

## Insurance Alert

December 7, 2016

### Recent Regulatory Obstacles and Potential Solutions for InsurTech Companies

On November 23, 2016, the Washington Insurance Commissioner ordered Zenefits to cease providing free access to software,<sup>1</sup> following a nearly two-year investigation that began in February 2015 and a separate \$100,000 fine in October 2016 for employing unlicensed producers to sell insurance in Washington.<sup>2</sup>

California-based Zenefits offers an online, cloud-based, software-as-a-service platform that integrates “apps” for the administration of human resources, payroll and employee benefits. The core HR apps, which include hiring and terminating employees, managing employee information, tracking employee paid time off, generating Affordable Care Act (ACA) filings, helping to ensure ACA compliance and generating various employer reports, are offered to the public at no charge. Zenefits also offers noninsurance premium features for a fee, including commuter benefits, time-and-attendance tracking and Zenefits payroll. Zenefits also integrates noninsurance third-party apps into its system, allowing the client to manage certain HR aspects of the third-party app with Zenefits. For certain insurance-related features centered on insurance enrollment and administration, Zenefits requires a client to designate Zenefits as its broker of record.

However, the Insurance Commissioner found that Washington antirebating and inducement laws (RCW 48.30.140 and RCW 48.30.150) prohibit a licensee like Zenefits from offering valuable software functions or other valuable benefits for free or at less than fair market value to the public.<sup>3</sup>

The Commissioner’s Order presents two types of challenges to insurance producers operating in Washington: (1) can any noninsurance services be offered to the public for free, and (2) can any insurance-related services be offered to the public for free?

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<sup>1</sup> See *In the Matter of YourPeople, Inc. dba Zenefits FTW Ins. Servs.*, Order No. 16-0219 (Wash. Ins. Comm’r) (Nov. 23, 2016) (“Consent Order”).

<sup>2</sup> See *Kreidler: Zenefits’ free software offer illegal under state law*, Washington State Office of the Insurance Commissioner (Dec. 1, 2016), <https://www.insurance.wa.gov/about-oic/newsroom/news/2016/12-01-2016.html>.

<sup>3</sup> RCW 48.30.140 prohibits an insurer or insurance producer from offering, as an inducement to insurance, “any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy.”

RCW 48.30.150 prohibits an insurer or insurance producer from offering, as an inducement to insurance, “prizes, goods, wares, gift cards, gift certificates, or merchandise of an aggregate value in excess of one hundred dollars per person in the aggregate in any consecutive twelve-month period.”

Opinions by other regulators around the country regarding the provision of free insurance-related services, such as insurance-related software features and related instech offerings, may offer insurtech companies some helpful guidance in navigating these challenges. The New York Department of Financial Services has clarified that an insurer or insurance producer may provide services that directly relate to the sale or servicing of the policy or provide general information about insurance or risk reduction.<sup>4</sup> The insurer or insurance producer must provide the service in a fair and nondiscriminatory manner to like insureds or potential insureds. Exemplary services include risk assessments, insurance consulting services, insurance-related regulatory and legislative updates, certain claims assistance services, and certain services performed pursuant to COBRA. Other state regulators, such as the Illinois Department of Insurance, the Missouri Department of Insurance, Financial Institutions and Professional Registration, and the New Hampshire Insurance Department, have issued similar guidance.<sup>5</sup>

## Potential Solutions

One solution for companies facing similar issues is to charge a fee for services. As a result of the Order, Zenefits announced that it will charge all Washington State customers \$5 per employee per month for its core HR product.<sup>6</sup> Charging such a fee will require a fair market value assessment.

An alternative may be to challenge the Order through the administrative process, state courts or legislative measures. Under an agreement with the Insurance Commissioner, Zenefits can challenge the Order within 90 days. Zenefits has said that it will “work with the legislature and other stakeholders in the coming months to uphold” the principle that “Zenefits and every other company should have the freedom to set prices for [its] products and services in the way that drives the best value for consumers,”<sup>7</sup> possibly signaling a challenge to the Order through legislative means. We will await a challenge in the coming months.

Some less conventional challenges to the Order may be available. To the extent that the Order applies to employee health care benefits and pensions, the Order may be pre-empted by ERISA. Although ERISA saves from pre-emption state laws that regulate insurance, such laws must be specifically directed toward entities engaged in insurance, and they must substantially affect the risk pooling arrangement between the insurer and the insured.<sup>8</sup> The Order may not “substantially affect the risk pooling arrangement

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<sup>4</sup> See *Circular Letter No. 9*, New York Dept. of Financial Services (Mar. 3, 2009), [http://www.dfs.ny.gov/insurance/circltr/2009/cl09\\_09.htm](http://www.dfs.ny.gov/insurance/circltr/2009/cl09_09.htm).

<sup>5</sup> See *Company Bulletin 2012-11*, Illinois Dept. of Insurance (Dec. 19, 2012), <http://insurance.illinois.gov/cb/2012/CB2012-11.pdf>; *Insurance Bulletin 10-07*, Missouri Dept. of Insurance, Financial Institutions and Professional Registration (Nov. 5, 2010), <https://insurance.mo.gov/Contribute%20Documents/InsuranceBulletin10-07.pdf>; *Rebates under New Hampshire Insurance Law*, New Hampshire Insurance Dept. (July 24, 2010), [https://www.nh.gov/insurance/producers/documents/reb\\_laws.pdf](https://www.nh.gov/insurance/producers/documents/reb_laws.pdf).

<sup>6</sup> See *Zenefits and Washington State Reach Agreement on Pricing*, Zenefits (Dec. 1, 2016), <https://www.zenefits.com/blog/zenefits-washington-state-reach-agreement-pricing/>

<sup>7</sup> *Id.*

<sup>8</sup> *Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329, 341-42 (2003).

between the insurer and the insured” because Zenefits did not require anyone to become an insurance client to use its core HR apps.<sup>9</sup>

The “dormant” commerce clause may also provide some basis to challenge the state’s action as an undue burden on interstate commerce. Further analysis is needed to determine whether these potential grounds for challenging the Order would be viable solutions to an insurance producer such as Zenefits

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<sup>9</sup> See Consent Order at 2.

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