

Debating Anti-Rebate And Inducement Laws In Washington

Law360, New York (February 17, 2017, 11:02 AM EST) -- Similar to most other states, Washington prohibits insurers and insurance producers from offering to pay to an insured any rebate or any other valuation consideration not expressly provided for in the insurance policy as an inducement to purchasing insurance.[1] There are certain exceptions to this restriction, including advertising or promotional programs that offer prizes or other goods not exceeding \$100 in value and that are given to all insureds or prospective insureds under similar qualifying circumstances.[2]

Several states have issued guidance clarifying their anti-rebating and inducement statutes, providing that certain “value-added” services may be provided to insureds or potential insureds if they are provided incidental to the insurance and in a fair and nondiscriminatory manner. The New York Department of Financial Services, for instance, has advised insurance agents and brokers that such services include risk assessments, insurance consulting services, insurance-related regulatory and legislative updates, certain claims assistance services and the like.[3] However, certain other services could violate New York anti-rebating and inducement laws if they are provided for free or at a reduced fee because they are too attenuated to the provision of insurance, such as flexible spending administration services, legal services, payroll services, management of employee benefit programs other than the insurance sold by the producer, development of employee handbooks and training and other similar services.[4] States such as Illinois, New Hampshire, and Missouri have issued similar guidance regarding “value-added” services.

Accordingly, on Nov. 23, 2016, the Washington Insurance Commissioner found that Washington anti-rebating and inducement laws prohibit a licensee, specifically California-based insurance producer Zenefits, from offering valuable software functions or other valuable benefits for free, or at less than fair market value, to the public.[5] Zenefits had been offering an online, cloud-based, software-as-a-service platform that integrates “apps” for the administration of human resources, payroll and employee benefits, including core HR apps for hiring and terminating employees, managing employee information, tracking employee paid time off, generating Affordable Care Act filings, helping to ensure ACA compliance and generating various employer reports. These core HR apps were offered to the public at no charge, and Zenefits did not require anyone to become an insurance client to use the core HR apps.[6]



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As a result of the insurance commissioner's consent order, as of Jan. 1, 2017, Zenefits began charging all Washington state customers \$5 per employee per month for its core HR product — a service that is free for customers in other states.[7] Although Zenefits instituted this fee, it also committed to working with the legislature and other stakeholders to “have the freedom to set prices for [its] products and services in the way that drives the best value for consumers.”[8]

On Jan.18, 2017, just weeks after the consent order, a Washington state Senate bill (SB 5242) was introduced that would amend its anti-rebating and inducement laws to allow an insurer or insurance producer to offer goods or services, whether or not they are directly related to an insurance contract, for free or for less than fair market value, so long as the receipt of the goods or services is not contingent upon the purchase of insurance.[9]

The Senate Committee on Financial Institutions & Insurance held a public hearing on the bill on Jan. 26, 2017, during which Zenefits, along with representatives from several other companies, organizations and the Office of the Insurance Commissioner, testified both in support of and in opposition to the bill.[10]

The points made against and in support of the bill illustrate the increasing tension between the growing insurtech industry and conventional insurance agents and brokers.

Support for SB 5242

The primary concern expressed by those in support of the bill is that, following the insurance commissioner's consent order, Washington's anti-rebating and inducement laws prevent consumers from accessing valuable services that help them save money and time and that are not contingent upon the purchase of insurance. Chris Massey, vice president of government relations at Zenefits, testified that “by [the insurance commissioner's] logic, banks can no longer offer free checking accounts if, like most, they also sell insurance. And travel companies like Expedia won't be able to provide free ticket booking since they sell trip insurance as well. Nor can financial firms like Fidelity offer free investment advice or retirement planning since they also sell insurance.” Massey further testified, “SB 5242 would clarify the anti-rebating laws so that Washington small businesses can take advantage of the many free technology solutions available online to help streamline HR and other administrative functions.”

Likewise, Brian Kreger, a lawyer and a member of the Federation of Regulatory Counsel, testified in support of SB 5242, explaining that “SB 5242 ... allows companies and producers to provide consumers, especially small businesses, with access to services that can save money and time in the operation of the business and make [them] more productive without providing those services being contingent in any way upon the purchase of insurance,” Kreger said.

Ian Adams, a fellow at R Street Institute, a nonprofit research group in Washington, D.C., also testified that “at no point were [the anti-rebating laws] designed to be wielded to stifle free-market competition” and that “requiring companies that offer insurance to charge fees for non-insurance products both artificially reduces competitive pressures and impairs the market for non-insurance products by imposing minimum prices that must be charged by companies that also sell insurance.”[11]

Supporters of the bill also claim that, currently, Washington is an outlier among states across the country. Massey testified that “as a result of [the Consent Order], Washington is now the only state in the nation to force small businesses and nonprofits to pay for technology and services that are free everywhere else. I think it's important to point out that Washington is the outlier here. Insurance

commissioners in over 10 other states have issued formal guidance that Zenefits does not violate the anti-rebating statutes, and many other states have provided informal guidance to the same effect.” He believes that SB 5242 “will bring Washington state back in line with the rest of the country and restore access to free technology solutions available online for Washington small businesses and nonprofits.”

Joanie Deutsch, TechNet executive director for the Northwest, echoed these concerns, testifying that the Zenefits decision “makes Washington the only state in the country to force consumers to pay for a technology that is free everywhere else. TechNet believes this sends a discouraging signal to disruptive technology innovators in the state. If Washington is to continue to be a leading place for entrepreneurs, this state must allow for innovative new ways of delivering services, especially those that help entrepreneurs, start-ups, small businesses and small non-profit organizations.”

Opposition to SB 5242

Those opposing the bill, including the Office of the Insurance Commissioner, the National Association of Insurance and Financial Advisors, and the Washington Association of Health Underwriters, among others, expressed concern for fair competition and inducement. Several opponents to the bill argued that SB 5242 would stifle competition and harm the “mom and pop” insurance agents in Washington who would be unable to compete with large out-of-state institutions offering valuable services for free or at a reduced fee.

Neal Kloke, president of the National Association of Insurance and Financial Advisors, said, “[T]his bill, lifting the lid on law from two years ago from \$100 [referring to the state gift laws] to an unlimited amount, does not continue fair competition” Keith Wallace, president of the Washington Association of Health Underwriters, also testified that “it can harm the consumer if we don’t create a level playing field so that the mom and pop insurance agent who is really one of your friends can help you navigate these really dicey waters.”

Lonnie Johns-Brown, legislative director at the Office of the Insurance Commissioner, expressed concern that SB 5242 undermines the purpose behind Washington’s inducement laws and discourages consumers from making “good decisions” about insurance, such as what health plan or auto insurance to have, based on what is actually in the policy and how that benefits them, as opposed to making decisions based on gifts like software packages. Johns-Brown said that SB 5242 “blows open” the idea of a fair playing field, as well as these state inducement laws.

Addressing the argument that free services could be used as the basis for insurance decisions, Sen. Phil Fortunato (31st Dist.) commented that, “if a business is going to make a decision for their company and be stupid enough to make a decision on insurance based on some gift card or some promotion, that’s really their business and not the state’s. The fairness issue, you have an argument, but this inducement issue I don’t think is a valid argument.”

Current Status

Sen. Joe Fain (47th Dist.), who co-sponsored the bill along with Sen. Mark Mullet (5th Dist.), expressed interest in hearing about evidence that this type inducement activity is occurring in other states and that there is poor decision-making by consumers related to the selection of online platforms, such as Zenefits, as opposed to using a local broker. “Understanding and digging into the reasons behind the inducement laws, I think, makes a lot of sense,” Fain said.

The bill remains in committee. Further developments will be seen in the coming weeks.

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[1] See RCW 48.30.140 and RCW 48.30.150.

[2] Id.

[3] Circular Letter No. 9 Re: Permissible services of insurance agents and brokers; rebating and inducements, New York Dept. of Fin. Servs. (Mar. 3, 2009).

[4] Id.

[5] See In the Matter of YourPeople Inc. dba Zenefits FTW Insurance Servs., Order No. 16-0219 (Wash. Ins. Comm'r) (Nov. 23, 2016) (hereinafter, "Consent Order"). See also Shawn Hanson and Crystal Roberts, Recent InsurTech Obstacles And Their Potential Solutions, Law360 (Dec. 16, 2016), https://www.law360.com/articles/874036/recent-insurtech-obstacles-and-their-potential-solutions?ts_pk=ce45751b-865c-4d8c-96a5-fa2eeb224804&utm_source=user-alerts&utm_medium=email&utm_campaign=tracked-search-alert.

[6] See Consent Order.

[7] See "Zenefits and Washington State Reach Agreement on Pricing," Zenefits (Dec. 1, 2016), <https://www.zenefits.com/blog/zenefits-washington-state-reach-agreement-pricing/>.

[8] Id.

[9] See SB 5242, available at <http://app.leg.wa.gov/billssummary?BillNumber=5242&Year=2017>.

[10] See Senate Financial Institutions & Insurance Committee Hearing (Jan. 26, 2017), <http://www.tvw.org/watch/?eventID=2017011327>.

[11] See Testimony on Washington state's anti-rebating law, R Street (Jan. 26, 2017), <http://www.rstreet.org/outreach/testimony-on-washington-states-anti-rebating-law/>.