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California Links

State Senate

State Assembly

Department of
Insurance

Legislators Announce Introduction of Bill to Force
Pharmaceuticals to Disclose Decisions Behind Drug
Pricing

Senator Ed Hernandez, D-West Covina, joined by co-author Assembly Member David Chiu, D-San Francisco, as well as billionaire Silicon Valley activist Tom Steyer, along with organized labor and others, held a news conference this last Wednesday on drug pricing disclosure. SB 17 renews the authors' efforts to require pharmaceuticals to provide this information to state regulators.

Senator Hernandez ended pursuit of SB 1010, the same legislation last year, after amendments weakened the bill. The amendments were made by the existing Assembly Appropriations Committee Chair, Lorena Gonzalez Fletcher (D-San Diego), which if reinserted increases the likelihood of a similar fate for the measure.

Nevertheless, the hopeful future Lieutenant Governor, Hernandez, and likely San Francisco Mayoral candidate Chiu are using the issue of prescription drug costs, which manufacturers acknowledge for some are quite high, as a way to generate interest in their political ambitions. The two politicians cite drug costs as the culprit for driving insurance premiums up across the nation. Two drugs they identify as particularly expensive are Sovaldi, an antiviral medication that cures hepatitis, and EpiPen. At the press conference, the legislators also mentioned Deflazacort, newly approved by the US Food and Drug Administration to treat Duchenne Muscular Dystrophy, a rare and fatal disease that impacts 12,000 boys in the country, as the latest drug causing great concern for families because the yearly estimate of cost for the medication is \$89,000.

Both legislators cited a study by the Kaiser Family Foundation that found that total US spending on prescriptions grew more than 22% from 2014 to 2015. And, the organization estimates that such drugs accounted for more than 19% of the cost of employee health coverage. However, there was no mention at the press conference that spending on

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prescription medicines makes up only about 10% of the country's overall healthcare budget, as it has for years.

Millions of Californians have health insurance, but affordability remains a critical issue, the lawmakers outlined. They stated that a tactic of drug companies is to help consumers with their copayments, but this only shields consumers from the true cost of the drug while driving up insurance premiums for everyone. While other sectors of the healthcare system have safeguards and transparency requirements in place with regard to cost drivers, the pharmaceutical industry has no such mechanisms in place, leading to unsustainable increases in the cost of prescription drugs, Hernandez argued.

Last September, Senate Health Committee Chair Hernandez conducted an informational hearing to explore how price increases have impacted patients, families, and providers.

Service Tax Moving Forward

SB 640, authored by Senator Bob Hertzberg, was recently referred to the Committee on Governance and Finance. The bill would create a state tax on services, which had previously been exempted from any form of sales tax. Also included in the text of the bill is the creation of a fund in the State Treasury that would divert money raised from the service tax towards tax relief on lower and middle income families. This is the third time that Senator Hertzberg has introduced this tax even though there has been fierce opposition each time from the business community and it has not received any form of strong support from the Governor.

A study done by the Board of Equalization last year showed that a tax on services could raise approximately \$123 billion dollars per year if it were to be enacted. That study assumed a statewide tax rate of 8.42 percent, and showed that \$60.9 billion would go to the state and \$61.7 billion would go to city, county, and local governments. Senator Hertzberg has said that the new tax is an attempt to reform California's tax code and move the state away from the boom and bust cycles it has faced in the past when collecting its tax revenues. However opponents say that it is far too onerous a burden to place on both businesses and taxpayers, and that it would only serve as a backhanded type of job killer. In light of the extreme opposition that this bill has faced, Senator Hertzberg has said that if it does not make it through the Legislature this year, he has considered placing it on the 2018 ballot as an initiative for the voters to decide.

Workers Compensation Prescription Drug Formulary Regulations Entering Final Stages of Approval

Last week, copies of the proposed prescription drug formulary regulations were being circulated among stakeholders for review. While the regulations could have been posted for notice on March 10 and thus given more time to navigate the Administrative Procedures Act process, those who received the draft were told that the regulations would be noticed in the Notice Register of the Office of Administrative Law (OAL) on March 17. That means they will be open for review for 45 days, consistent with the expected hearing on the regulations on May 1. This is where the process becomes more interesting. OAL has up to 30 days to review the regulations. In order to meet the statutory deadline of July 1 for implementation of the formulary, the Division of Workers Compensation must do everything in its power to finalize the rulemaking record within no more than two additional 15 day comment periods if amendments to the regulations are made.

The formulary has a significant impact on both utilization review (UR) and independent medical review (IMR). Once adopted, payers are going to need to significantly revise their approval processes for prescription drugs and how to respond to requests for IMR. This will be even more important once the changes in the UR process mandated by SB 1160 (Mendoza) start being implemented in 2018. But for now, the key is to do everything possible to integrate the formulary requirements into existing workflows. That will make the role of pharmacy benefit managers even more important as keeping up with approved drugs and drugs (including all opioids) that require prior authorization will be critical in terms of managing how prescriptions are fulfilled after July 1.

Effort to Stop “Ban the Box” Regulation Occurring, Despite Being 11th Hour

The California Chamber of Commerce Employment Law team is not relenting in its effort to stop Fair Employment Housing Council (FEHC) regulation that prohibits employers from asking candidates for employment about their criminal history before offering a conditional offer of employment. The CalChamber is asking the Office of Administrative Law (OAL) to reject proposed regulations that create confusion regarding when employers may consider criminal history in making employment decisions.

The CalChamber does not believe FEHC has legal authority to adopt the proposed regulations. There is no statutory authority for the FEHC to interpret the Civil Code or the labor Code regarding the relevancy of criminal convictions, based upon the time that has passed, as the Council seeks to do in this case. Legislation introduced last month emphasizes the FEHC's lack of statutory authority. The bill, AB 1008 (McCarty, D-Sacramento) requires employers to consider the factors and nature of an offense and the time passed since the conviction. If the FEHC had authority to promulgate the regulations, there would be no need for the Legislature to amend the Government Code as proposed in AB 1008.

In terms of additional detail about the pending regulations, they create a presumption that considering any conviction more than seven years old is discriminatory. If the employer deems that the applicant does pose a risk, the employer could be exposed to litigation for discrimination under the state Fair Employment and Housing Act (FEHA).

The risk of litigation under FEHA is enhanced by the catchall provision that states even if an employer demonstrates its decision not to hire an applicant with a criminal history is job-related and excluding the applicant is consistent with business necessity, the employer still may be liable if the applicant can show there was a less discriminatory alternative available other than denying the applicant employment.

The OAL has until April 27, 2017 to approve or disapprove the pending regulations.

Senate Republicans Announce Leadership Transition

Senate Republican Leader Jean Fuller, R-Bakersfield, stepped down as Senate Republican Leader this week. Senate Republicans elected Senator Patricia Bates, R-Laguna Niguel, to serve as the next Senate Republican Leader. Senator Fuller is termed-out next year and wanted to give Senator Bates ample time to prepare for her new role.

In accepting her new position, Leader Bates said, "It is no secret that Republicans face a challenging political environment in California. But, Republicans embrace taxpayers who want a more efficient government ... and a Republican Party that can attract broad support in California."

Senator Fuller was the first woman to serve as Senate Republican Leader in the California Legislature.

David Hadley Announces Run for Governor

Last Friday, former Assembly Member David Hadley formed a campaign committee for the 2018 gubernatorial race. Hadley is a one-term former Assembly Member from the 66th Assembly District in the South Bay Area who positioned himself as a moderate during his term from 2014 to 2016. While Hadley had defeated the Democrat Al Muratsuchi to take the Assembly seat in 2014, it was reclaimed by Muratsuchi in one of 2016's closest and most expensive races. Hadley has joined a deepening field of candidates for the 2018 race, which although it is still over a year and a half away already promises to be a close contest.

The leader is still currently California's Lieutenant Governor Gavin Newsom, however there are other strong contenders that may pose a challenge. Former Assembly Speaker and Mayor of Los Angeles Antonio Villaraigosa has announced his candidacy with an emphasis on jobs

and education, and California's State Treasurer John Chiang has the early support of organized labor. Others such as San Diego Mayor Kevin Faulconer and the billionaire activist Tom Steyer have considered running, making for a packed field long before the campaign truly begins.

Trump to Consider Tort Reform Long Awaited by Business; No Certainty President will Endorse

President Donald Trump is expected to soon begin reviewing a series of bills that represent the most significant congressional challenge to the established litigation process in more than a decade, and would likely aid business defendants in thousands of cases every year. At stake are six items championed by big business entities, which include changes large and small to class actions and other devices that shape the modern civil litigation process. The bills lay bare industry efforts to rewrite class-action practice, aid defendants striving to keep cases out of plaintiff-friendly state courts, and punish attorneys who file dubious claims.

The legislative package, known as tort reform, also seeks to put new limits on settlements entered into by the US Department of Justice and the federal Environmental Protection Agency, and require more disclosures by asbestos victims who seek compensation from bankruptcy trusts. Public Citizen, a major consumer group opposed to the legislation, calls the prospects for enactment "scarily real."

Since the Class Action Fairness Act was signed into law in 2005 making it easier for defendants to move class and other suits from state to federal court, supporters of federal "litigation reform" have mostly come up dry. The Republican-controlled House of Representatives is already strongly supportive of the business-friendly legislative package. What's different this time is that most of the bills are now on House Speaker Paul Ryan's, R-Wisconsin, "must pass menu" and will move through the House faster than ever before, greasing the wheels for Senate action.

But whether legislation supporters can surmount the 60-vote threshold for passage in the Senate is another matter. The Senate rule requiring 60 votes to end debate has derailed earlier attempts at getting such legislation through Congress, but with the Republican majority the prospects of passage are considered high.

The lack of position or comment on tort reform from the White House has created tremendous uncertainty, complicating strategy on both sides. Consumer advocates point to the President's long history of litigating to resolve business matters, appearing frequently as a plaintiff and as a defendant. Also, working class people who voted for him would not be in favor of rigging the legal system further in favor of corporations, consumer groups predict. Looking at it from the other side, Trump does not owe any political favors to the trial lawyers.



Bringing the topic to California, with somewhat of a tie to the actions federally discussed above, a bill of particular danger to the business community, SB 33 (Dodd, D-Vacaville), allows for waiver of forced arbitration when a consumer alleges financial services contract fraud. The author is committed to narrowing the focus of the measure, but the fact is that it still contains the term “financial services,” which is concerning because this captures the insurance industry. This language is too broad to address the bill’s intended purpose of addressing forced arbitration that occurred as part of the Wells Fargo fake account setup scandal. New language is expected, but details are unclear.