California Association of Small Employer Health Plans

DATE

TO: Members, Senate Health Committee

SUBJECT: AB 648 (NAZARIAN) WELLNESS PROGRAMS
OPPOSE – AS AMENDED JANUARY 23, 2020
SCHEDULED FOR HEARING -

The California Chamber of Commerce and the organizations listed below are **OPPOSED** to **AB 648** (Nazarian) as amended January 23, 2020, as it imposes limitations that would likely end voluntary workplace Wellness Programs that benefit employees and contribute to a healthy workforce. Additionally, it creates significant liability for employers who fail to adhere to the bill's burdensome requirements.

AB 648 Seeks to Eradicate Employer and Insurer Communications Regarding a Wellness Plan Participant

Group health plans offer two kinds of wellness programs; participatory wellness programs and health contingent wellness programs. In a participatory program, either no reward is offered, or none of the conditions for obtaining a reward are based on an individual satisfying a standard related to a health factor. This would include a program that reimburses employees for the membership cost at a fitness center or a diagnostic testing program that provides a reward for participation. In a health contingent wellness program, participants must satisfy a standard related to a health factor in order to obtain a reward.

AB 648 seeks to prevent a health care service plan, insurer, and employer from sharing personal information amongst each other in relation to a wellness plan participant. In fact, the bill punishes these entities with fines if they share the participant's personal information. This wholly defeats the purpose of a wellness plan since participants are rewarded or reimbursed by an employer for engaging in a wellness-based activity. If the entities are prevented from communicating with each other in relation to a participant, the wellness program's purpose is totally defeated.

AB 648 Exposes Employers to Liability, Which Will Disincentivize Their Use of Wellness Programs:

Employee wellness programs are generally provided as an additional voluntary benefit or perk for working for the employer. Their goal to is to encourage healthy lifestyles. **AB 648** would disincentivize employers from offering these programs, given the mandates and proposed financial repercussions.

AB 648 also requires an employer, insurer, and health care service plan to provide a detailed "written explanation" that is "reasonably likely to be understood by an employee on its internet website." These subjective requirements will lead to differing opinions as to whether the employer and insurer has complied, which is concerning given the liability imposed under **AB 648**. Additionally, this requirement is burdensome for an employer, insurer, or health care service plan.

Furthermore, **AB 648** requires health care service plans, insurers, and employers to immediately destroy a participant's personal information if the program is concluded or the participant terminates their enrollment. The requirement is vague as to how the information would be destroyed. If it is retained electronically, are servers to be destroyed? Or, if the information is retained in a cloud-based system, must it be sent to a server as a "dead-file?" Is that then destroyed? **AB 648** lacks guidance in this regard.

AB 648 also requires health care service plans, insurers, and employers to produce a participant's personal information and records when they request it. However, these entities would not be able to comply with the request if the information was destroyed pursuant to the abovementioned provision. Thus, liability would be imposed upon an entity no matter how they followed the law.

These mandates and threats of liability will simply eliminate the potential for any wellness program, as no employer will be willing to take on such risk and work for offering an employee perk.

Federal Laws Already Regulate Wellness Programs:

Both the American with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) impose limits on wellness programs. HIPAA and the Affordable Care Act (ACA) also contain rules regarding wellness programs. The ADA prohibits employers from obtaining medical information from applicants and employees unless they want to volunteer that information if they choose to participate in a wellness program. The GINA prohibits the use of genetic information, which includes an employee's family medical history, in making employment decisions and limits an employer's ability to unilaterally request, acquire or disclose genetic information.

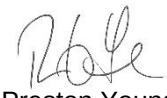
There are EEOC regulations currently in place that specifically prohibit employers from 1) requiring participation in wellness programs, 2) denying or limiting employees' health coverage or benefits if employees don't participate or 3) taking any adverse action, retaliating, interfering with, coercing, intimidating or threatening employees. The regulations also already require specific notice and description requirements and confidentiality of the information voluntarily provided by the employee.

Additionally, wellness programs referenced in **AB 648** are covered by ERISA when they consist of more than just education services or encouragement of a healthy lifestyle, such as those that require screening, physical exams or counseling. ERISA requires employers to 1) adopt official plan documents that describe the plan's terms and operations, 2) explain the plan's terms and rules to participants through a "Summary Plan Description", 3) file an annual report 4) comply with certain fiduciary standards of conduct and 5) establish a claims and appeals process for participants. Congress' intent in enacting ERISA was to establish a uniform national regulatory scheme and protect ERISA plans from compliance burdens in satisfying differing state laws and regulations. ERISA's broad preemption provision preempts any state law that "relates to" an ERISA plan.

Wellness Programs incentivize good health and contribute to a healthy workforce. At a time when obesity and cancer are on the rise and health care costs are increasing, California should encourage wellness programs, rather than place limitations on them.

For these and other reasons, we are **OPPOSED to AB 648 (Nazarian)**.

Sincerely,



Preston Young
Policy Advocate
California Chamber of Commerce

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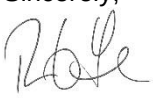
Sincerely,



Preston Young
Policy Advocate
California Chamber of Commerce

Acclamation Insurance Management Services
Allied Managed Care Incorporated
Big Bear Chamber of Commerce
Brea Chamber of Commerce
California Association of Small Employer Health Plans
California Association of Health Underwriters
California Technology & Manufacturers Association
California Retailers Association
California State Council of the Society for Human Resources Management (CalSHRM)
California Trucking Association
Camarillo Chamber of Commerce
Elk Grove Chamber of Commerce
Fresno Chamber of Commerce
Greater Coachella Valley Chamber
Independent Insurance Agents and Brokers of California
Lake Tahoe South Shore Chamber of Commerce
North Orange County Chamber
Oceanside Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redding Chamber of Commerce
Simi Valley Chamber
Torrance Area Chamber of Commerce
Victor Valley Chamber of Commerce
Yorba Linda Chamber of Commerce

cc: Legislative Affairs, Office of the Governor
Noah Lightman, Office of Assemblymember Adrin Nazarian
Teri Boughton, Senate Health Committee
Tim Conaghan/Joe Parra, Senate Republican Caucus

PY:ldl