington 61st Legislature 2009 Regular Session

By House Health Care & Wellness (originally sponsored by Representatives Pedersen, Hinkle, Cody, Clibborn, Morrell, Campbell, Green, DeBolt, Seaquist, Nelson, Moeller, Ericks, Appleton, Hudgins, Hasegawa, Conway, Kagi, and Kenney)

READ FIRST TIME 02/23/09.

1 AN ACT Relating to prohibiting the use of patient health care
2 information for prescription drug marketing; amending RCW 70.02.010,
3 70.02.050, 70.02.170, and 19.86.090; adding a new section to chapter
4 70.02 RCW; creating a new section; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) The legislature finds that:

7 (a) The state of Washington has clear and long-standing interests
8 in maximizing the health and well-being of its residents, safeguarding
9 the confidentiality and integrity of the doctor-patient relationship,
10 and containing health care costs;

11 (b) To further its substantial interest in the health and well-
12 being of its residents and in containing health care costs, the state
13 of Washington has shown a strong commitment to evidence-based care and
14 cost-effective health purchasing;

15 (c) Health care providers in Washington who write prescriptions for
16 their patients have a strong interest in the integrity of the patient-
17 provider relationship; and

18 (d) The use of patient identifiable prescription data to market

1 prescription drugs to patients runs counter to Washington's strong
2 commitment to both evidence-based care and cost-effective health
3 purchasing.

4 (2) It is the intent of the legislature to preserve patient privacy
5 and contain health care costs by providing greater protection for
6 patient specific health information than is currently provided by
7 federal law.

8 **Sec. 2.** RCW 70.02.010 and 2006 c 235 s 2 are each amended to read
9 as follows:

10 The definitions in this section apply throughout this chapter
11 unless the context clearly requires otherwise.

12 (1) "Audit" means an assessment, evaluation, determination, or
13 investigation of a health care provider by a person not employed by or
14 affiliated with the provider to determine compliance with:

15 (a) Statutory, regulatory, fiscal, medical, or scientific
16 standards;

17 (b) A private or public program of payments to a health care
18 provider; or

19 (c) Requirements for licensing, accreditation, or certification.

20 (2) "Directory information" means information disclosing the
21 presence, and for the purpose of identification, the name, location
22 within a health care facility, and the general health condition of a
23 particular patient who is a patient in a health care facility or who is
24 currently receiving emergency health care in a health care facility.

25 (3) "Federal, state, or local law enforcement authorities" means an
26 officer of any agency or authority in the United States, a state, a
27 tribe, a territory, or a political subdivision of a state, a tribe, or
28 a territory who is empowered by law to: (a) Investigate or conduct an
29 official inquiry into a potential criminal violation of law; or (b)
30 prosecute or otherwise conduct a criminal proceeding arising from an
31 alleged violation of law.

32 (4) "General health condition" means the patient's health status
33 described in terms of "critical," "poor," "fair," "good," "excellent,"
34 or terms denoting similar conditions.

35 (5) "Health care" means any care, service, or procedure provided by
36 a health care provider:

1 (a) To diagnose, treat, or maintain a patient's physical or mental
2 condition; or

3 (b) That affects the structure or any function of the human body.

4 (6) "Health care facility" means a hospital, clinic, nursing home,
5 laboratory, office, or similar place where a health care provider
6 provides health care to patients.

7 (7) "Health care information" means any information, whether oral
8 or recorded in any form or medium, that identifies or can readily be
9 associated with the identity of a patient and directly relates to the
10 patient's health care, including a patient's deoxyribonucleic acid and
11 identified sequence of chemical base pairs. The term includes any
12 required accounting of disclosures of health care information.

13 (8) "Health care operations" means any of the following activities
14 of a health care provider, health care facility, or third-party payor
15 to the extent that the activities are related to functions that make an
16 entity a health care provider, a health care facility, or a third-party
17 payor:

18 (a) Conducting: Quality assessment and improvement activities,
19 including outcomes evaluation and development of clinical guidelines,
20 if the obtaining of generalizable knowledge is not the primary purpose
21 of any studies resulting from such activities; population-based
22 activities relating to improving health or reducing health care costs,
23 protocol development, case management and care coordination, contacting
24 of health care providers and patients with information about treatment
25 alternatives; and related functions that do not include treatment;

26 (b) Reviewing the competence or qualifications of health care
27 professionals, evaluating practitioner and provider performance and
28 third-party payor performance, conducting training programs in which
29 students, trainees, or practitioners in areas of health care learn
30 under supervision to practice or improve their skills as health care
31 providers, training of nonhealth care professionals, accreditation,
32 certification, licensing, or credentialing activities;

33 (c) Underwriting, premium rating, and other activities relating to
34 the creation, renewal, or replacement of a contract of health insurance
35 or health benefits, and ceding, securing, or placing a contract for
36 reinsurance of risk relating to claims for health care, including stop-
37 loss insurance and excess of loss insurance, if any applicable legal
38 requirements are met;

1 (d) Conducting or arranging for medical review, legal services, and
2 auditing functions, including fraud and abuse detection and compliance
3 programs;

4 (e) Business planning and development, such as conducting cost-
5 management and planning-related analyses related to managing and
6 operating the health care facility or third-party payor, including
7 formulary development and administration, development, or improvement
8 of methods of payment or coverage policies; and

9 (f) Business management and general administrative activities of
10 the health care facility, health care provider, or third-party payor
11 including, but not limited to:

12 (i) Management activities relating to implementation of and
13 compliance with the requirements of this chapter;

14 (ii) Customer service, including the provision of data analyses for
15 policy holders, plan sponsors, or other customers, provided that health
16 care information is not disclosed to such policy holder, plan sponsor,
17 or customer;

18 (iii) Resolution of internal grievances;

19 (iv) The sale, transfer, merger, or consolidation of all or part of
20 a health care provider, health care facility, or third-party payor with
21 another health care provider, health care facility, or third-party
22 payor or an entity that following such activity will become a health
23 care provider, health care facility, or third-party payor, and due
24 diligence related to such activity; and

25 (v) Consistent with applicable legal requirements, creating
26 deidentified health care information or a limited dataset and fund-
27 raising for the benefit of the health care provider, health care
28 facility, or third-party payor.

29 (9) "Health care provider" means a person who is licensed,
30 certified, registered, or otherwise authorized by the law of this state
31 to provide health care in the ordinary course of business or practice
32 of a profession.

33 (10) "Health carrier" has the same meaning as defined in RCW
34 48.43.005.

35 (11) "Health plan" or "health benefit plan" has the same meaning as
36 defined in RCW 48.43.005.

37 (12) "Institutional review board" means any board, committee, or
38 other group formally designated by an institution, or authorized under

1 federal or state law, to review, approve the initiation of, or conduct
2 periodic review of research programs to assure the protection of the
3 rights and welfare of human research subjects.

4 ~~((11))~~ (13) "Maintain," as related to health care information,
5 means to hold, possess, preserve, retain, store, or control that
6 information.

7 ~~((12))~~ (14) "Marketing" means making a communication that
8 encourages recipients of the communication to purchase or use a product
9 or service. "Marketing" does not include any of the following:

10 (a) Communications, including those made under (b) of this
11 subsection, made orally or in writing by an entity with access to the
12 recipient's health information if the entity making the communication
13 does not receive direct or indirect remuneration including, but not
14 limited to, gifts, fees, payments, subsidies, or other economic
15 benefits, from a third party for making the communication.
16 Remuneration does not include payments received by a pharmacist or
17 pharmacy from carriers, state purchased health care programs or other
18 entities purchasing services under a health benefit plan, from health
19 plan enrollees, or from a patient for the following activities:

20 (i) Prescription drug ingredient costs;

21 (ii) Dispensing fees;

22 (iii) Formulary compliance; or

23 (iv) Case management related to the diagnosis, treatment, or
24 management of illness of a specific patient when conducted by, or under
25 the supervision of, a pharmacist, including but not limited to care
26 management educational materials provided to a patient about the
27 patient's health condition, adherence to a prescribed course of
28 therapy, such as refill reminders, or other information about the
29 product being dispensed;

30 (b) Communications made to current enrollees by the carrier, or to
31 a patient by that patient's primary provider solely for the purpose of
32 describing a provider's participation in an existing health care
33 provider network or health plan network to which the enrollees or the
34 patient already subscribes;

35 (c) Communications made to current enrollees by the carrier, or to
36 a current patient by that patient's primary provider solely for the
37 purpose of describing if, and the extent to which, a product or

1 service, or payment for a product or service, is provided by a
2 provider, contractor, or plan or is included in a health benefit plan
3 to which the enrollees or the patient already subscribes;

4 (d) Communications made to a current patient by the patient's
5 physician or primary health care provider for purposes of the patient's
6 health care treatment; and

7 (e) Communications made to plan enrollees describing the
8 availability of more cost-effective pharmaceuticals, medical devices,
9 or treatment options.

10 (15) "Patient" means an individual who receives or has received
11 health care. The term includes a deceased individual who has received
12 health care.

13 ~~((+13))~~ (16) "Payment" means:

14 (a) The activities undertaken by:

15 (i) A third-party payor to obtain premiums or to determine or
16 fulfill its responsibility for coverage and provision of benefits by
17 the third-party payor; or

18 (ii) A health care provider, health care facility, or third-party
19 payor, to obtain or provide reimbursement for the provision of health
20 care; and

21 (b) The activities in (a) of this subsection that relate to the
22 patient to whom health care is provided and that include, but are not
23 limited to:

24 (i) Determinations of eligibility or coverage, including
25 coordination of benefits or the determination of cost-sharing amounts,
26 and adjudication or subrogation of health benefit claims;

27 (ii) Risk adjusting amounts due based on enrollee health status and
28 demographic characteristics;

29 (iii) Billing, claims management, collection activities, obtaining
30 payment under a contract for reinsurance, including stop-loss insurance
31 and excess of loss insurance, and related health care data processing;

32 (iv) Review of health care services with respect to medical
33 necessity, coverage under a health plan, appropriateness of care, or
34 justification of charges;

35 (v) Utilization review activities, including precertification and
36 preauthorization of services, and concurrent and retrospective review
37 of services; and

1 (vi) Disclosure to consumer reporting agencies of any of the
2 following health care information relating to collection of premiums or
3 reimbursement:

4 (A) Name and address;

5 (B) Date of birth;

6 (C) Social security number;

7 (D) Payment history;

8 (E) Account number; and

9 (F) Name and address of the health care provider, health care
10 facility, and/or third-party payor.

11 (~~(14)~~) (17) "Person" means an individual, corporation, business
12 trust, estate, trust, partnership, association, joint venture,
13 government, governmental subdivision or agency, or any other legal or
14 commercial entity.

15 (~~(15)~~) (18) "Reasonable fee" means the charges for duplicating or
16 searching the record, but shall not exceed sixty-five cents per page
17 for the first thirty pages and fifty cents per page for all other
18 pages. In addition, a clerical fee for searching and handling may be
19 charged not to exceed fifteen dollars. These amounts shall be adjusted
20 biennially in accordance with changes in the consumer price index, all
21 consumers, for Seattle-Tacoma metropolitan statistical area as
22 determined by the secretary of health. However, where editing of
23 records by a health care provider is required by statute and is done by
24 the provider personally, the fee may be the usual and customary charge
25 for a basic office visit.

26 (~~(16)~~) (19) "Third-party payor" means an insurer regulated under
27 Title 48 RCW authorized to transact business in this state or other
28 jurisdiction, including a health care service contractor, and health
29 maintenance organization; or an employee welfare benefit plan; or a
30 state or federal health benefit program.

31 (~~(17)~~) (20) "Treatment" means the provision, coordination, or
32 management of health care and related services by one or more health
33 care providers or health care facilities, including the coordination or
34 management of health care by a health care provider or health care
35 facility with a third party; consultation between health care providers
36 or health care facilities relating to a patient; or the referral of a
37 patient for health care from one health care provider or health care
38 facility to another.

1 **Sec. 3.** RCW 70.02.050 and 2007 c 156 s 12 are each amended to read
2 as follows:

3 (1) Except to the extent that use or disclosure of health care
4 information is limited under section 4 of this act, a health care
5 provider or health care facility may disclose health care information
6 about a patient without the patient's authorization to the extent a
7 recipient needs to know the information, if the disclosure is:

8 (a) To a person who the provider or facility reasonably believes is
9 providing health care to the patient;

10 (b) To any other person who requires health care information for
11 health care education, or to provide planning, quality assurance, peer
12 review, or administrative, legal, financial, actuarial services to, or
13 other health care operations for or on behalf of the health care
14 provider or health care facility; or for assisting the health care
15 provider or health care facility in the delivery of health care and the
16 health care provider or health care facility reasonably believes that
17 the person:

18 (i) Will not use or disclose the health care information for any
19 other purpose; and

20 (ii) Will take appropriate steps to protect the health care
21 information;

22 (c) To any other health care provider or health care facility
23 reasonably believed to have previously provided health care to the
24 patient, to the extent necessary to provide health care to the patient,
25 unless the patient has instructed the health care provider or health
26 care facility in writing not to make the disclosure;

27 (d) To any person if the health care provider or health care
28 facility reasonably believes that disclosure will avoid or minimize an
29 imminent danger to the health or safety of the patient or any other
30 individual, however there is no obligation under this chapter on the
31 part of the provider or facility to so disclose;

32 (e) To immediate family members of the patient, including a
33 patient's state registered domestic partner, or any other individual
34 with whom the patient is known to have a close personal relationship,
35 if made in accordance with good medical or other professional practice,
36 unless the patient has instructed the health care provider or health
37 care facility in writing not to make the disclosure;

1 (f) To a health care provider or health care facility who is the
2 successor in interest to the health care provider or health care
3 facility maintaining the health care information;

4 (g) For use in a research project that an institutional review
5 board has determined:

6 (i) Is of sufficient importance to outweigh the intrusion into the
7 privacy of the patient that would result from the disclosure;

8 (ii) Is impracticable without the use or disclosure of the health
9 care information in individually identifiable form;

10 (iii) Contains reasonable safeguards to protect the information
11 from redisclosure;

12 (iv) Contains reasonable safeguards to protect against identifying,
13 directly or indirectly, any patient in any report of the research
14 project; and

15 (v) Contains procedures to remove or destroy at the earliest
16 opportunity, consistent with the purposes of the project, information
17 that would enable the patient to be identified, unless an institutional
18 review board authorizes retention of identifying information for
19 purposes of another research project;

20 (h) To a person who obtains information for purposes of an audit,
21 if that person agrees in writing to:

22 (i) Remove or destroy, at the earliest opportunity consistent with
23 the purpose of the audit, information that would enable the patient to
24 be identified; and

25 (ii) Not to disclose the information further, except to accomplish
26 the audit or report unlawful or improper conduct involving fraud in
27 payment for health care by a health care provider or patient, or other
28 unlawful conduct by the health care provider;

29 (i) To an official of a penal or other custodial institution in
30 which the patient is detained;

31 (j) To provide directory information, unless the patient has
32 instructed the health care provider or health care facility not to make
33 the disclosure;

34 (k) To fire, police, sheriff, or another public authority, that
35 brought, or caused to be brought, the patient to the health care
36 facility or health care provider if the disclosure is limited to the
37 patient's name, residence, sex, age, occupation, condition, diagnosis,

1 estimated or actual discharge date, or extent and location of injuries
2 as determined by a physician, and whether the patient was conscious
3 when admitted;

4 (l) To federal, state, or local law enforcement authorities and the
5 health care provider, health care facility, or third-party payor
6 believes in good faith that the health care information disclosed
7 constitutes evidence of criminal conduct that occurred on the premises
8 of the health care provider, health care facility, or third-party
9 payor;

10 (m) To another health care provider, health care facility, or
11 third-party payor for the health care operations of the health care
12 provider, health care facility, or third-party payor that receives the
13 information, if each entity has or had a relationship with the patient
14 who is the subject of the health care information being requested, the
15 health care information pertains to such relationship, and the
16 disclosure is for the purposes described in RCW 70.02.010(8) (a) and
17 (b); or

18 (n) For payment.

19 (2) A health care provider shall disclose health care information
20 about a patient without the patient's authorization if the disclosure
21 is:

22 (a) To federal, state, or local public health authorities, to the
23 extent the health care provider is required by law to report health
24 care information; when needed to determine compliance with state or
25 federal licensure, certification or registration rules or laws; or when
26 needed to protect the public health;

27 (b) To federal, state, or local law enforcement authorities to the
28 extent the health care provider is required by law;

29 (c) To federal, state, or local law enforcement authorities, upon
30 receipt of a written or oral request made to a nursing supervisor,
31 administrator, or designated privacy official, in a case in which the
32 patient is being treated or has been treated for a bullet wound,
33 gunshot wound, powder burn, or other injury arising from or caused by
34 the discharge of a firearm, or an injury caused by a knife, an ice
35 pick, or any other sharp or pointed instrument which federal, state, or
36 local law enforcement authorities reasonably believe to have been
37 intentionally inflicted upon a person, or a blunt force injury that

1 federal, state, or local law enforcement authorities reasonably believe
2 resulted from a criminal act, the following information, if known:

3 (i) The name of the patient;

4 (ii) The patient's residence;

5 (iii) The patient's sex;

6 (iv) The patient's age;

7 (v) The patient's condition;

8 (vi) The patient's diagnosis, or extent and location of injuries as
9 determined by a health care provider;

10 (vii) Whether the patient was conscious when admitted;

11 (viii) The name of the health care provider making the
12 determination in (c)(v), (vi), and (vii) of this subsection;

13 (ix) Whether the patient has been transferred to another facility;

14 and

15 (x) The patient's discharge time and date;

16 (d) To county coroners and medical examiners for the investigations
17 of deaths;

18 (e) Pursuant to compulsory process in accordance with RCW
19 70.02.060.

20 (3) All state or local agencies obtaining patient health care
21 information pursuant to this section shall adopt rules establishing
22 their record acquisition, retention, and security policies that are
23 consistent with this chapter.

24 NEW SECTION. **Sec. 4.** A new section is added to chapter 70.02 RCW
25 to read as follows:

26 Notwithstanding allowable disclosures under RCW 70.02.050, and
27 unless expressly authorized by the patient as provided in RCW
28 70.02.030, (1) health care providers, including pharmacies and entities
29 licensed under chapter 18.64 RCW, (2) health carriers, (3) pharmacy
30 benefit managers, or (4) the business associates, subsidiaries, or
31 affiliates of the entities set out in subsections (1) through (3) of
32 this section, shall not intentionally share, sell, or otherwise use any
33 health care information for the purpose of marketing prescription drugs
34 to patients.

35 **Sec. 5.** RCW 70.02.170 and 1991 c 335 s 801 are each amended to
36 read as follows:

1 (1) A person who has complied with this chapter may maintain an
2 action for the relief provided in this section against a health care
3 provider or facility who has not complied with this chapter.

4 (2) The court may order the health care provider or other person to
5 comply with this chapter. Such relief may include actual damages, but
6 shall not include consequential or incidental damages. The court shall
7 award reasonable attorneys' fees and all other expenses reasonably
8 incurred to the prevailing party.

9 (3) Any action under this chapter is barred unless the action is
10 commenced within two years after the cause of action is discovered.

11 (4) Except to the extent provided otherwise in subsection (5) of
12 this section, a violation of this chapter shall not be deemed a
13 violation of the consumer protection act, chapter 19.86 RCW.

14 (5) In addition to any other remedy provided by law, the
15 legislature finds that the practices covered by section 4 of this act
16 are matters vitally affecting the public interest for the purpose of
17 applying the consumer protection act, chapter 19.86 RCW. A violation
18 of section 4 of this act is not reasonable in relation to the
19 development and preservation of business and is an unfair or deceptive
20 act in trade or commerce and an unfair method of competition for the
21 purpose of applying the consumer protection act, chapter 19.86 RCW.

22 **Sec. 6.** RCW 19.86.090 and 2007 c 66 s 2 are each amended to read
23 as follows:

24 (1) Except to the extent provided in subsection (2) of this
25 section, any person who is injured in his or her business or property
26 by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or
27 19.86.060, or any person so injured because he or she refuses to accede
28 to a proposal for an arrangement which, if consummated, would be in
29 violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may
30 bring a civil action in the superior court to enjoin further
31 violations, to recover the actual damages sustained by him or her, or
32 both, together with the costs of the suit, including a reasonable
33 attorney's fee, and the court may in its discretion, increase the award
34 of damages to an amount not to exceed three times the actual damages
35 sustained: PROVIDED, That such increased damage award for violation of
36 RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER,
37 That such person may bring a civil action in the district court to

1 recover his or her actual damages, except for damages which exceed the
2 amount specified in RCW 3.66.020, and the costs of the suit, including
3 reasonable attorney's fees. The district court may, in its discretion,
4 increase the award of damages to an amount not more than three times
5 the actual damages sustained, but such increased damage award shall not
6 exceed the amount specified in RCW 3.66.020. For the purpose of this
7 section, "person" shall include the counties, municipalities, and all
8 political subdivisions of this state.

9 (2)(a) Any person who is injured by a violation of section 4 of
10 this act may bring a civil action in the superior court to enjoin
11 further violations, to recover the greater of one thousand dollars or
12 actual damages sustained by him or her, or both, together with the
13 costs of the suit, including reasonable attorneys' fees. The court
14 may, in its discretion, increase the award of damages to an amount not
15 to exceed the greater of three thousand dollars or three times the
16 actual damages sustained.

17 (b) Each prescription drug marketing communication sent or conveyed
18 to a patient shall constitute a separate violation of section 4 of this
19 act.

20 (3) Whenever the state of Washington is injured, directly or
21 indirectly, by reason of a violation of RCW 19.86.030, 19.86.040,
22 19.86.050, or 19.86.060, it may sue therefor in the superior court to
23 recover the actual damages sustained by it, whether direct or indirect,
24 and to recover the costs of the suit including a reasonable attorney's
25 fee.

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