

Insurance Alert

February 3, 2017

Key Points

- The Washington Insurance Commissioner recently found that Washington's anti-rebating and inducement laws prohibit 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.
- On January 18, 2017, the Washington state Senate introduced SB 5242, a bill to 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.
- The Senate Committee on Financial Institutions & Insurance held a public hearing on the bill on January 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. Further developments will be seen in the coming weeks.



Washington Introduces Bill to Clarify Anti-Rebating and Inducement Laws

Similar to most other states, Washington prohibits insurers and insurance producers from offering to pay to any insured any rebate or any other valuation consideration not expressly provided for in the insurance policy as an inducement to purchasing insurance. 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.¹

On November 23, 2016, the Washington Insurance Commissioner found that these 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

¹ See RCW 48.30.140 and RCW 48.30.150.

the public.² Zenefits had been offering an online, cloud-based, software-as-a-service platform that integrates “apps” for the administration of human resources (HR), 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 (ACA) filings, helping to ensure ACA compliance and generating various employer reports. These core HR apps were offered to the public at no charge.³ As a result of the Insurance Commissioner’s Consent Order, as of January 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.⁴ 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.”⁵

Just weeks after the Insurance Commissioner’s decision with respect to Zenefits, on January 18, 2017, the Washington state Senate introduced a bill (“SB 5242”) 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.⁶

The Senate Committee on Financial Institutions & Insurance held a public hearing on the bill on January 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.⁷

Support for SB 5242

Chris Massey, vice president of government relations at Zenefits, testified on behalf of Zenefits in support of the bill. Massey stated 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.” According to Massey, “by [the insurance commissioner’s] logic, banks can no longer offer free checking

² 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.

³ See Consent Order.

⁴ See “Zenefits and Washington State Reach Agreement on Pricing,” Zenefits (Dec. 1, 2016), <https://www.zenefits.com/blog/zenefits-washington-state-reach-agreement-pricing/>.

⁵ *Id.*

⁶ See SB 5242, available at <http://app.leg.wa.gov/bills/summary?BillNumber=5242&Year=2017>.

⁷ See Senate Financial Institutions & Insurance Committee Hearing (Jan. 26, 2017), <http://www.tvw.org/watch/?eventID=2017011327>.

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" and "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."

Likewise, Brian Kreger, a lawyer and a member of the Federation of Regulatory Counsel, testified in support of SB 5242, explaining that "SB 5242 does not do away with the prohibition against illegal inducements or illegal rebates . . . Rather, it 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 D.C., also testified in support of the bill, stating 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."⁸

Opposition to SB 5242

The Office of the Insurance Commissioner, the National Association of Insurance and Financial Advisors, and the Washington Association of Health Underwriters, among others, opposed the bill, focusing on fair competition and inducement concerns.

Neal Kloke, president of the National Association of Insurance and Financial Advisors, said, "As financial advisors, life insurance and health insurance agents, we appreciate competition. For small businesses, competition is phenomenal for our consumers and for our small businesses. However, this bill, lifting the

⁸ 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/>.

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 against the bill, stating, “our experience has been with this particular organization [Zenefits] is that they are based out of California, the agents are talking to the consumer on the phone, there [are] only two agents that I know of in Washington that actually participate in the program as agents of Zenefits, and 85% of the business that was written in Washington state was done by non-licensed agents.” Wallace said, “I think that when you have the mainstream agent that can meet with you face-to-face, come to your place of business . . . it really retains the level of service that they’re not going to receive if some large institution comes from out of the state, wows you with a fantastic platform, and doesn’t charge you anything for it, gets you on board but then you’re no longer able to receive the service that you need. So for those reasons, I feel 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, also opposes the bill. Johns-Brown explained the reasoning behind inducement laws, which is to encourage consumers to make “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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