

Introduced by Senator Maldonado

February 25, 2009

An act to amend Section 56.36 of the Civil Code, and to amend Sections 1280.15 and 130202 of the Health and Safety Code, relating to confidential medical information.

LEGISLATIVE COUNSEL'S DIGEST

SB 368, as introduced, Maldonado. Confidential medical information: unlawful disclosure.

(1) Existing law, the Confidentiality of Medical Information Act, generally prohibits the unlawful disclosure of confidential patient information, sets forth criminal and civil penalties for prescribed violations, and authorizes prescribed persons to bring enforcement actions.

This bill would authorize a person who brings an action against a licensed health care provider pursuant to those provisions to send a recommendation for further investigation of, or discipline for, a potential violation of those provisions to the licensee's relevant licensing authority.

(2) Existing law establishes provisions for the licensing and certification of clinics, health facilities, home health agencies, and hospices under the jurisdiction of the State Department of Public Health, prohibits the unlawful release of medical records by those entities, and authorizes the department to assess administrative penalties for violations.

This bill would, if the director finds that the violation was due to unlawful conduct of a licensed health care professional, authorize the director to send a recommendation for further investigation of, or

discipline for, a potential violation to the licensed health care professional’s relevant licensing authority

(3) Existing law requires every provider of health care to reasonably safeguard confidential medical information from unauthorized or unlawful access, use, or disclosure. Existing law establishes within the California Health and Human Services Agency the Office of Health Information Integrity to assess and impose administrative fines for a violation of these provisions. Existing law authorizes the director to send a recommendation for further investigation of, or discipline for, a potential violation to the licensee’s relevant licensing authority.

The law does not permit the office to assess prescribed administrative penalties that are authorized to be assessed against licensed health care providers by the State Department of Public Health.

This bill would authorize the office to assess those administrative penalties for unlawful disclosure of confidential medical records if the Director of Public Health has delegated that authority to the office.

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

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

1 SECTION 1. Section 56.36 of the Civil Code is amended to
2 read:

3 56.36. (a) Any violation of the provisions of this part that
4 results in economic loss or personal injury to a patient is punishable
5 as a misdemeanor.

6 (b) In addition to any other remedies available at law, any
7 individual may bring an action against any person or entity who
8 has negligently released confidential information or records
9 concerning him or her in violation of this part, for either or both
10 of the following:

11 (1) Nominal damages of one thousand dollars (\$1,000). In order
12 to recover under this paragraph, it shall not be necessary that the
13 plaintiff suffered or was threatened with actual damages.

14 (2) The amount of actual damages, if any, sustained by the
15 patient.

16 (c) (1) In addition, any person or entity that negligently
17 discloses medical information in violation of the provisions of this
18 part shall also be liable, irrespective of the amount of damages
19 suffered by the patient as a result of that violation, for an

1 administrative fine or civil penalty not to exceed two thousand
2 five hundred dollars (\$2,500) per violation.

3 (2) (A) Any person or entity, other than a licensed health care
4 professional, who knowingly and willfully obtains, discloses, or
5 uses medical information in violation of this part shall be liable
6 for an administrative fine or civil penalty not to exceed twenty-five
7 thousand dollars (\$25,000) per violation.

8 (B) Any licensed health care professional, who knowingly and
9 willfully obtains, discloses, or uses medical information in violation
10 of this part shall be liable on a first violation, for an administrative
11 fine or civil penalty not to exceed two thousand five hundred
12 dollars (\$2,500) per violation, or on a second violation for an
13 administrative fine or civil penalty not to exceed ten thousand
14 dollars (\$10,000) per violation, or on a third and subsequent
15 violation for an administrative fine or civil penalty not to exceed
16 twenty-five thousand dollars (\$25,000) per violation. Nothing in
17 this subdivision shall be construed to limit the liability of a health
18 care service plan, a contractor, or a provider of health care that is
19 not a licensed health care professional for any violation of this
20 part.

21 (3) (A) Any person or entity, other than a licensed health care
22 professional, who knowingly or willfully obtains or uses medical
23 information in violation of this part for the purpose of financial
24 gain shall be liable for an administrative fine or civil penalty not
25 to exceed two hundred fifty thousand dollars (\$250,000) per
26 violation and shall also be subject to disgorgement of any proceeds
27 or other consideration obtained as a result of the violation.

28 (B) Any licensed health care professional, who knowingly and
29 willfully obtains, discloses, or uses medical information in violation
30 of this part for financial gain shall be liable on a first violation, for
31 an administrative fine or civil penalty not to exceed five thousand
32 dollars (\$5,000) per violation, or on a second violation for an
33 administrative fine or civil penalty not to exceed twenty-five
34 thousand dollars (\$25,000) per violation, or on a third and
35 subsequent violation for an administrative fine or civil penalty not
36 to exceed two hundred fifty thousand dollars (\$250,000) per
37 violation and shall also be subject to disgorgement of any proceeds
38 or other consideration obtained as a result of the violation. Nothing
39 in this subdivision shall be construed to limit the liability of a
40 health care service plan, a contractor, or a provider of health care

1 that is not a licensed health care professional for any violation of
 2 this part.

3 (4) Nothing in this subdivision shall be construed as authorizing
 4 an administrative fine or civil penalty under both paragraphs (2)
 5 and (3) for the same violation.

6 (5) Any person or entity who is not permitted to receive medical
 7 information pursuant to this part and who knowingly and willfully
 8 obtains, discloses, or uses medical information without written
 9 authorization from the patient shall be liable for a civil penalty not
 10 to exceed two hundred fifty thousand dollars (\$250,000) per
 11 violation.

12 (d) In assessing the amount of an administrative fine or civil
 13 penalty pursuant to subdivision (c), the Office of Health
 14 Information Integrity, licensing agency, or certifying board or
 15 court shall consider any one or more of the relevant circumstances
 16 presented by any of the parties to the case including, but not limited
 17 to, the following:

18 (1) Whether the defendant has made a reasonable, good faith
 19 attempt to comply with this part.

20 (2) The nature and seriousness of the misconduct.

21 (3) The harm to the patient, enrollee, or subscriber.

22 (4) The number of violations.

23 (5) The persistence of the misconduct.

24 (6) The length of time over which the misconduct occurred.

25 (7) The willfulness of the defendant’s misconduct.

26 (8) The defendant’s assets, liabilities, and net worth.

27 (e) (1) The civil penalty pursuant to subdivision (c) shall be
 28 assessed and recovered in a civil action brought in the name of the
 29 people of the State of California in any court of competent
 30 jurisdiction by any of the following:

31 (A) The Attorney General.

32 (B) Any district attorney.

33 (C) Any county counsel authorized by agreement with the
 34 district attorney in actions involving violation of a county
 35 ordinance.

36 (D) Any city attorney of a city.

37 (E) Any city attorney of a city and county having a population
 38 in excess of 750,000, with the consent of the district attorney.

1 (F) A city prosecutor in any city having a full-time city
2 prosecutor or, with the consent of the district attorney, by a city
3 attorney in any city and county.

4 (G) The Director of the Office of Health Information Integrity
5 may recommend that any person described in subparagraphs (A)
6 to (F), inclusive, bring a civil action under this section.

7 (2) If the action is brought by the Attorney General, one-half
8 of the penalty collected shall be paid to the treasurer of the county
9 in which the judgment was entered, and one-half to the General
10 Fund. If the action is brought by a district attorney or county
11 counsel, the penalty collected shall be paid to the treasurer of the
12 county in which the judgment was entered. Except as provided in
13 paragraph (3), if the action is brought by a city attorney or city
14 prosecutor, one-half of the penalty collected shall be paid to the
15 treasurer of the city in which the judgment was entered and one-half
16 to the treasurer of the county in which the judgment was entered.

17 (3) If the action is brought by a city attorney of a city and
18 county, the entire amount of the penalty collected shall be paid to
19 the treasurer of the city and county in which the judgment was
20 entered.

21 (4) Nothing in this section shall be construed as authorizing
22 both an administrative fine and civil penalty for the same violation.

23 (5) Imposition of a fine or penalty provided for in this section
24 shall not preclude imposition of any other sanctions or remedies
25 authorized by law.

26 (6) Administrative fines or penalties issued pursuant to Section
27 1280.15 of the Health and Safety Code shall offset any other
28 administrative fine or civil penalty imposed under this section for
29 the same violation.

30 (f) For purposes of this section, “knowing” and “willful” shall
31 have the same meanings as in Section 7 of the Penal Code.

32 (g) No person who discloses protected medical information in
33 accordance with the provisions of this part shall be subject to the
34 penalty provisions of this part.

35 (h) Paragraph (6) of subdivision (e) shall only become operative
36 if Senate Bill 541 of the 2007–08 Regular Session is enacted and
37 becomes effective on or before January 1, 2009.

38 (i) *Notwithstanding any other provision of law, a person who*
39 *brings an action pursuant to this section against a licensed health*
40 *care provider may send a recommendation for further investigation*

1 *of, or discipline for, a potential violation of this part to the*
2 *licensee's relevant licensing authority. The recommendation shall*
3 *include all documentary evidence collected by the person in*
4 *evaluating whether or not to make that recommendation. The*
5 *recommendation and accompanying evidence shall be deemed in*
6 *the nature of an investigative communication and be protected by*
7 *Section 6254 of the Government Code. The licensing authority of*
8 *the licensed health care provider shall review all evidence*
9 *submitted and may take action for further investigation or*
10 *discipline of the licensee.*

11 SEC. 2. Section 1280.15 of the Health and Safety Code is
12 amended to read:

13 1280.15. (a) A clinic, health facility, home health agency, or
14 hospice licensed pursuant to Section 1204, 1250, 1725, or 1745
15 shall prevent unlawful or unauthorized access to, and use or
16 disclosure of, patients' medical information, as defined in
17 subdivision (g) of Section 56.05 of the Civil Code and consistent
18 with Section 130203. The department, after investigation, may
19 assess an administrative penalty for a violation of this section of
20 up to twenty-five thousand dollars (\$25,000) per patient whose
21 medical information was unlawfully or without authorization
22 accessed, used, or disclosed, and up to seventeen thousand five
23 hundred dollars (\$17,500) per subsequent occurrence of unlawful
24 or unauthorized access, use, or disclosure of that patients' medical
25 information. For purposes of the investigation, the department
26 shall consider the clinic's, health facility's, agency's, or hospice's
27 history of compliance with this section and other related state and
28 federal statutes and regulations, the extent to which the facility
29 detected violations and took preventative action to immediately
30 correct and prevent past violations from recurring, and factors
31 outside its control that restricted the facility's ability to comply
32 with this section. The department shall have full discretion to
33 consider all factors when determining the amount of an
34 administrative penalty pursuant to this section.

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

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

7 (c) If a clinic, health facility, agency, or hospice to which
8 subdivision (a) applies violates subdivision (b), the department
9 may assess the licensee a penalty in the amount of one hundred
10 dollars (\$100) for each day that the unlawful or unauthorized
11 access, use, or disclosure is not reported, following the initial
12 five-day period specified in subdivision (b). However, the total
13 combined penalty assessed by the department under subdivision
14 (a) and this subdivision shall not exceed two hundred fifty thousand
15 dollars (\$250,000) per reported event.

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

26 (e) All penalties collected by the department pursuant to this
27 section, Sections 1280.1, 1280.3, and 1280.4, shall be deposited
28 into the Internal Departmental Quality Improvement Account,
29 which is hereby created within the Special Deposit Fund under
30 Section 16370 of the Government Code. Upon appropriation by
31 the Legislature, moneys in the account shall be expended for
32 internal quality improvement activities in the Licensing and
33 Certification Program.

34 (f) If the licensee disputes a determination by the department
35 regarding a failure to prevent or failure to timely report unlawful
36 or unauthorized access to, or use or disclosure of, patients' medical
37 information, or the imposition of a penalty under this section, the
38 licensee may, within 10 days of receipt of the penalty assessment,
39 request a hearing pursuant to Section 131071. Penalties shall be

1 paid when appeals have been exhausted and the penalty has been
2 upheld.

3 (g) In lieu of disputing the determination of the department
4 regarding a failure to prevent or failure to timely report unlawful
5 or unauthorized access to, or use or disclosure of, patients' medical
6 information, transmit to the department 75 percent of the total
7 amount of the administrative penalty, for each violation, within
8 30 business days of receipt of the administrative penalty.

9 (h) Notwithstanding any other provision of law, the department
10 may refer violations of this section to the office of Health
11 Information Integrity for enforcement pursuant to Section 130303,
12 except that if Assembly Bill 211 of the 2007–08 Regular Session
13 is not enacted, the department may refer violations to the Office
14 of HIPAA Implementation.

15 (i) For purposes of this section, the following definitions shall
16 apply:

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

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

27 (j) *Notwithstanding any other provision of law, if the director*
28 *finds that a violation of this section was due to the unlawful action*
29 *of a licensed health care professional, the director may send a*
30 *recommendation for further investigation of, or discipline for, a*
31 *potential violation of this section to the licensee's relevant licensing*
32 *authority. The recommendation shall include all documentary*
33 *evidence collected by the director in evaluating whether or not to*
34 *make that recommendation. The recommendation and*
35 *accompanying evidence shall be deemed in the nature of an*
36 *investigative communication and be protected by Section 6254 of*
37 *the Government Code. The licensing authority of the licensed*
38 *health care professional shall review all evidence submitted by*
39 *the director and may take action for further investigation or*
40 *discipline of the licensee.*

1 SEC. 3. Section 130202 of the Health and Safety Code is
2 amended to read:

3 130202. (a) (1) Upon receipt of a referral from the State
4 Department of Public Health, the office may assess an
5 administrative fine against any person or any provider of health
6 care, whether licensed or unlicensed, for any violation of this
7 division in an amount as provided in Section 56.36 of the Civil
8 Code. Proceedings against any person or entity for a violation of
9 this section shall be held in accordance with administrative
10 adjudication provisions of Chapter 4.5 (commencing with Section
11 11400) and Chapter 5 (commencing with Section 11500) of Part
12 1 of Division 3 of Title 2 of the Government Code.

13 (2) Paragraph (1) shall not apply to a clinic, health facility,
14 agency, or hospice licensed pursuant to Section 1204, 1250, 1725,
15 or 1745 if Senate Bill 541 of the 2007–08 Regular Session is
16 enacted and becomes effective on or before January 1, 2009.

17 (3) Nothing in paragraph (1) shall be construed as authorizing
18 the office to assess the administrative penalties described in Section
19 1280.15 of the Health and Safety Code, *unless the Director of*
20 *Public Health has delegated that authority to the office.*

21 (b) The office shall adopt, amend, or repeal, in accordance with
22 the provisions of Chapter 3.5 (commencing with Section 11340)
23 of Part 1 of Division 3 of Title 2 of the Government Code, such
24 rules and regulations as may be reasonable and proper to carry out
25 the purposes and intent of this division, and to enable the authority
26 to exercise the powers and perform the duties conferred upon it
27 by this division not inconsistent with any other provision of law.

28 (c) Paragraph (3) of subdivision (a) shall only become operative
29 if Senate Bill 541 of the 2007–08 Regular Session is enacted and
30 becomes effective on or before January 1, 2009.