

Date of Hearing: April 25, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 1697 (Schiavo) – As Amended April 6, 2023

Proposed Consent

SUBJECT: Uniform Electronic Transactions Act

SYNOPSIS

This author-sponsored measure would amend California's Confidentiality of Medical Information Act and Uniform Electronic Transactions Act, so as to permit the use of electronic signatures to authorize the sharing of certain medical information. Under California law, these authorizations have long required handwritten signatures. The premise of this bill is that prohibiting e-signatures for these documents presents unnecessary obstacles for patients, given that telemedicine is increasingly the norm for provision of health care services in cases where in-person contact is unnecessary.

The bill also proposes to add further flexibility to authorizations for release of medical information, first, by allowing them to expire when a specified event occurs (rather than on a specified date), and second, by allowing non-electronic authorizations to be handwritten by persons other than the signatory (thereby assisting persons with certain disabilities.)

Committee amendments add appropriate safeguards, borrowed from federal law, for the use of expiration events, rather than expiration dates, on such authorizations.

The bill is supported by the California Dental Association. It has no opposition on file.

SUMMARY: Permits the use of electronic signatures to authorize disclosure of medical information and genetic test results. Permits these authorizations to expire on the occurrence of a specified event, rather than on a specified date. Allows persons other than the signatory to handwrite authorizations for release of medical information. Specifically, **this bill:**

- 1) Deems an authorization for release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor to be valid if, among other enumerated requirements, the authorization:
 - a) Is signed, even if signed with an electronic signature.
 - b) States a specific expiration event, rather than a specific date, after which the authorized party is no longer authorized to disclose the medical information.
 - c) Is handwritten, even if it is not handwritten by the person who signs it.
- 2) Permits disclosure of genetic test results contained in an applicant's or enrollee's medical records by a health care service plan if, among other enumerated requirements, the written authorization:
 - a) Is signed, even if signed with an electronic signature.

- b) Describes an expiration event, as an alternative to specifying the length of time the authorization shall remain valid.
- 3) Deems an authorization for an employer to disclose medical information to be valid if, among other enumerated requirements, the authorization:
- a) Is signed, even if signed with an electronic signature.
 - b) States a specific expiration event, rather than a specific date, after which the authorized party is no longer authorized to disclose the medical information.
 - c) Is handwritten, even if it is not handwritten by the person who signs it.
- 4) Amends California's Uniform Electronic Transactions Act so that it no longer excludes
- a) electronic signatures for authorizations for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor and
 - b) authorizations for the release of genetic test results by a health care service plan, thereby authorizing the use of electronic contracts and electronic signatures for both.

EXISTING LAW:

- 1) Provides, pursuant to the California Constitution, that all people have inalienable rights, including the right to pursue and obtain privacy. (Cal. Const., art. I, § 1.)
- 2) Establishes the Confidentiality of Medical Information Act (CMIA) to regulate the sharing, sale, use for marketing, and other uses of medical information, as defined. (Civ. Code §§ 56-56.37.)
- 3) Enumerates requirements for an authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor to be deemed valid, including that the authorization:
 - a) Be signed and dated by the patient or other statutorily-authorized person, such as the legal representative of the patient if the patient is a minor or an incompetent.
 - b) State a specific date after which the authorized party is no longer authorized to disclose the medical information.
 - c) Be handwritten by the person who signs it or in a typeface no smaller than 14-point type. (Civ. Code § 56.11.)
- 4) Enumerates requirements for an authorization for the disclosure of genetic test results contained in an applicant's or enrollee's medical records by a health care service plan to be deemed valid, including that the authorization:
 - a) Be signed and dated by the individual or other person authorized to act on the individual's behalf.
 - b) Specifies the length of time the authorization shall remain valid. (Civ. Code § 56.17.)

- 5) Enumerates requirements for an authorization for an employer to disclose medical information to be deemed valid, including that the authorization:
 - a) Be signed and dated by the patient or other statutorily-authorized person, including the legal representative of the patient, if the patient is a minor or an incompetent.
 - b) State a specific date after which the authorized party is no longer authorized to disclose the medical information.
 - c) Be handwritten by the person who signs it or in a typeface no smaller than 14-point type. (Civ. Code § 56.21.)
- 6) Establishes the Uniform Electronic Transactions Act (UETA) to authorize the transaction of business, commerce, and contracts by electronic means. (Civ. Code §§ 1633.1–1633.17.)
- 7) Exempts from UETA certain transactions that cannot be conducted using electronic records and signatures, including an authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor and an authorization for the release of genetic test results by a health care service plan, both under the CMIA. (Civ. Code § 1633.3.)
- 8) Clarifies that UETA does not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form. (Civil Code § 1633.5(a).)
- 9) Establishes under federal law, the Health Information Portability and Accountability Act of 1996 (HIPAA), which sets standards for the privacy of individually identifiable health information and security standards for the protection of electronic protected health information, including, through regulations, that a HIPAA-covered entity may not condition the provision of treatment, payment, enrollment in a health plan, or eligibility for benefits on the provision of an authorization, except under specified circumstances. Provides that if HIPAA’s provisions conflict with state law, the provision that is most protective of patient privacy prevails. (42 U.S.C. § 1320d, *et seq.*; 45 C.F.R. Part 164.)
- 10) Provides that a valid authorization under HIPAA for use and disclosure of protected health information must include either an expiration date or an expiration event that relates to the individual or the purpose of the use or disclosure. Permits the use of statement like “end of the research study” or “none” in connection with research. (45 C.F.R. § 164.508(c)(1)(v).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS:

1) **Background.** California’s Uniform Electronic Transactions Act (UETA), enacted in 1999, generally recognizes that digital documents signed electronically have the same legal efficacy and validity as printed documents that are signed by hand. However, due to concerns around fraud and meaningful consent, certain documents and transactions are categorically excluded from UETA and must have a “wet ink” signature. Examples of such excluded documents and transactions are wills, automobile sales and lease contracts, and the subject of this bill:
(i) authorizations for release of medical information by a provider of health care, health care

service plan, pharmaceutical company, or contractor; and (ii) authorizations for release of genetic test results by a health service plan. (*See, generally*, Civ. Code § 1633.3(b), (c).) California's Confidentiality of Medical Information Act (CMIA) also imposes a handwritten signature requirement on both of these types of documents, as well as on authorizations for an employer to release medical information.

The premise of this bill is that California's prohibition on e-signatures for these three categories of documents is unduly burdensome for patients, given that telemedicine is increasingly becoming the norm for provision of health care services where in-person contact is not required. Accordingly, the bill would permit e-signatures on all three categories of documents.

If enacted, this bill could prove relevant in implementing California's Health and Human Services Data Exchange Framework, described as:

[A] first-ever, statewide data sharing agreement that will accelerate and expand the exchange of health information among health care entities, government agencies, and social service programs beginning in 2024. The data exchange framework is...an agreement across health and human services systems and providers to share information safely. That means every health care provider can access the information they need to treat you quickly and safely; health care, behavioral health and social services agencies can connect to each other to deliver what Californians need to be healthy; and our public health system can better assess how to address the needs of all communities. (Center for Data Insights and Innovations, *What is the Data Exchange Framework?*, available at <https://www.cdii.ca.gov/committees-and-advisory-groups/data-exchange-framework/>.)

The bill also proposes to add flexibility to authorizations for release of medical information by allowing them to expire when a specified event occurs (rather than on a specified date) and by allowing them to be handwritten by persons other than the signatory (thereby assisting persons with certain disabilities.)

2) **Author's statement.** According to the author:

AB 1697 will reduce administrative barriers patients face in authorizing medical providers to share their medical history. As transactions have increasingly occurred online, and as digital security has expanded to support legally binding electronic signatures, electronic signatures are becoming a secure and commonplace method of providing an individual's legal authorization. With the advent of remote work and telehealth, allowing electronic signatures for medical release forms is an opportunity to reduce administrative barriers for patients. AB 1697 does so by ensuring that electronic signatures are given equal legal [status as] physical signatures.

3) **Analysis: permitting electronic signatures to authorize release of certain medical information.** This bill would, for the first time, permit electronic signatures for three categories of documents: (i) authorizations for release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor; (ii) authorizations for release of genetic test results contained in medical records by a health service plan; and (iii) authorizations for disclosure of medical information by employers.

One justification for loosening these restrictions is that, increasingly, there are circumstances in which a person may want to consent to disclose such information, but for them to provide a

handwritten signature may be unduly burdensome. For example, a patient who is consulting with a health care specialist for the first time likely wants the specialist to receive and review their medical records beforehand. But if this consultation takes place online, via telemedicine, the patient would have either had to travel to a location where they could provide a handwritten signature (a challenge for individuals with mobility impairments or without ready access to transportation), or provided the handwritten signature by mail (a challenge if the authorization needs to be provided quickly). The COVID-19 pandemic also made clear that it may be dangerous for a person to be in a health care facility unnecessarily, given they could either transmit or catch an illness while there. Permitting electronic signatures therefore also reduces the chances of unnecessary disease spread.

Generally speaking, there are two reasons that California law prohibits electronic signatures. The first is fraud. There are certain documents, such as wills and auto sales contracts, in which there might be financial incentives to affix a fake electronic signature to a doctored document. Authorizing the release of medical information does not seem to present the same sorts of financial incentives to commit fraud. Further, preparing a will and purchasing a car are events that occur relatively infrequently in most people's lives. While obtaining a handwritten signature may be inconvenient, this inconvenience is offset by the fact that the signature needs to only be given rarely, and is given as part of a financially-significant transaction. By contrast, people frequently change employers and health insurers, and often see new medical providers. Given the unlikelihood of fraud in these circumstances, reducing the burdens attendant on sharing information under these circumstances seems worthwhile.

The second concern behind requiring handwritten signatures is to ensure that meaningful consent is given, under the assumption that a person will more closely review a paper document than a document presented on a screen, particularly a smartphone screen. If signing is conducted in-person, a handwritten signature requirement can also help ensure that the signatory is able to ask a human being to explain any confusing terms.

Federal law has permitted these classes of documents to be electronically signed in many other states since the late 1990s. Committee staff has reviewed case law involving electronically-signed medical release authorizations; they failed to find disputes in which a person asserted that they did not understand the nature of the document they were electronically signing. Given this absence, and for the reasons discussed above, it appears that California may reasonably permit these authorizations to be electronically signed.

Finally, it bears mention that nothing in UETA or in this bill would require a person to electronically sign an authorization to release their medical information. "UETA applies...only when the parties consent to conduct the transaction by electronic means." (*J.B.B. Investment Partners, Ltd. v. Fair* (2014) 232 Cal. App. 4th 974, 988 [citing Civil Code Section 1633.5 (b)].) Preservation of the paper option is important, given that some individuals—due to age or disability—may face difficulty in filing electronic applications and/or lack devices to do so.

4) Analysis: allowing authorizations to lapse based on expiration events, rather than specific dates. This bill would also alter legal requirements for the three categories of documents discussed in the previous section—(i) authorizations for release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor; (ii) authorizations for release of genetic test results contained in medical records by a health service plan; and (iii) authorizations for disclosure of medical information by employers—by

permitting the authorization to state a specific expiration event, rather than a specific date, after which the authorized party may no longer disclose the information in question.

The author's goal appears to be to allow tailoring of authorizations to the purpose for which the information is being disclosed. If medical information is being disclosed, e.g., to determine whether one qualifies for a drug trial, it may make more sense to authorize disclosure until one's eligibility for the trial is determined or until the trial is complete, rather than an arbitrary period of time.

Permitting a signer to specify an expiration event may also facilitate the goal of meaningful consent discussed above. It may be more likely that one understands one is signing an authorization for release of medical information if one has to specify an event that would terminate that authorization, rather than simply some future date.

One cause for concern, however, is that the bill offers no statutory guidance around what expiration events are, and are not, appropriate. It would be easy, under the current version of the bill, for someone preparing the authorization for signature to simply write "none" or "never" as the expiration event, and claim to have complied with the law.

5) Committee amendment—enacting appropriate safeguards for expiration events. A federal regulation, 45 C.F.R. § 164.508(c)(1)(v), places two safeguards around the use of expiration events in HIPAA-compliant authorizations for disclosure of medical information. First, the expiration event must "relate to the individual or the purpose of the use or disclosure." That is, the expiration event must tie to the signer's life circumstances or the reason the information is being disclosed. Second, provisions such as "end of the research study" or "none" are deemed appropriate in the context of research.

These standards appear to have proven workable in the more than two decades since they were first enacted at the federal level. Legal research again failed to uncover a dispute centering around defective specification of an expiration event. Accordingly, it appears prudent to import the federal standards into this bill, as follows:

Civil Code 56.11. [...]

(j) For purposes of this section, an expiration event shall relate to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

Civil Code 56.17. [...]

(j) For purposes of this section, an expiration event shall relate to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

Civil Code 56.21. [...]

(j) For purposes of this section, an expiration event shall relate to the individual or the purpose of the use or disclosure. The statement “end of the research study,” “none,” or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

6) **Analysis: allowing non-signatories to handwrite authorizations.** California law currently permits handwritten authorizations to release medical information, but requires that the person signing the release be the same person who handwrote the authorization. (In certain circumstances, authorizations for release of medical information may be signed and dated by persons other than the patient, such as their legal representative or their spouse.)

This requirement is arguably burdensome for individuals who may have difficulty manipulating a pen or pencil due to age or disability.

To that end—assisting individuals facing such challenges—this bill would amend legal requirements for two of the categories of documents discussed above—(i) authorizations for release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor; and (ii) authorizations for disclosure of medical information by employers—by deleting the requirement that such an authorization be handwritten “by the person who signs it.”

If a handwritten authorization allowed by this bill gives rise to a dispute, it may be helpful to know the identity of the person who wrote it in order to resolve the dispute. Committee staff briefly considered an amendment requiring a person who handwrites an authorization to also identify themselves as part of the written authorization. However, upon reflection, it became clear that a handwritten authorization is most likely to be used by a person in a relatively-informal setting (where an authorization form is not available); if the person writing the authorization did not know that they had to identify themselves, it would potentially invalidate the entire document. Also, in the event of a dispute, a person’s handwriting ought to produce significant forensic evidence as to their identity. Accordingly, Committee staff did not pursue this amendment.

7) **Related legislation.** SB 1020 (Johnston, Chap. 695, Stats. 1995) prohibited health insurers and health plans from providing different terms or benefits on the basis of genetic characteristics and established privacy protections for the results of genetic tests.

SB 820 (Sher, Chap. 428, Stats. 1999) enacted the Uniform Electronic Transactions Act (UETA) to authorize electronic signatures for many types of contracts, while exempting certain fraud-prone transactions such as conditional sale and lease contracts for motor vehicles.

SB 251 (Calderon, Chap. 369, Stats. 2013) authorized, until January 1, 2019, an insurer, with the consent of the policyholder, to transmit electronically certain notices pertaining to workers’ compensation insurance; the offer of renewal required for personal auto, real and personal property, and liability insurance policies; the notice of conditional renewal for commercial insurance policies; and the offer of renewal and certain disclosures related to earthquake insurance, so long as the insurer complied with UETA and certain additional procedures.

AB 2747 (Judiciary, Chap. 913, Stats. 2014), among other things, amended UETA to no longer exclude agreements for security deposits in residential rental housing.

AB 1743 (Dababneh, 2016) would have amended UETA to no longer exclude conditional sale and lease contracts for motor vehicles, while also enacting certain consumer protections. The bill died in the Senate Judiciary Committee.

AB 380 (Dababneh, 2017) was similar to AB 1743. The bill died in the Senate Judiciary Committee.

SB 1065 (Berman, Chap. 235, Stats. 2019) repealed the January 1, 2019 sunset date established by SB 251 (Calderon).

AB 133 (Budget, Chap. 143, Stats. 2021) established the California Health and Human Services Data Exchange Framework.

SB 361 (Umberg, 2021) would have amended UETA to no longer exclude conditional sale and lease contracts for motor vehicles, with no accompanying consumer protections. The bill died in the Assembly Judiciary Committee.

SB 1179 (Glazer, Chap. 39, Stats. 2022) authorized the use of electronic signatures on applications for Medicare Supplement Insurance policies regulated by the California Department of Insurance.

ARGUMENTS IN SUPPORT: California Dental Association believes this bill would facilitate teledentistry:

The use of telehealth services has significantly increased since the onset of the COVID-19 pandemic, which has included dentistry. As access to oral health through the use of teledentistry becomes more readily available, as in other areas of medicine, so should the availability of patient's ability to use electronic signatures. Without updating existing law, patients may be able to receive critical and much needed care remotely, but then face barriers on the administrative side, having to either go in person or mail release forms back to their providers. AB 1697 will reduce administrative barriers for patients while continuing to protect patients through HIPAA.

REGISTERED SUPPORT / OPPOSITION:

Support

California Dental Association

Opposition

None on file

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