

Amended Mock-up for 2015-2016 AB-2688 (Gordon (A))

**Mock-up based on Version Number 96 - Amended Assembly 4/28/16
Submitted by: Staff Name, Office Name**

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 22.4 (commencing with Section 22596) is added to Division 8 of the Business and Professions Code, to read:

CHAPTER 22.4. Digital Commercial Health Monitoring Programs

22596. For purposes of this chapter:

(a) “Commercial health monitoring program” means a commercial ~~Internet Web site or online product or service, which is not a “third party” as defined in (e), that is delivered online to used by consumers that whose primary purpose is to collect~~ health monitoring information to track or evaluate ~~regarding the consumer’s mental or physical condition when that information is stored over time, from sources including, but not limited to, manual entry, sensors, or both.~~

(b) “Health care provider” has the meaning given that term in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104-191).

(~~c~~) “Health monitoring information” means any individually identifiable information, in electronic or physical form, ~~about a consumer’s mental or physical condition that is collected by in possession of, or derived from, a commercial health monitoring program regarding a consumer’s mental or physical condition, through a direct measurement of a consumer’s mental or physical condition or through user-input regarding a consumer’s mental or physical condition~~ into a commercial health monitoring program.

(~~d~~) “Individually identifiable” means ~~that the~~ health monitoring information ~~that~~ includes or contains an element of personal identifying information sufficient to allow identification of the consumer, including, but not limited to, the consumer’s name, address, electronic mail address, telephone number, social security number, ~~or unique electronic identifier~~, or other information that, alone or in combination with other publicly available information, reveals the consumer’s identity.

(~~e~~) “Third party” means an entity with whom the consumer does not have a direct relationship with respect to their use of the commercial health monitoring program and whose processing of the data is not otherwise necessary for the functionality of the commercial health monitoring program. An entity is not a third party if it solely provides services to the operator of the commercial health monitoring program and does not further use the health monitoring information or disclose that information for any purpose other than the provision of service to the operator. An entity is not a third party if it controls, is controlled by, or is under common control with the provider of the commercial health monitoring program and either:

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(1) maintains data sharing practices with respect to individual identifiable health monitoring information that are no more permissive than those of the commercial health monitoring program.

(2)(A) The commercial health monitoring program disclosing the health monitoring information and the entity are both principally engaged in the same line of business.

(B) The commercial health monitoring program disclosing the the health monitoring information and the entity share a common brand, excluding a brand consisting solely of a graphic element or symbol, within their trademark, service mark, or trade name, which is used to identify the source of the products and services provided.

~~includes, but is not limited to, an advertising network, consumer data reseller, data analytics provider, health care service plan, pharmaceutical company, government entity, operating system or platform, social network, or other commercial Internet Web site or online service.~~

(e) “Consumer” includes employees of employers subject to the provisions of Section 22596.2.

~~(f) “Business associate” means a person or entity who provides, other than in the capacity of a member of the workforce of an operator of a commercial health monitoring program, legal, actuarial, accounting, consulting, data aggregation (as defined in the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104 191)), management, administrative, accreditation, or financial services to or for a consumer health monitoring program where the provision of the service involves the disclosure of health monitoring information from a commercial health monitoring program or from another business associate of a commercial health monitoring program.~~

22596.1. (a) An operator of a commercial health monitoring program shall not intentionally share, sell, or disclose health monitoring information to or with a third party without first providing clear and conspicuous notice and obtaining from the consumer’s explicit opt in authorization which fulfills the following requirements, affirmative consent:

(1) The request for authorization shall be ~~clear, conspicuous, and separate~~ from all other authorizations or agreements.

(2) The request for authorization shall include the name of the third party, and nature of the third party, ~~or~~ and the reason for the request.

~~(3) Each request for authorization shall be limited to a single third party entity.~~

~~(4) A consumer’s refusal to authorize third party disclosure of health monitoring information shall not limit the consumer’s ability to use the commercial health monitoring program even if features and services provided by the specific third party are inoperable.~~

~~(5) A waiver of any legal right, penalty, remedy, forum, or enforcement procedure imposed as a condition of use is unconscionable and unenforceable. Any person who seeks to enforce such a waiver shall have the burden of proving that the waiver was knowing and voluntary and was not made as a condition of use.~~

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~~(6) Each request for authorization shall state that a consumer has the right to revoke the authorization at any time without cost or penalty by a readily accessible method.~~

(b) An operator of a commercial health monitoring program shall make available a process whereby a consumer may withdraw the consent granted in (a). Any withdrawal of consent shall apply prospectively and shall not impact valid disclosures and consent prior to the operative date of withdrawal.

~~(b) Notwithstanding subdivision (a), an authorization is not required where the third party solely provides services to the operator of the commercial health monitoring program and does not further use or disclose health monitoring information.~~

(c) An operator of a commercial health monitoring program that creates, maintains, preserves, stores, abandons, ~~destroys/deletes~~, or disposes of health monitoring information shall do so in a manner that reasonably preserves the security and confidentiality of the health monitoring information contained therein.

(d) This chapter is not intended to limit the required disclosure of health monitoring information pursuant to another provision of law.

(e) Nothing in this chapter shall be construed to limit or otherwise reduce existing privacy protections provided for in state or federal law.

(f) Health monitoring information may be disclosed without satisfying the consent requirements of this chapter:

(1) to a provider of health care as that term is defined in federal law and regulation to aid the diagnosis or treatment of the consumer, where the consumer is unable to consent to the disclosure.

~~or other health care professional or facility to aid the diagnosis or treatment of the consumer, where the consumer is unable to authorize the disclosure due to an emergent medical condition.~~

(2) to a government official or law enforcement if necessary to prevent an imminent threat to health, safety or property.

(3) if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.

(4) to the extent that part of the information which is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the operator and consumer are parties and in which the consumer has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding.

22596.2. (a) An employer that receives health monitoring information shall establish appropriate procedures ~~to ensure that~~ reasonably preserve the security and confidentiality of information. These procedures may include, but are not limited to, instruction regarding confidentiality of employees and agents handling files containing health monitoring information and security systems restricting access to files containing such ~~health monitoring~~ information.

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(b) An employer shall not discriminate against an employee in any terms or conditions of employment due to that employee's refusal to provide a consent ~~n authorization~~ pursuant to Section 22596.1.

(c) An employer shall not discriminate against an employee in any terms or conditions of employment due to the findings of that employee's health monitoring information. Notwithstanding the foregoing, nothing herein is meant to limit an employer's ability to use or rely on de-identified data in lawfully defining or changing its benefits, offerings or programs.

(d) An employer shall not use, disclose, or knowingly permit its employees or agents to use, sell, or disclose to a third party health monitoring information which the employer possesses pertaining to its employees without first obtaining that employee's consent ~~authorization~~ to do so.

(e) An employer that has attempted in good faith to substantially comply with this section shall not be liable for any unauthorized use or disclosure of the health monitoring information by the person or entity to which the employer disclosed the health monitoring information.

(f) Except as otherwise provided therein, a recipient of health monitoring information pursuant to a consent ~~n authorization~~ as provided by this chapter shall not further disclose that health monitoring information to a third party unless in accordance ~~with the original consent~~ or a new authorizationconsent.

22596.3. (a) A covered entity, provider of health care, business associate, health care service plan, contractor, employer, or any other person subject to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104-191) or the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code) shall not be subject to this chapter with respect to any activity or exemption regulated by those acts.

(b) The definitions in those acts, in effect on January 1, 2016, shall apply to this section.

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