Opposition Testimony before the Ohio House Insurance Committee on SB 227

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Protecting Ohio's Employees

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Mr. Chairman and members of the Committee, my name is Neil Klingshirn and I’m here on behalf of Protecting Ohio’s Employees (POE) and the Ohio Employment Lawyers Association (OELA) to object to and oppose the mandate in Senate Bill 227 that health plan providers disclose to group policyholders, such as employers, significant claim amounts, the serious health conditions giving rise to such claims and all potential, catastrophic diagnoses or prognoses of every person covered by the policy. Absent the attached proposed amendments, POE and OELA oppose SB 227 because it is unlikely to achieve its intended benefits for employers and very likely to have unintended consequences for employees’ medical privacy and job security.

Senate Bill 227 will require health plan issuers upon request to provide group policyholders with, among other information:

1. For each claim over $30,000:
   1. The amount paid toward that claim; and
   2. The claimant’s health condition or diagnosis; and
2. For every person covered by the policy, a complete listing of all potential catastrophic diagnoses and prognoses.

Disclosure of covered claims costs, claimant diagnoses, and potential catastrophic conditions will violate employee medical privacy, motivate unscrupulous employers to terminate employees responsible for such claims, and expose all employers who request the information to potential liability.

We understand that proponents of SB 227 argue that it could create “transparency” for policyholders to use to control their group health care insurance costs. This is neither economically nor legally possible. Employers have no control over treatment decisions. They cannot control treatment costs for people covered by their plans. They cannot negotiate with providers for lower prices. Group policyholders can only negotiate with the health plan issuer for better rates and coverage. Importantly, under the Affordable Care Act, claim costs, claimant diagnoses, and the potential for catastrophic claims cannot, by law, affect insurance premium rates. This is because the ACA limits rate setters for small group markets to factors based on age, geography, covered family size and tobacco use. This prohibits insurers from setting premium rates on any other rating factors, such as health status and claims history (42 USC § 300gg; 45 CFR § 147.102). As a result, a history free of significant claims will not lower policyholders’ insurance premiums, and vice versa.

SB 227 also raises important concerns for the employees whose healthcare needs and costs are at issue. First, disclosure of employee diagnoses can violate their medical privacy. Although SB 227 does not authorize claim information by name or date of occurrence, employers know from other sources, like FMLA leave requests, requests for accommodations under the ADA and short-term disability programs, who is making claims under their group healthcare policy. SB 227 gives employers a diagnosis for such employees. Certain diagnoses, such as sexual or reproductive disorders and serious mental health conditions, are extremely private.

Next, some managers may still be tempted to reduce claims expenses by eliminating employees with expensive health care needs. This causes a triple harm to their victims, who lose their medical privacy, their jobs, **and** the group health insurance on which they depend. It harms employers too, since federal laws prohibit employers from using such information to make adverse employment decisions. Countless claims under ERISA, the Americans with Disabilities Act, and the Age Discrimination in Employment Act have arisen from HR employees conducting a routine analysis of high-dollar insurance claims, then having their analysis used by less scrupulous managers in a push to reduce claims costs. Pregnancy and sex discrimination claims have also arisen from employers analyzing their insurance costs and acting based on the costs commonly incurred due to a high-risk pregnancy or premature birth. As a result, if enacted, SB 227 disclosures will provide smoking gun evidence that the employer laid off or terminated the employees responsible for such claims. Only employers who do not request this information will be free of the need to defend their use of it in court.

At minimum, employees deserve to know when their privacy and job security are at risk. Accordingly, we propose the attached amendments, which would require insurers, upon request, to provide the employee with the same information the insurer provides to the employer about them and/or their covered dependents, and would require employers to certify to insurers that they are notifying their employees (and any applicable union) that their information is being requested, and that each employee has the right to request the same information from the health insurer.

Information about employees’ claims and health conditions cannot help employers control insurance rates. Disclosure of such information has the potential to invade employee privacy, lead to the loss of employment and coverage, and expose employers to liability. Absent amendments that will protect employees by informing them of these disclosures, POE and OELA respectfully oppose SB 227.

Thanks you for the opportunity to testify today and I’d be happy to answer any questions.