



## Agenda Item 9

August 19, 2014

**ITEM NAME:** Proposition 46 – Drug and Alcohol Testing of Doctors and Medical Negligence Lawsuits

**PROGRAM:** Legislation – State Initiative Statute

**ITEM TYPE:** Information

### **EXECUTIVE SUMMARY**

Among other things, Proposition 46 – The Troy and Alana Pack Patient Safety Act of 2014, provides for mandatory random drug and alcohol testing for physicians, with failure or refusal to submit to testing subject to discipline by the Medical Board of California (Medical Board). It also requires health care practitioners and pharmacists to consult an existing statewide prescription database prior to prescribing or dispensing certain drugs such as OxyContin or Vicodin. The initiative also applies an inflation adjustment to the existing \$250,000 statutory cap on non-economic damages in a medical malpractice lawsuit, effectively raising it to \$1.1 million in current dollars.

### **STRATEGIC PLAN**

This item relates to Goal A of the California Public Employees' Retirement System (CalPERS) Strategic Plan to improve long-term pension and health benefit sustainability, as the intent of the initiative, in part, is to reduce the incidence of medical errors by imposing mandatory drug testing on doctors, which could contribute to reducing the number of medical malpractice cases and lowering health care costs.

### **BACKGROUND**

#### 1. Existing Law

##### *Substance Abuse Testing*

The Medical Board is responsible for licensing, investigating complaints and disciplining specified health care professionals, including physicians, for such things as failure to follow an appropriate standard of care, illegally prescribing drugs, and drug abuse. The Medical Board follows uniform licensee monitoring and drug testing standards established by a Substance Abuse Coordination Committee within the Department of Consumer Affairs. In addition, it does not have a Diversion Program for substance abusers, and penalties are limited to licensee probation or revocation.

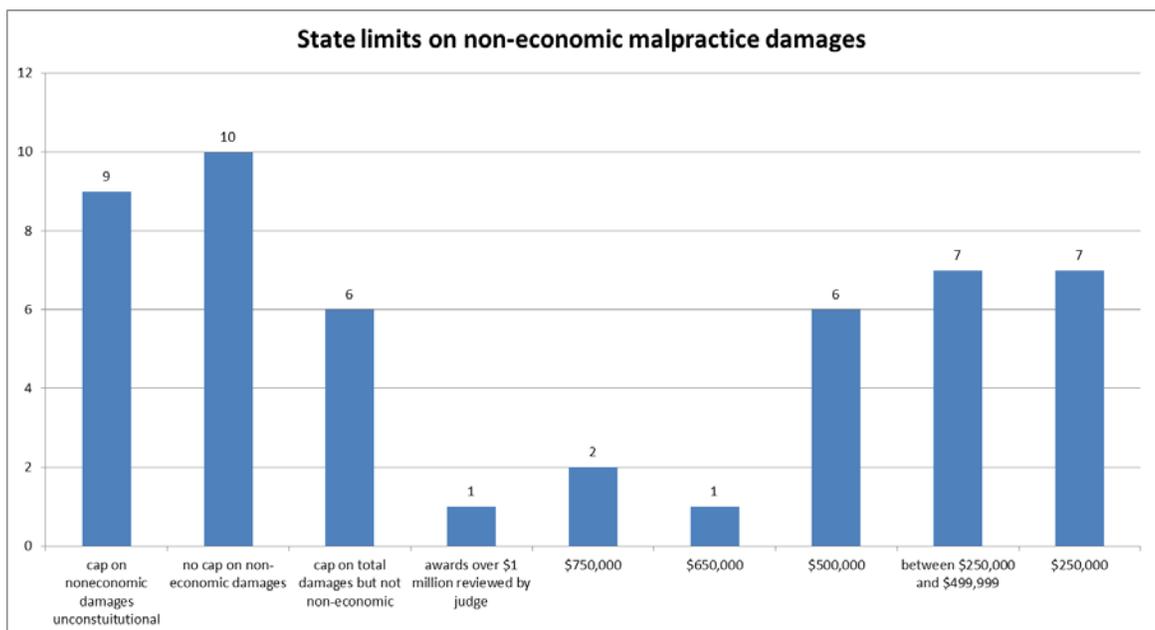
*Statewide Prescription Database*

The California Department of Justice (DOJ) currently maintains an electronic database known as the Controlled Substance Utilization Review and Evaluation System (CURES), which contains electronic information about the prescribing and dispensing of certain drugs. As of 2013, the DOJ estimated that about 6 percent of all prescribers and pharmacists were registered to use the system, but beginning on January 1, 2016, all prescribers and pharmacists will be required to apply for access (but not required to consult the database before prescribing or dispensing controlled substances).

*Medical Malpractice Awards*

Injured patients are able to sue their health care providers for medical malpractice under state law for failure to follow an appropriate standard of care. If these plaintiffs are successful in medical malpractice cases, they can recover economic damages for medical bills, loss of income, etc. that result from the injury, and non-economic damages for pain and suffering. In 1975, the California Legislature passed and the Governor signed into law the Medical Injury Compensation Reform Act which, among other things, imposed a \$250,000 cap on non-economic damages that could be awarded to an injured plaintiff. The amount of the cap was not made subject to any annual inflationary adjustment.

Other states place limits on non-economic damage awards as follows:



Data Courtesy of the National Conference of State Legislatures

## **ANALYSIS**

### 1. Proposed changes

Specifically, Proposition 46 would:

#### *Substance Abuse Testing*

- Require all physicians, and permit anyone else, to report to the Medical Board any information which appears to show that any physician may be or has been impaired by drugs or alcohol while on duty, or failed to follow the appropriate standard of care during an adverse event.
- Upon adoption of regulations by the Medical Board, require hospitals to conduct drug and alcohol testing on physicians as follows: (1) on a random basis on physicians that are employees, contractors, or have admitting privileges, immediately upon the occurrence of an adverse event on physicians responsible for the care and treatment of a patient during the event or who treated or prescribed medication for the patient within 24 hours of the event, and (2) at the direction of the Medical Board upon receiving a referral pursuant to the aforementioned provisions.
- Mandate hospitals to bill physicians for the costs of these tests and prohibit physicians from passing on the costs of the tests to patients or their insurers.
- Require hospitals to report verified positive test results, or the refusal or willful failure to submit to testing by a physician, to the Medical Board.
- Require the Medical Board to refer the matter of the positive test result to the DOJ, temporarily suspend the physician's license pending a Board investigation and hearing, and notify the physician and each health facility at which he or she practices of the suspension.
- Require the Medical Board, after an investigation and hearing, to take disciplinary action against a physician found to have been impaired by drugs or alcohol while on duty or during an adverse event or willfully refused or failed to comply with drug and alcohol testing.
- Upon a finding that a physician was impaired by drugs or alcohol during an adverse event, require the Medical Board to notify the patient involved, or, if the patient has died, the family of the patient.
- Require the Medical Board to impose a fee on all physicians that is sufficient to pay the reasonable costs of administering the physician drug and alcohol testing and enforcement provisions of the Initiative by the Medical Board and the DOJ.
- Make payment of the fee a condition of physician licensure or license renewal.

#### *Statewide Prescription Database*

- Require licensed health care practitioners and pharmacists to access and consult the electronic history in the CURES database prior to prescribing or

dispensing a Schedule II or Schedule III controlled substance to a patient for the first time.

- Prohibit a licensed health care professional from prescribing any additional controlled substances if a patient has an existing prescription for a Schedule II or Schedule III controlled substance, unless the practitioner determines there is a legitimate need for the prescription.
- Subject a health care practitioner to disciplinary action for failure to consult with the CURES database.
- Require the licensing boards for all health care practitioners authorized to write or issue prescriptions to notify the practitioners of the requirements in the Initiative regarding the CURES database and prescriptions.

#### *Medical Malpractice Awards*

- Effective January 1, 2015, adjust the \$250,000 cap on non-economic damages in a medical malpractice case to reflect increases in inflation as measured by the annual Consumer Price Index (CPI) since the cap was established.
- Require the January 1, 2015, revised cap on non-economic damages to be annually adjusted thereafter to reflect increases in inflation as measured by the CPI.
- Require the Department of Finance to calculate and publish on its Internet website the adjustments to the cap on non-economic damages.
- Apply the revised cap on non-economic damages to an award of non-economic damages in any action not resolved by final settlement, judgment, or arbitration award as of January 1, 2015.
- Apply the limitation of attorney's fees set forth in section 6146 of the Business & Professions Code to actions for medical malpractice.
- Create a presumption of professional negligence in any malpractice action against a physician who tested positive for drugs or alcohol or who refused or failed to comply with drug and alcohol testing required by the Initiative following the alleged malpractice and in any action arising from the failure of a licensed health care practitioner to comply with the requirements in the Initiative relating to prescribing a Schedule II or Schedule III controlled substance.

## **BUDGET AND FISCAL IMPACTS**

### **1. Benefit Costs**

#### *Substance Abuse Testing*

The supporters of Proposition 46 cite a 2000 California Medical Board study that estimates that 18 percent of physicians have a drug or alcohol abuse problem at some time in their careers. A more recent (2007) study not specific to California estimates that approximately 6 percent to 8 percent of doctors have a substance abuse disorder and up to 14 percent have an alcohol use

disorder (which mirrors the addiction levels in the general population). A 2011 California Medical Board newsletter cited the above estimates, as well as other estimates, that 13 percent of doctors suffered from alcohol abuse, 5 percent from alcohol dependence, 8 percent from drug abuse, and 3 percent from drug dependence.

Proposition 46 requires hospitals to bill physicians for the costs of substance abuse testing and prohibits physicians from passing on the costs of the tests to patients or their insurers. It also requires the Medical Board to impose a fee on all physicians sufficient to pay the costs of administering the associated enforcement provisions of the Initiative. However, there is a potential that physicians and hospitals will imbed these unknown costs in their contracts with health plans and insurers, including the contracts of CalPERS' health plan partners.

#### *Statewide Prescription Database*

An analysis of Proposition 46 by the Legislative Analyst's Office (LAO) notes that the requirement of providers to check the CURES system before prescribing drugs could have a number of fiscal effects that are difficult to quantify. Prescription costs could be lower, as fewer drugs would be dispensed to patients who engaged in "doctor shopping" in order to illicitly obtain the drugs. Consequently, fewer prescriptions would mean fewer instances of prescription drug abuse, which would lower the costs of enforcing laws related to drug abuse. However, the requirement to use CURES might involve more time in filling prescriptions, which would reduce the time available for other patient-related activities. This could result in increased costs that would be passed along to health care purchasers. Overall, the fiscal effects of the increased use of the CURES system are difficult to quantify.

#### *Medical Malpractice Awards*

CalPERS staff could not estimate the potential impact of costs passed on to CalPERS' health benefit programs due to higher malpractice awards, as it is not known if those increases would be passed on to individual or group health insurance markets as a result of higher malpractice awards and malpractice insurance premiums. The LAO's analysis of the initiative estimated that the increase in the cap on non-economic damages in malpractice cases could potentially raise health care costs. The LAO cited the experiences of other states in estimating that the direct cost of increasing medical malpractice damages would be a cost increase between 0.1 percent to 0.5 percent. Costs might also rise due to doctors ordering more tests for "defensive" reasons, although this might be offset by the reduction of costs because doctors might opt not to perform risky procedures due to concerns over malpractice liability.

The LAO estimated that the net effect of these behavioral changes would be an additional 0.1 percent to 1.0 percent in higher costs. When combined with the direct impact of higher malpractice awards, the total impact would be an increase in health care costs between 0.2 percent to 1.5 percent. Using LAO's percentage changes, the estimated impact on CalPERS would be between \$15 million to \$112.7 million.

2. Administrative Costs

There are no anticipated administrative costs for CalPERS.

**ATTACHMENTS**

Attachment 1 – CalPERS Board of Administration's State Ballot Initiative Policy  
Standard

Attachment 2 – Support and Opposition

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