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Testimony of the Department of Commerce and Consumer Affairs

Before the
Senate Committee on Ways and Means
and
Senate Committee on Judiciary

Wednesday, February 26, 2020
1:10 p.m.
State Capitol, Conference Room 211

On the following measure:
S.B. 2586, S.D. 1, RELATING TO MEDICAL CANNABIS

WRITTEN TESTIMONY ONLY

Chair Dela Cruz, Chair Rhoads, and Members of the Committees:

My name is Colin Hayashida, and I am the Insurance Commissioner of the Department of Commerce and Consumer Affairs' (Department) Insurance Division. The Department offers comments on this bill.

The purpose of this bill is to permit qualifying patients to be reimbursed by health insurers, mutual benefit societies, and health maintenance organizations for amounts spent on medical cannabis and manufactured cannabis products and to limit the monthly amount of reimbursement.

Section 2 of the bill on page 2, line 18 to page 3, line 14; section 3 of the bill on page 4, line 8 to page 5, line 4; and section 4 of the bill on page 5, line 18 to page 6, line

14 require qualifying patients who acquire medical cannabis to be eligible for reimbursement.

The Department is in the process of establishing contact with the federal Department of Health and Human Services (HHS) to seek guidance on state-required benefits. The HHS recently proposed rulemaking to the Patient Protection and Affordable Care Act (PPACA) that addresses states' defrayment and obligations. The HHS proposed rule would require states to annually report to HHS "any state-required benefits applicable to the individual and/or small group market that are considered in addition to [the essential health benefits.]"[1]

Thank you for the opportunity to testify on this bill.

[1] See Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans (HHS Notice). This document was published on February 6, 2020 and has a comment period that ends on March 2, 2020. The PDF version is available at: https://www.federalregister.gov/documents/2020/02/06/2020-02021/benefit-and-payment-parameters-notice-requirement-for-non-federal-governmental-plans.

WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020

ON THE FOLLOWING MEASURE:
S.B. NO. 2586, S.D. 1, RELATING TO MEDICAL CANNABIS.

LATE

BEFORE THE:
SENATE COMMITTEES ON WAYS AND MEANS AND ON JUDICIARY

DATE: Wednesday, February 26, 2020 **TIME:** 1:10 p.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Daniel K. Jacob,
Deputy Attorney General, at 586-1190)

Chairs Dela Cruz and Rhoads and Members of the Committees:

The Department of the Attorney General makes the following comments. The purpose of this bill is to require insurance companies to reimburse for amounts spent on medical cannabis and manufactured cannabis products. This bill may be subject to preemption because compliance with both federal and state law may be impossible. *Wyeth v. Levine*, 555 U.S. 555, 568, S. Ct. 1187, 1196 (2009).

Cannabis is a Schedule I controlled substance that is illegal to produce, possess, sell, or use according to the federal government and the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-904. The legalization of cannabis under state law, however, does not prevent the enforcement or validity of the federal prohibition. *Gonzales v. Raich*, 545 U.S. 1, 3, 125 S. Ct. 2195, 2198, 162 L. Ed. 2d 1 (2005)

At least two states have reached opposite conclusions on the issue of preemption. We have not found a federal case directly addressing this issue.

In *Bourgoin v. Twin Rivers Paper Company, LLC*, 187 A.3d 10 (Me 2018), the Maine Supreme Court ruled that the CSA preempted the Maine Medical Use of Marijuana Act (MMUMA) when used by a hearings officer "as a basis for requiring an employer to reimburse an employee for the cost of medical marijuana." *Id.* at 21. The *Bourgoin* court stated, "[a]s invoked against [employer], the MMUMA requires what federal law forbids, and the authority ostensibly provided by the Maine law is 'without effect.'" *Id.* at 21. *See also Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M.

2016) (CSA preempted interpretation of state acts as requiring employer to accommodate employee's use of medical marijuana); *Washburn v. Columbia Forest Prods.*, Inc., 340 Or. 469, 134 P.3d 161, 167-68 (Or. 2006) (Kistler, J., concurring) (stating that "the fact the state may choose to exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically prohibits").

On the other hand, we note that the Superior Court of New Jersey, Appellate Division, reached an opposite conclusion from the *Bourgoin* Court, finding that a workers' compensation judge's order requiring an employer to reimburse its employee for the employee's use of cannabis was not preempted because of a conflict with federal law. *Hager v. M & K Constr.*, No. A-0102-18T3, 2020 WL 218390, at *1 (N.J. Super. Ct. App. Div. Jan. 13, 2020). The *Hager* court determined that the workers' compensation judge's order did not conflict with federal law because the order did not require the employer to possess, manufacture, or distribute cannabis in violation of the CSA, and that the employer's compliance with the order did not establish the specific intent element of an aiding and abetting offense under federal law. *Id*. at 8.

Because a federal court has not issued a decision regarding this matter, it is unclear whether or not a federal court would find a statute mandating insurers to reimburse insureds for amounts spent on medical cannabis would be found to be preempted due to conflict with federal law. We do note, however, that the United States District Court for the District of Hawaii has found that a private insurance contract for reimbursement of cannabis is unenforceable because the contract is contrary to federal law and public policy as provided in the CSA. See *Tracy v. USSA Cas. Ins. Co.*, Civil No. 11-00487 LEK-KSC, 2012 WL 928186 (Mar. 16, 2012) (Unreported).

In the event the State is authorized to require insurers to reimburse their insureds for amounts spent on medical cannabis and manufactured cannabis products, it may constitute a new mandate. Under section 1311(d)(3)(B) of the Affordable Care Act and 45 C.F.R. section 155.170, a state may only require a Qualified Health Plan to add benefits if the state defrays the cost of the additional benefits, unless the proposed new

benefit is directly attributable to State compliance with Federal requirements to provide Essential Health Benefits after December 31, 2011.

This bill would require qualified health plans to provide coverage for reimbursement of amounts spent on medical cannabis or manufactured cannabis products. Because this benefit was neither mandated by state law prior to December 31, 2011, nor directly attributable to compliance with Federal requirements after December 31, 2011, it may be considered an additional mandate and the State would be required to defray the cost.

At this time, our department is unaware of a state that has been subjected to the obligation to defray the cost for additional benefits. Therefore, there are no prior examples of how the State would meet its obligation and what specific procedures would be necessary to fulfill the obligation. Our department's best understanding is that after the Qualified Health Plan issuer submits the issuer's costs attributable to the additional mandate, the Legislature would need to appropriate the money during the following legislative session and propose a mechanism to distribute the money.

Thank you for the opportunity to comment.

DAVID Y. IGE
GOVERNOR

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WRITTEN ONLY

TESTIMONY BY DEREK MIZUNO
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEES ON WAYS AND MEANS AND JUDICIARY
ON SENATE BILL NO. 2586 S.D. 1

February 26, 2020
1:10 p.m.
Room 211

RELATING TO MEDICAL CANNABIS

Chairs Dela Cruz and Rhoads, Vice Chairs Keith-Agaran and Keohokalole, and Members of the Committees:

The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) Board of Trustees has not taken a position on this bill. The EUTF staff has concerns how medical cannabis will legally be reimbursed, even under a paper claim process, by the insurers, pharmacy benefit managers and payors since cannabis even for medical purposes is considered a controlled substance under federal law. We are not aware of any other state that has mandated that health plans cover medical cannabis. Additionally, there will be added costs to the EUTF which cannot be quantified because coverage has not been specified and usage is unknown. These added costs will result in higher premiums for the State and counties, employees and retirees and will increase the State's OPEB unfunded liability.

Thank you for the opportunity to testify.

An Independent Licensee of the Blue Cross and Blue Shield Association

February 25, 2020

The Honorable Donovan M. Dela Cruz, Chair
The Honorable Gilbert S.C. Keith-Agaran, Vice Chair
Senate Committee on Ways and Means

The Honorable Karl Rhoads, Chair
The Honorable Jarrett Keohokalole, Vice Chair
Senate Committee on Judiciary

Re: SB 2586, SD1 – Relating to Medical Cannabis

Dear Chair Dela Cruz, Chair Rhoads, Vice Chair Keith-Agaran, Vice Chair Keohokalole and Committee Members:

Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 2586, SD1, which permits qualifying patients to be reimbursed by health insurers, mutual benefit societies, and health maintenance organizations for amounts spent on medical cannabis and manufactured cannabis products. Additionally, this measure limits the monthly amount of reimbursement.

HMSA appreciates the intent of this measure. However, we have concerns with regards to the requirement placed on health insurers, mutual benefit societies, and health maintenance organizations to establish a system to reimburse qualifying patients for medical cannabis. All plans administered by HMSA, both commercial and government, currently exclude coverage for drugs that are not approved by the U.S. Food and Drug Administration (FDA). Also, medical cannabis is classified by the federal government as a Schedule 1 drug, which means that it has no accepted medical value.

We remain open to working with all stakeholders to further the discussions. Thank you for allowing us to testify on SB 2586, SD1. Your consideration of our comments is appreciated.

Sincerely,

Pono Chong
Vice President, Government Relations

Akamai Cannabis Clinic
3615 Harding Ave, Suite 304
Honolulu, HI 96816

TESTIMONY ON SENATE BILL 2586 SD1
RELATING TO HEALTH
By
Clifton Otto, MD

Senate Committee on Ways and Means
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Wednesday, February 26, 2020; 1:10 PM
State Capitol, Conference Room 211

Thank you for the opportunity to provide testimony on this measure. Please consider the following comments related to this bill:

If the purpose of this bill is to allow local medical insurance providers to reimburse registered patients for purchases of state-authorized medical cannabis, then a better approach would be to remove the current misconception that our constitutionally enacted medical cannabis program is violating federal law.

Any medical insurance provider that depends upon medicare or medicaid reimbursements will be unable to participate because of the current manner in which the federal regulation of the non-medical use of marijuana is being misapplied to our program.

For example, our terminally ill hospice patients are still unable to engage in the state—authorized medical use of cannabis in local hospice facilities because these organizations are afraid of losing Part B Medicare reimbursements if they allow such medical use to occur on-site.

One way to address this conflict is to remove the perception that our medical cannabis program is violating federal law. This can be achieved by adding the following amendment from SB2462:

"329D-25 Coordination among state and federal agencies. The department shall initiate ongoing dialogue among relevant state and federal agencies to identify processes and policies that ensure the privacy of qualifying patients and qualifying out-of-state patients and the compliance of qualifying patients, primary caregivers, qualifying out-of-state patients, and caregivers of qualifying out-of-state patients and medical cannabis dispensaries with state laws and regulations related to medical cannabis. The department shall submit a written request, in accordance with title 21 C.F.R. section 1307.03, to the Office of Diversion Control, Drug Enforcement Administration by September 1, 2020, stating that part IX of chapter 329 and this chapter do not create any positive conflict with state or federal drug laws and regulations and are consistent with title 21 U.S.C. section 903, and requesting formal written acknowledgement that the listing of marijuana as a controlled substance in federal schedule I does not apply to the nonprescription use of cannabis under the medical cannabis registry and dispensary programs established pursuant to chapters 329 and 329D."

Thank you for considering this very necessary solution.

Aloha.

LATE

SB-2586-SD-1
Submitted on: 2/26/2020 8:25:15 AM
Testimony for JDC on 2/26/2020 1:10:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
dain retzlaff	Individual	Support	No

Comments:

LATE

SB-2586-SD-1
Submitted on: 2/26/2020 10:04:01 AM
Testimony for JDC on 2/26/2020 1:10:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
jaclyn moore	Testifying for Big Island Grown	Support	No

Comments: