

AMENDED IN SENATE MAY 26, 2017  
AMENDED IN SENATE MAY 2, 2017  
AMENDED IN SENATE APRIL 17, 2017  
AMENDED IN SENATE MARCH 23, 2017

**SENATE BILL**

**No. 538**

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**Introduced by Senator Monning**

February 16, 2017

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An act to add Section 513 to the Business and Professions Code, to add Sections 1268.9 and 1367.32 to the Health and Safety Code, and to add Section 10133.57 to the Insurance Code, relating to hospital contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 538, as amended, Monning. Hospital contracts.

Existing law, the Knox-Keene Health Care Service Plan Act of 1975, provides for the licensure and regulation of health care service plans by the Department of Managed Health Care and makes a willful violation of the act a crime. Existing law also provides for the regulation of health insurers by the Department of Insurance. Existing law provides for the licensure and regulation of health facilities, including general acute care hospitals, acute psychiatric hospitals, and special hospitals, administered by the State Department of Public Health. A violation of these provisions is a crime. Existing law, the Health Care Providers' Bill of Rights, prescribes restrictions on the types of contractual provisions that may be included in agreements between health care service plans and health care providers and agreements between health insurers and health care providers.

This bill, the Health Care Market Fairness Act of 2017, would prohibit contracts between hospitals and contracting agents, health care service plans, or health insurers from containing certain provisions, including, but not limited to, setting payment rates or other terms for nonparticipating affiliates of the hospital, requiring the contracting agent, plan, or insurer to keep the contract's payment rates confidential from any payor, as defined, that is or may become financially responsible for the payment, and requiring the contracting agent, plan, or insurer to submit to arbitration, or any other alternative dispute resolution program, any claims or causes of action that arise under state or federal antitrust laws after those claims or causes of action arise, except as provided. The bill would make any prohibited contract provision void and unenforceable. The bill would define "contracting agent" and "hospital" for those purposes. The bill would enact an identical provision under the health facility licensure and regulation provisions as that provision described above for contracts between hospitals and contracting agents. The bill would provide that its provisions are severable.

*Existing law requires every health facility for which a license or special permit has been issued to be periodically inspected by the State Department of Public Health, or by another governmental entity under contract with the department. Existing law requires the department to inspect the facility for compliance with provisions of state law and regulations during a state periodic inspection, or at the same time that a federal periodic inspection is performed.*

*This bill would provide that the contracts made pursuant to the provisions described above are not subject to those inspection requirements.*

Because a willful violation of the provisions relating to health care service plans is a crime, and a violation of those licensure and regulation provisions relating to hospitals is a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. This act shall be known, and may be cited, as the  
2 Health Care Market Fairness Act of 2017.

3 SEC. 2. The Legislature finds and declares all of the following:

4 (a) There has been a surge in hospital consolidations in  
5 California, fueling the formation of ever larger multihospital  
6 systems. Almost one-half of all hospitals in California are in  
7 multihospital systems, with the two largest systems controlling  
8 almost 60 hospitals. According to recent studies, hospital prices  
9 in California grew between the years 2004 and 2013 across all  
10 hospitals, but prices at hospitals that are part of multihospital  
11 systems grew substantially more. The evidence indicates that higher  
12 prices are consistent with the use of contract provisions of the type  
13 addressed in this act.

14 (b) Concentration of hospitals also has had an impact on  
15 premium rates in California's 19 health insurance rating areas.  
16 Researchers found that reducing hospital concentration to levels  
17 that would exist in moderately competitive markets could reduce  
18 overall premiums by more than 2 percent and in three regions by  
19 more than 10 percent.

20 (c) Because they tend to lessen competition, increase prices,  
21 and reduce the affordability and availability of insurance coverage,  
22 and for the protection of other important state interests, the hospital  
23 contract provisions described in this act are deemed to be unfair,  
24 and against public policy, both of which are grounds for the  
25 revocation of any contract under the laws of this state.

26 (d) This act regulates the business of insurance, as that term is  
27 defined for purposes of the federal McCarran-Ferguson Act (15  
28 U.S.C. Sec. 1012). Nothing in this act shall be construed to impose  
29 the regulatory requirements of the Insurance Code on health care  
30 service plans regulated by the Health and Safety Code, or on  
31 network vendors regulated by the Business and Professions Code.

32 SEC. 3. Section 513 is added to the Business and Professions  
33 Code, to read:

34 513. (a) A contract between a hospital or any affiliate of a  
35 hospital and a contracting agent shall not, directly or indirectly,  
36 do any of the following:

37 (1) Set payment rates or other terms for nonparticipating  
38 affiliates of the hospital.

1 (2) Require the contracting agent to contract with any one or  
2 more of the hospital's affiliates. This section does not prohibit a  
3 contract from requiring that the contracting agent contract with  
4 the medical group with which the hospital's medical staff is  
5 affiliated.

6 (3) Require payors to certify, attest, or otherwise confirm in  
7 writing that the payor is bound by the terms of the contract between  
8 the hospital and the contracting agent. A contracting agent shall  
9 be responsible for including and disclosing relevant terms of the  
10 provider contract in its contract with a payor.

11 (4) Require the contracting agent, as a condition to entering into  
12 the contract with the hospital or continuing the contract on its then  
13 current terms, to submit to arbitration, or any other alternative  
14 dispute resolution program, any claims or causes of action that  
15 arise under state or federal antitrust laws. This paragraph does not  
16 prohibit a hospital or any affiliate of a hospital and a contracting  
17 agent from entering into a consensual agreement to submit those  
18 claims or causes of action to arbitration or any other alternative  
19 dispute resolution program, other than as a condition to entering  
20 into the contract or continuing the contract on its then current  
21 terms.

22 (5) Require the contracting agent to impose the same  
23 cost-sharing obligations on beneficiaries when the hospital is  
24 in-network but at a different cost-sharing tier than any other  
25 in-network hospital. For purposes of this section, "cost sharing"  
26 includes copayment, coinsurance, deductible, or any other  
27 cost-sharing provision for covered benefits other than share of  
28 premium.

29 (6) Require the contracting agent to keep the contract's payment  
30 rates confidential from any existing or potential payor that is or  
31 may become financially responsible for the payments. This  
32 paragraph does not prohibit a requirement that any communication  
33 of the contract's payment rates to an existing or potential payor  
34 be subject to a reasonable nondisclosure agreement.

35 (b) Any contract provision that violates subdivision (a) is void  
36 and unenforceable.

37 (c) For the purposes of this section, the following terms have  
38 the following meanings:

39 (1) "Affiliate" means, with respect to any person, any other  
40 person that, directly or indirectly, through one or more

1 intermediaries, controls, is controlled by, or is under common  
2 control with, that person. The term “control” means the possession,  
3 directly or indirectly, of the power to direct or cause the direction  
4 of the management and policies of a person, whether through  
5 ownership of voting securities, membership rights, by contract or  
6 otherwise, and the terms “controlled” and “controlling” have  
7 meanings correlative thereto.

8 (2) “Contracting agent” has the same meaning as set forth in  
9 Section 511.1.

10 (3) “Hospital” means any general acute care hospital, acute  
11 psychiatric hospital, or special hospital, as those terms are defined  
12 in Section 1250 of the Health and Safety Code.

13 (4) “Nonparticipating” means that with respect to the services  
14 rendered, the hospital or its affiliate is out of network according  
15 to the applicable health care service plan contract or health care  
16 welfare benefit plan.

17 (5) “Payor” means a person who is financially responsible, in  
18 whole or in part, for paying or reimbursing the cost of health care  
19 services received by beneficiaries of a health care welfare benefit  
20 plan sponsored or arranged by that person. This definition includes,  
21 but is not limited to, the health care welfare benefit plan itself.

22 SEC. 4. Section 1268.9 is added to the Health and Safety Code,  
23 to read:

24 1268.9. (a) A contract between a hospital or any affiliate of a  
25 hospital and a contracting agent shall not, directly or indirectly,  
26 do any of the following:

27 (1) Set payment rates or other terms for nonparticipating  
28 affiliates of the hospital.

29 (2) Require the contracting agent to contract with any one or  
30 more of the hospital’s affiliates. This section does not prohibit a  
31 contract from requiring that the contracting agent contract with  
32 the medical group with which the hospital’s medical staff is  
33 affiliated.

34 (3) Require payors to certify, attest, or otherwise confirm in  
35 writing that the payor is bound by the terms of the contract between  
36 the hospital and the contracting agent. A contracting agent shall  
37 be responsible for including and disclosing relevant terms of the  
38 provider contract in its contract with a payor.

39 (4) Require the contracting agent, as a condition to entering into  
40 the contract with the hospital or continuing the contract on its then

1 current terms, to submit to arbitration, or any other alternative  
2 dispute resolution program, any claims or causes of action that  
3 arise under state or federal antitrust laws. This paragraph does not  
4 prohibit a hospital or any affiliate of a hospital and a contracting  
5 agent from entering into a consensual agreement to submit those  
6 claims or causes of action to arbitration or any other alternative  
7 dispute resolution program, other than as a condition to entering  
8 into the contract or continuing the contract on its then current  
9 terms.

10 (5) Require the contracting agent to impose the same  
11 cost-sharing obligations on beneficiaries when the hospital is  
12 in-network but at a different cost-sharing tier than any other  
13 in-network hospital. For purposes of this section, “cost sharing”  
14 includes copayment, coinsurance, deductible, or any other  
15 cost-sharing provision for covered benefits other than share of  
16 premium.

17 (6) Require the contracting agent to keep the contract’s payment  
18 rates ~~secret~~ confidential from any existing or potential payor that  
19 is or may become financially responsible for the payments. This  
20 paragraph does not prohibit a requirement that any communication  
21 of the contract’s payment rates to an existing or potential payor  
22 be subject to a reasonable nondisclosure agreement.

23 (b) Any contract provision that violates subdivision (a) is void  
24 and unenforceable.

25 (c) For the purposes of this section, the following terms have  
26 the following meanings:

27 (1) “Affiliate” means, with respect to any person, any other  
28 person that, directly or indirectly, through one or more  
29 intermediaries, controls, is controlled by, or is under common  
30 control with, that person. The term “control” means the possession,  
31 directly or indirectly, of the power to direct or cause the direction  
32 of the management and policies of a person, whether through  
33 ownership of voting securities, membership rights, by contract or  
34 otherwise, and the terms “controlled” and “controlling” have  
35 meanings correlative thereto.

36 (2) “Contracting agent” has the same meaning as set forth in  
37 Section 511.1 of the Business and Professions Code.

38 (3) “Hospital” means any general acute care hospital, acute  
39 psychiatric hospital, or special hospital, as those terms are defined  
40 in Section 1250.

1 (4) “Nonparticipating” means that, with respect to the services  
2 rendered, the hospital or its affiliate is out of network according  
3 to the applicable health care service plan contract or health care  
4 welfare benefit plan.

5 (5) “Payor” means a person who is financially responsible, in  
6 whole or in part, for paying or reimbursing the cost of health care  
7 services received by beneficiaries of a health care welfare benefit  
8 plan sponsored or arranged by that person. This definition includes,  
9 but is not limited to, the health care welfare benefit plan itself.

10 (d) *The inspection requirements in Section 1279 do not apply*  
11 *to contracts made pursuant to this section.*

12 SEC. 5. Section 1367.32 is added to the Health and Safety  
13 Code, to read:

14 1367.32. (a) A contract between a hospital or any affiliate of  
15 a hospital and a health care service plan shall not, directly or  
16 indirectly, do any of the following:

17 (1) Set payment rates or other terms for nonparticipating  
18 affiliates of the hospital.

19 (2) Require the health care service plan to contract with any one  
20 or more of the hospital’s affiliates. This section does not prohibit  
21 a contract from requiring that the health care service plan contract  
22 with the medical group with which the hospital’s medical staff is  
23 affiliated.

24 (3) Require payors to certify, attest, or otherwise confirm in  
25 writing that the payor is bound by the terms of the contract between  
26 the hospital and the health care service plan. A health care service  
27 plan shall be responsible for including and disclosing relevant  
28 terms of the provider contract in its contract with a payor.

29 (4) Require the health care service plan, as a condition to  
30 entering into the contract with the hospital or continuing the  
31 contract on its then current terms, to submit to arbitration, or any  
32 other alternative dispute resolution program, any claims or causes  
33 of action that arise under state or federal antitrust laws. This  
34 paragraph does not prohibit a hospital or any affiliate of a hospital  
35 and a health care service plan from entering into a consensual  
36 agreement to submit those claims or causes of action to arbitration  
37 or any other dispute resolution program, other than as a condition  
38 to entering into the contract or continuing the contract on its then  
39 current terms.

1 (5) Require the health care service plan to impose the same  
2 cost-sharing obligations on beneficiaries when the hospital is  
3 in-network but at a different cost-sharing tier than any other  
4 in-network hospital. For purposes of this section, “cost sharing”  
5 includes copayment, coinsurance, deductible, or any other  
6 cost-sharing provision for covered benefits other than share of  
7 premium.

8 (6) Require the health care service plan to keep the contract’s  
9 payment rates confidential from any existing or potential payor  
10 that is or may become financially responsible for the payments.  
11 This paragraph does not prohibit a requirement that any  
12 communication of the contract’s payment rates to an existing or  
13 potential payor be subject to a reasonable nondisclosure agreement.

14 (b) Any contract provision that violates subdivision (a) is void  
15 and unenforceable.

16 (c) For the purposes of this section, the following terms have  
17 the following meanings:

18 (1) “Affiliate” means, with respect to any person, any other  
19 person that, directly or indirectly, through one or more  
20 intermediaries, controls, is controlled by, or is under common  
21 control with, that person. The term “control” means the possession,  
22 directly or indirectly, of the power to direct or cause the direction  
23 of the management and policies of a person, whether through  
24 ownership of voting securities, membership rights, by contract or  
25 otherwise, and the terms “controlled” and “controlling” have  
26 meanings correlative thereto.

27 (2) “Hospital” means any general acute care hospital, acute  
28 psychiatric hospital, or special hospital, as those terms are defined  
29 in Section 1250.

30 (3) “Nonparticipating” means that with respect to the services  
31 rendered, the hospital or affiliate is out of network according to  
32 the applicable health care service plan contract or health care  
33 welfare benefit plan.

34 (4) “Payor” means a person that is financially responsible, in  
35 whole or in part, for paying or reimbursing the cost of health care  
36 services received by beneficiaries of a health care welfare benefit  
37 plan sponsored or arranged by that person. This definition includes,  
38 but is not limited to, the health care welfare benefit plan itself.

39 SEC. 6. Section 10133.57 is added to the Insurance Code, to  
40 read:

1 10133.57. (a) A contract between a hospital or any affiliate of  
2 a hospital and a health insurer shall not, directly or indirectly, do  
3 any of the following:

4 (1) Set payment rates or other terms for nonparticipating  
5 affiliates of the hospital.

6 (2) Require the health insurer to contract with any one or more  
7 of the hospital’s affiliates. This section does not prohibit a contract  
8 from requiring that the ~~contracting agent~~ *health insurer* contract  
9 with the medical group with which the hospital’s medical staff is  
10 affiliated.

11 (3) Require payors to certify, attest, or otherwise confirm in  
12 writing that the payor is bound by the terms of the contract between  
13 the hospital and the health insurer. A health insurer shall be  
14 responsible for including and disclosing relevant terms of the  
15 provider contract in its contract with a payor.

16 (4) Require the health insurer, as a condition to entering into  
17 the contract with the hospital or continuing the contract on its then  
18 current terms, to submit to arbitration, or any other alternative  
19 dispute resolution program, any claims or causes of action that  
20 arise under state or federal antitrust laws. This paragraph does not  
21 prohibit a hospital or any affiliate of a hospital and a health insurer  
22 from entering into a consensual agreement to submit those claims  
23 or causes of action to arbitration or any other alternative dispute  
24 resolution program, other than as a condition to entering into the  
25 contract or continuing the contract on its then current terms.

26 (5) Require the health insurer to impose the same cost-sharing  
27 obligations on beneficiaries when the hospital is in-network but  
28 at a different cost-sharing tier than any other in-network hospital.  
29 For purposes of this section, “cost sharing” includes copayment,  
30 coinsurance, deductible, or any other cost-sharing provision for  
31 covered benefits other than share of premium.

32 (6) Require the health insurer to keep the contract’s payment  
33 rates confidential from any existing or potential payor that is or  
34 may become financially responsible for the payments. This  
35 paragraph does not prohibit a requirement that any communication  
36 of the contract’s payment rates to an existing or potential payor  
37 be subject to a reasonable nondisclosure agreement.

38 (b) Any contract provision that violates subdivision (a) is void  
39 and unenforceable.

1 (c) For the purposes of this section, the following terms have  
2 the following meanings:

3 (1) “Affiliate” means, with respect to any person, any other  
4 person that, directly or indirectly, through one or more  
5 intermediaries, controls, is controlled by, or is under common  
6 control with, that person. The term “control” means the possession,  
7 directly or indirectly, of the power to direct or cause the direction  
8 of the management and policies of a person, whether through  
9 ownership of voting securities, membership rights, by contract or  
10 otherwise, and the terms “controlled” and “controlling” have  
11 meanings correlative thereto.

12 (2) “Hospital” means any general acute care hospital, acute  
13 psychiatric hospital, or special hospital, as those terms are defined  
14 in Section 1250 of the Health and Safety Code.

15 (3) “Nonparticipating” means that with respect to the services  
16 rendered, the hospital or affiliate is out of network according to  
17 the applicable health insurance policy or health care welfare  
18 benefit.

19 (4) “Payor” means a person that is financially responsible, in  
20 whole or in part, for paying or reimbursing the cost of health care  
21 services received by beneficiaries of a health care welfare benefit  
22 plan sponsored or arranged by that person. This definition includes,  
23 but is not limited to, the health care welfare benefit plan itself.

24 SEC. 7. The provisions of this act are severable. If any  
25 provision of this act or its application is held invalid, that invalidity  
26 shall not affect other provisions or applications that can be given  
27 effect without the invalid provision or application.

28 SEC. 8. No reimbursement is required by this act pursuant to  
29 Section 6 of Article XIII B of the California Constitution because  
30 the only costs that may be incurred by a local agency or school  
31 district will be incurred because this act creates a new crime or  
32 infraction, eliminates a crime or infraction, or changes the penalty  
33 for a crime or infraction, within the meaning of Section 17556 of  
34 the Government Code, or changes the definition of a crime within  
35 the meaning of Section 6 of Article XIII B of the California  
36 Constitution.

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