

**Senate Bill No. 270**

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Passed the Senate August 26, 2010

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*Secretary of the Senate*

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Passed the Assembly August 19, 2010

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*Chief Clerk of the Assembly*

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This bill was received by the Governor this \_\_\_\_\_ day  
of \_\_\_\_\_, 2010, at \_\_\_\_\_ o'clock \_\_\_\_M.

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*Private Secretary of the Governor*

## CHAPTER \_\_\_\_\_

An act to amend Sections 1280.15, 130251, 130316, and 130317 of the Health and Safety Code, relating to public health, and declaring the urgency thereof, to take effect immediately.

## LEGISLATIVE COUNSEL'S DIGEST

SB 270, Alquist. Health care providers: medical information.

(1) Existing law provides for the licensing and regulation of clinics, health facilities, home health agencies, and hospices by the State Department of Public Health. Existing law requires these entities to prevent unlawful or unauthorized access to, and use or disclosure of, a patient's medical information. A violation of these provisions is a crime. Existing law requires these entities to report an instance of unlawful or unauthorized access to, and use or disclosure of, a patient's medical information to the department and to the affected patient or patient's representative, as prescribed, within 5 business days of its detection, except that an entity is required to delay compliance with this reporting requirement beyond this 5 business day period if a law enforcement agency or official provides the entity with a written or oral statement that compliance with the reporting requirement would impede the law enforcement agency's activities that relate to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information and specifies the date upon which the delay shall end, as prescribed.

This bill would, instead, apply the provision requiring a delay in compliance with the reporting requirement only to a statement that compliance with that requirement would impede the law enforcement agency's investigations, rather than activities. By expanding circumstances to which a crime would apply, the bill would create a state-mandated local program.

Under existing law, the department is authorized to assess a penalty of \$100 against a clinic, health facility, home health agency, or hospice to which the above provisions apply, for each day that an unlawful or unauthorized access, use, or disclosure is not reported.

This bill would specify that the disclosure is required to be reported to the department or the affected patient. The bill would create a rebuttable presumption, for enforcement purposes, that the facility did not notify the affected patient if the notification was not documented.

(2) Existing law establishes the Office of Health Information Integrity within the California Health and Human Services Agency to ensure the enforcement of state law mandating confidentiality of medical information and to impose administrative fines for the unauthorized use of medical information. Existing law authorizes the California Health and Human Services Agency, or one of the departments under its jurisdiction, to apply for federal funds made available through the federal American Recovery and Reinvestment Act (ARRA) for health information technology and exchange and, if no application is made, requires the Governor to designate a nonprofit entity to be the state-designated entity for purposes of health information exchange. Existing law requires the agency or state-designated entity to facilitate and expand the use and disclosure of health information electronically among organizations, as prescribed, while protecting individual privacy and the confidentiality of electronic medical records.

This bill would, in addition, require the agency or state-designated entity to facilitate and expand the use and disclosure of health information electronically among organizations in accordance with applicable state and federal law.

(3) Existing law, the Health Insurance Portability and Accountability Implementation Act of 2001 (the act), provides for the implementation of the federal Health Insurance Portability and Accountability Act (HIPAA) by the state under the direction of the Office of HIPAA Implementation, which was established by the Governor in the California Health and Human Services Agency. Under existing law, the act will become inoperative on July 1, 2010, and will be repealed January 1, 2011, unless a later enacted statute, that is enacted before January 1, 2011, deletes or extends that date, and all unexpended or unencumbered funds under the act will revert to the General Fund on July 1, 2010.

This bill would extend the act's duration to January 1, 2013, when it would be repealed, and all funds under the act that are unexpended or unencumbered as of that date would revert to the General Fund.

(4) 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.

(5) This bill would declare that it is to take effect immediately as an urgency statute.

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

SECTION 1. Section 1280.15 of the Health and Safety Code is amended to read:

1280.15. (a) A clinic, health facility, home health agency, or hospice licensed pursuant to Section 1204, 1250, 1725, or 1745 shall prevent unlawful or unauthorized access to, and use or disclosure of, patients' medical information, as defined in subdivision (g) of Section 56.05 of the Civil Code and consistent with Section 130203. For purposes of this section, internal paper records, electronic mail, or facsimile transmissions inadvertently misdirected within the same facility or health care system within the course of coordinating care or delivering services shall not constitute unauthorized access to, or use or disclosure of, a patient's medical information. The department, after investigation, may assess an administrative penalty for a violation of this section of up to twenty-five thousand dollars (\$25,000) per patient whose medical information was unlawfully or without authorization accessed, used, or disclosed, and up to seventeen thousand five hundred dollars (\$17,500) per subsequent occurrence of unlawful or unauthorized access, use, or disclosure of that patients' medical information. For purposes of the investigation, the department shall consider the clinic's, health facility's, agency's, or hospice's history of compliance with this section and other related state and federal statutes and regulations, the extent to which the facility detected violations and took preventative action to immediately correct and prevent past violations from recurring, and factors outside its control that restricted the facility's ability to comply with this section. The department shall have full discretion to consider all factors when determining the amount of an administrative penalty pursuant to this section.

(b) (1) A clinic, health facility, home health agency, or hospice to which subdivision (a) applies shall report any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information to the department no later than five business days after the unlawful or unauthorized access, use, or disclosure has been detected by the clinic, health facility, home health agency, or hospice.

(2) Subject to subdivision (c), a clinic, health facility, home health agency, or hospice shall also report any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information to the affected patient or the patient's representative at the last known address, no later than five business days after the unlawful or unauthorized access, use, or disclosure has been detected by the clinic, health facility, home health agency, or hospice.

(c) (1) A clinic, health facility, home health agency, or hospice shall delay the reporting, as required pursuant to paragraph (2) of subdivision (b), of any unlawful or unauthorized access to, or use or disclosure of, a patient's medical information beyond five business days if a law enforcement agency or official provides the clinic, health facility, home health agency, or hospice with a written or oral statement that compliance with the reporting requirements of paragraph (2) of subdivision (b) would likely impede the law enforcement agency's investigation that relates to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information and specifies a date upon which the delay shall end, not to exceed 60 days after a written request is made, or 30 days after an oral request is made. A law enforcement agency or official may request an extension of a delay based upon a written declaration that there exists a bona fide, ongoing, significant criminal investigation of serious wrongdoing relating to the unlawful or unauthorized access to, and use or disclosure of, a patient's medical information, that notification of patients will undermine the law enforcement agency's investigation, and that specifies a date upon which the delay shall end, not to exceed 60 days after the end of the original delay period.

(2) If the statement of the law enforcement agency or official is made orally, then the clinic, health facility, home health agency, or hospice shall do the following:

(A) Document the oral statement, including, but not limited to, the identity of the law enforcement agency or official making the oral statement and the date upon which the oral statement was made.

(B) Limit the delay in reporting the unlawful or unauthorized access to, or use or disclosure of, the patient's medical information to the date specified in the oral statement, not to exceed 30 calendar days from the date that the oral statement is made, unless a written statement that complies with the requirements of this subdivision is received during that time.

(3) A clinic, health facility, home health agency, or hospice shall submit a report that is delayed pursuant to this subdivision not later than five business days after the date designated as the end of the delay.

(d) If a clinic, health facility, home health agency, or hospice to which subdivision (a) applies violates subdivision (b), the department may assess the licensee a penalty in the amount of one hundred dollars (\$100) for each day that the unlawful or unauthorized access, use, or disclosure is not reported to the department or the affected patient, following the initial five-day period specified in subdivision (b). However, the total combined penalty assessed by the department under subdivision (a) and this subdivision shall not exceed two hundred fifty thousand dollars (\$250,000) per reported event. For enforcement purposes, it shall be presumed that the facility did not notify the affected patient if the notification was not documented. This presumption may be rebutted by a licensee only if the licensee demonstrates, by a preponderance of the evidence, that the notification was made.

(e) In enforcing subdivisions (a) and (d), the department shall take into consideration the special circumstances of small and rural hospitals, as defined in Section 124840, and primary care clinics, as defined in subdivision (a) of Section 1204, in order to protect access to quality care in those hospitals and clinics. When assessing a penalty on a skilled nursing facility or other facility subject to Section 1423, 1424, 1424.1, or 1424.5, the department shall issue only the higher of either a penalty for the violation of this section or a penalty for violation of Section 1423, 1424, 1424.1, or 1424.5, not both.

(f) All penalties collected by the department pursuant to this section, Sections 1280.1, 1280.3, and 1280.4, shall be deposited

into the Internal Departmental Quality Improvement Account, which is hereby created within the Special Deposit Fund under Section 16370 of the Government Code. Upon appropriation by the Legislature, moneys in the account shall be expended for internal quality improvement activities in the Licensing and Certification Program.

(g) If the licensee disputes a determination by the department regarding a failure to prevent or failure to timely report unlawful or unauthorized access to, or use or disclosure of, patients' medical information, or the imposition of a penalty under this section, the licensee may, within 10 days of receipt of the penalty assessment, request a hearing pursuant to Section 131071. Penalties shall be paid when appeals have been exhausted and the penalty has been upheld.

(h) In lieu of disputing the determination of the department regarding a failure to prevent or failure to timely report unlawful or unauthorized access to, or use or disclosure of, patients' medical information, transmit to the department 75 percent of the total amount of the administrative penalty, for each violation, within 30 business days of receipt of the administrative penalty.

(i) Notwithstanding any other law, the department may refer violations of this section to the Office of Health Information Integrity for enforcement pursuant to Section 130303.

(j) For purposes of this section, the following definitions shall apply:

(1) "Reported event" means all breaches included in any single report that is made pursuant to subdivision (b), regardless of the number of breach events contained in the report.

(2) "Unauthorized" means the inappropriate access, review, or viewing of patient medical information without a direct need for medical diagnosis, treatment, or other lawful use as permitted by the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code) or any other statute or regulation governing the lawful access, use, or disclosure of medical information.

SEC. 2. Section 130251 of the Health and Safety Code is amended to read:

130251. (a) The California Health and Human Services Agency or one of the departments under its jurisdiction may apply for federal funds made available through the federal American

Recovery and Reinvestment Act of 2009 (Public Law 111-5) for health information technology and exchange.

(b) In the event that the California Health and Human Services Agency or one of the departments under its jurisdiction elects not to submit an application described in subdivision (a), the Governor shall designate a qualified nonprofit entity to be the state-designated entity for the purposes of health information exchange, pursuant to the requirements set forth in ARRA.

(c) The agency or state-designated entity shall execute tasks related to accessing federal stimulus funds made available through ARRA, and facilitate and expand the use and disclosure of health information electronically among organizations according to nationally recognized standards and implementation specifications while protecting, to the greatest extent possible, individual privacy and the confidentiality of electronic medical records in accordance with applicable state and federal law.

(d) The agency or state-designated entity shall develop a plan to ensure that health information exchange capabilities are available, adopted, and utilized statewide so that patients do not experience disparities in access to the benefits of this technology by age, race, ethnicity, language, income, insurance status, geography, or otherwise.

(e) The agency or state-designated entity shall create a plan for a self-sustaining funding mechanism that does not include use of General Fund moneys that shall cover all reasonable costs of the administration of health information exchange when federal ARRA funds expire or are exhausted.

(f) The state-designated entity shall continually meet any conditions for being so designated as determined by the Secretary of California Health and Human Services. Failure to comply with this subdivision may result in the entity losing its designation.

(g) As a condition of receiving the state designation, the state-designated entity shall comply with all of the following requirements:

(1) It shall be subject to oversight by the California Health and Human Services Agency.

(2) (A) It shall be governed by a board with a diverse composition from multiple types of organizations from multiple regions throughout the state. The governing board shall include, at a minimum, all of the following:

(i) The Secretary of California Health and Human Services or his or her designee.

(ii) The Chair of the Senate Committee on Health or his or her designee.

(iii) The Chair of the Assembly Committee on Health or his or her designee.

(iv) At least two consumer representatives, one of whom shall have expertise in privacy and security of health information.

(B) The majority of the board shall be comprised of nongovernmental employees.

(3) If the board convenes workgroups or subcommittees, the workgroups or subcommittees shall be comprised of representatives from multiple types of organizations from multiple regions throughout the state, and meetings of any workgroup or subcommittee shall be held in an open, public, and transparent way.

(4) It shall have nondiscrimination and conflict-of-interest policies that demonstrate a commitment to open, fair, and nondiscriminatory participation by stakeholders.

(h) The state-designated entity shall report to the California Health and Human Services Agency and the Legislature on its progress and activities at least annually.

SEC. 3. Section 130316 of the Health and Safety Code is amended to read:

130316. Any funds appropriated for the purpose of this division that remain unexpended or unencumbered on January 1, 2013, shall revert to the General Fund on that date unless a statute that is enacted before January 1, 2013, extends the provisions of this division.

SEC. 4. Section 130317 of the Health and Safety Code is amended to read:

130317. This division shall become inoperative on January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty

for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to provide for the continued performance of vital state functions relating to the security, confidentiality, and appropriate maintenance of health information, it is necessary for this act to take effect immediately.











Approved \_\_\_\_\_, 2010

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*Governor*