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Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits. Initiative Statute.

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AUG 30 2013

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

July 8, 2013

VIA MESSENGER

Office of the Attorney General
1300 "I" Street, 17th Floor
Sacramento, CA 95814

Attention: Ashley Johansson, Initiative Coordinator

Re: *The Troy and Alana Pack Patient Safety Act of 2014 – Version 2*

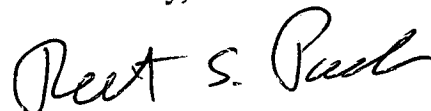
Dear Ms. Johansson:

In accordance with the requirements of Elections Code section 9001(a), we request that the Attorney General prepare a circulating title and summary of the chief purpose and points of version 2 of the initiative measure entitled "The Troy and Alana Pack Patient Safety Act of 2014." The text of the measure, a check for \$200.00, and the certifications required by Elections Code sections 9001 and 9608 are enclosed.

Please direct all correspondence and inquiries regarding this measure to:

Robin Johansen
James C. Harrison
Remcho, Johansen & Purcell, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
Fax: (510) 346-6201

Sincerely,



Robert S. Pack

Enclosures

TROY AND ALANA PACK PATIENT SAFETY ACT OF 2014

SECTION 1. Title.

This measure shall be known as the Troy and Alana Pack Patient Safety Act of 2014.

SECTION 2. Findings and Declarations.

The people of California find and declare the following:

1. Protecting the safety of patients is of paramount interest to the public.
2. Substance abuse by doctors is a growing problem in California and harms more and more patients every year. Last year, the Medical Board of California reported that it had suspended more physicians than it had the year before and that “[t]his increase correlates to the observed trend in an increased number of physician impairment cases.”
3. Studies find that at least one in ten physicians suffers from drug or alcohol abuse during his or her career. According to an article in the Annals of Internal Medicine, one third of physicians will, at some time in their careers, experience a condition, including alcohol or drug abuse, that impairs their ability to practice medicine safely. Nonetheless, no mandatory drug and alcohol testing exists for physicians, as it does for pilots, bus drivers, and others in safety-sensitive occupations, and no effective safeguards exist to stop physicians from practicing until a substance abuse problem is addressed.
4. Physicians who are impaired by drugs and alcohol while on the job pose a serious threat to patients and to the public at large. By one estimate cited in the Journal of the American Medical Association, one-third of all hospital admissions experience a medical error – and physician impairment may be a contributor to such patient harm. Doctors who are impaired while on duty may misdiagnose a communicable or life-threatening disease, perform surgery or other procedures in dangerous and unprofessional ways, and prescribe medication in ways that can cause permanent injury or death to their patients.
5. Studies show that a small percentage of doctors, including those who abuse drugs and alcohol, commit the vast majority of malpractice and go undeterred. Yet no law exists to require physicians to report peers they suspect of medical negligence or of practicing under the influence.
6. Patients are also being harmed by doctors who over-prescribe prescription drugs and fail to prevent prescription drug abuse. The Centers for Disease Control report that drug overdose is the leading cause of fatal injury, and most of those deaths are caused by prescription drugs, yet too few California physicians check a patient’s prescription history in the State-run electronic database known as CURES before prescribing addictive and potentially harmful narcotics.

7. Patients who are harmed by doctors who are impaired by drugs or alcohol, who over-prescribe addictive narcotics, or who commit other negligent medical acts are entitled to recover compensation for such things as pain, suffering, physical impairment, disfigurement, and decline of quality of life. The surviving family of a person killed by medical negligence should recover fair and reasonable compensation for the loss of their loved one.

8. In 1975, however, the Legislature set a cap of \$250,000 on compensation for these losses. That severe restriction on patients' legal rights to hold dangerous doctors accountable was accompanied by a promise that a strong regulatory system would be created to protect patients from harm. Patient safety scandals over the last 38 years, however, have demonstrated that physicians have been unable to police themselves.

9. After 38 years, that \$250,000 cap has never been adjusted for inflation. Despite the rulings of juries, it limits the value of children's lives, as well as the loss of quality of life for all people injured by medical negligence, to \$250,000, no matter how egregious the malpractice or serious the injury. As a result, negligent doctors are not held accountable and patients' safety has suffered.

10. Research has found that by providing fair and adequate compensation to patients injured by medical negligence, malpractice litigation prods health care providers to be more open and honest about mistakes and then take corrective action to reduce the chances of repeated errors, thereby limiting the chances of future harm to patients and acting as a deterrent to bad practices.

SECTION 3. Purpose and Intent.

It is the intent of the people of California in enacting this measure to:

1. Protect patients and their families from injury caused by doctors who are impaired by alcohol or drugs by requiring hospitals to conduct random drug and alcohol testing of the doctors who practice there and requiring them to test physicians after an unexpected death or serious injury occurs.
2. Protect patients and their families from injury by requiring doctors to report other physicians who appear to be impaired by drugs or alcohol while on duty or if any physician who was responsible for the care and treatment of a patient during an adverse event failed to follow the appropriate standard of care.
3. Require hospitals to report any verified positive results of drug and alcohol testing to the California Medical Board.
4. Require that any doctor who tests positive for alcohol or drugs while on duty or who willfully fails or refuses to submit to such testing be temporarily suspended from the practice of medicine pending an investigation.

5. Require the Medical Board to take disciplinary action against a doctor if the Board finds that the doctor was impaired by drugs or alcohol while on duty or during an adverse event or that the doctor willfully refused to comply with drug and alcohol testing.
6. Require doctors to check the State's CURES database prior to writing a prescription for a Schedule II or Schedule III controlled substance for a patient for the first time, and if the patient already has a prescription, determine that the patient has a legitimate need before prescribing the medication, in order to protect patients and others.
7. Adjust the \$250,000 cap on compensation for pain, suffering, physical impairment, disfigurement, decline of quality of life, and death in medical negligence lawsuits set by the Legislature in 1975 to account for inflation and to provide annual adjustments in the future in order to boost health care accountability, act as a deterrent, and ensure that patients, their families, and others who are injured by negligent doctors are entitled to be made whole for their loss.
8. Retain the cap on attorneys' fees in medical negligence cases.

SECTION 4. Article 14 (commencing with Section 2350.10) is added to Chapter 5 of Division 2 of the Business and Professions Code, to read:

Article 14. Physician and Surgeon Alcohol or Drug Impairment Prevention

2350.10. The Medical Board of California shall administer this article, and shall adopt regulations necessary to implement this article within one year of its effective date. These regulations shall be consistent with the standards for drug and alcohol testing, including, but not limited to, the collection of specimens, the testing of specimens, the concentration levels of drugs and alcohol, the verification of test results, the retention of specimens and requests for testing of a sample of the specimen by the subject of the test, record keeping, due process, return to duty, and privacy and confidentiality, set forth in 49 Code of Federal Regulations, Part 40, as of the effective date of this Act, to the extent that such standards do not conflict with the terms of this Act or the California or United States Constitutions.

2350.15. For the purposes of this article, the following terms have the following meanings:

(a) "Test" or "testing" means examination of a physician for use of drugs or alcohol while on duty that may impair or may have impaired the physician's ability to practice medicine.

(b) "Adverse event" has the same meaning as set forth in Section 1279.1 of the Health and Safety Code.

(c) "Board" means the Medical Board of California.

(d) "Drug" means Marijuana metabolites, Cocaine metabolites, Amphetamines, Opiate metabolites, and Phencyclidine (PCP). "Drug" does not include drugs prescribed by a licensed third party for a specific medical condition if the manner in which the physician uses the drug is not known to cause impairment.

(e) "Physician" means a holder of a physician and surgeon's certificate under this chapter.

(f) "Hospital" means a general acute care hospital as defined in section 1250 of the Health and Safety Code or any successor statute and an "outpatient setting" as defined in paragraph (1) of subdivision (b) of section 1248 of the Health and Safety Code or any successor statute.

(g) "Verified positive test result" means a positive test result that has been verified through a process established by the Board that includes a confirming test, an opportunity for the physician to offer an explanation, and review and determination by a medical review officer, and that satisfies the concentration levels for impairment specified by the Board.

2350.20. Every physician shall, and any other person may, report to the Board any information known to him or her which appears to show that any physician may be or has been impaired by drugs or alcohol while on duty, or that any physician who was responsible for the care and treatment of a patient during an adverse event failed to follow the appropriate standard of care. Notwithstanding any other provision of law, any physician or other person who in good faith makes such a report to the Board shall not be liable under any law of this State for any statement or opinion made in such report.

2350.25. (a) Upon the effective date of the regulations adopted by the Board to implement this Article, hospitals shall conduct testing for drugs and alcohol on physicians as follows:

(1) On a random basis on physicians who are employees or contractors or who have the privilege to admit patients.

(2) Immediately upon the occurrence of an adverse event on physicians who were responsible for the care and treatment of the patient during the event or who treated the patient or prescribed medication for the patient within 24 hours prior to the event. Testing shall be the responsibility of the physician, who shall make himself or herself available for testing at the hospital as soon as possible, and failure to submit to testing at the hospital within 12 hours after the physician learns of the adverse event may be cause for suspension of the physician's license.

(3) At the direction of the Board following a referral pursuant to section 2350.20 on a physician who is the subject of a referral.

(b) The hospital shall bill the physician for the cost of his or her test and shall not pass on any of the costs of the test to patients or their insurers.

2350.30. (a) *Hospitals shall report any verified positive test results, or the willful failure or refusal of a physician to submit to a test, to the Board, which shall do all of the following:*

(1) *Refer the matter to the Attorney General's Health Quality Enforcement Section for investigation and enforcement pursuant to Article 12 (commencing with Section 2220) of Chapter 5 of Division 2 of the Business and Professions Code.*

(2) *Temporarily suspend the physician's license pending the Board's investigation and hearing on the matter pursuant to Article 12 (commencing with Section 2220) of Chapter 5 of Division 2 of the Business and Professions Code.*

(3) *Notify the physician and each of the health facilities at which the physician practices that the physician's license has been temporarily suspended pending the Board's investigation and hearing on the matter.*

2350.35. (a) *If, after investigation and hearing, the Board finds that a physician was impaired by drugs or alcohol while on duty or during an adverse event or that a physician has willfully refused or failed to comply with drug and alcohol testing, the Board shall take disciplinary action against the physician, which may include treatment for addiction as a condition of licensure, additional drug and alcohol testing during a period of probation, and/or suspension of the physician's license until such time as the physician demonstrates to the Board's satisfaction that he or she is fit to return to duty.*

(b) *If the Board finds that a physician was impaired by drugs or alcohol during an adverse event, the Board shall inform the patient, or in the case of the patient's death, the patient's family, of its determination.*

2350.40. *The Board shall assess an annual fee on physicians sufficient to pay the reasonable costs of administering this article by the Board and the Attorney General. Every physician shall pay the fee as a condition of licensure or license renewal. The Board shall reimburse the Attorney General's Office for its costs in conducting investigations and enforcement actions under this article.*

SECTION 5. Section 3333.2 of the Civil Code is amended to read as follows:

(a) *In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.*

(b) *In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000), as adjusted pursuant to subdivision (c).*

(c) On January 1, 2015, the cap on the amount of damages specified in subdivision (b) shall be adjusted to reflect any increase in inflation as measured by the Consumer Price Index published by the United States Bureau of Labor Statistics since the cap was established. Annually thereafter, the cap on the amount of damages specified in this subdivision shall be adjusted to reflect any increase in inflation as measured by the Consumer Price Index published by the United States Bureau of Labor Statistics. The Department of Finance shall calculate and publish on the Internet the adjustments required by this subdivision.

(ed) For the purposes of this section:

(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

(e) The adjusted cap provided for in Subdivision (c) shall apply to an award of noneconomic damages in any action which has not been resolved by way of a final settlement, judgment, or arbitration award as of January 1, 2015.

(f) The limitation on attorneys' fees set forth in Section 6146 of the Business and Professions Code shall apply to an action for injury or damage against a health care provider based upon such person's alleged professional negligence, as defined in this section.

SECTION 6. Section 1714.85 is hereby added to the Civil Code to read:

1714.85. There shall be a presumption of professional negligence in any action against a health care provider arising from an act or omission by a physician or surgeon who tested positive for drugs or alcohol or who refused or failed to comply with the testing requirements of Article 14 (commencing with Section 2350.10) of Chapter 5 of Division 2 of the Business and Professions Code following the act or omission and in any action arising from the failure of a licensed health care practitioner to comply with Health and Safety Code section 11165.4.

SECTION 7. Section 11165.4 is hereby added to the Health and Safety Code to read:

11165.4. (a) Licensed health care practitioners and pharmacists shall access and consult the electronic history maintained pursuant to this Code of controlled substances

dispensed to a patient under his or her care prior to prescribing or dispensing a Schedule II or Schedule III controlled substance for the first time to that patient. If the patient has an existing prescription for a Schedule II or Schedule III controlled substance, the health care practitioner shall not prescribe any additional controlled substances until the health care practitioner determines there is a legitimate need.

(b) Failure to consult a patient's electronic history as required in subdivision (a) of this section shall be cause for disciplinary action by the health care practitioner's licensing board. The licensing boards of all health care practitioners authorized to write or issue prescriptions for controlled substances shall notify all authorized practitioners subject to the board's jurisdiction of the requirements of this section.

SECTION 8. Amendment.

This Act may be amended only to further its purpose of improving patient safety, including ensuring that patients, their families, and others who are injured by negligent doctors are made whole for their loss, by a statute approved by a two-thirds vote of each house of the Legislature and signed by the Governor.

SECTION 9. Conflicting Initiatives.

In the event that this measure and another initiative measure or measures that involve patient safety, including the fees charged by attorneys in medical negligence cases, shall appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure receives a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure shall be null and void.

SECTION 10. Severability.

If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this Act are severable.