



County of Los Angeles CHIEF EXECUTIVE OFFICE

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WILLIAM T FUJIOKA
Chief Executive Officer

September 15, 2014

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Second District

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Third District

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MICHAEL D. ANTONOVICH
Fifth District

To: Supervisor Don Knabe, Chairman
Supervisor Gloria Molina
Supervisor Mark Ridley-Thomas
Supervisor Zev Yaroslavsky
Supervisor Michael D. Antonovich

From: William T Fujioka
Chief Executive Officer

**MOTION THAT THE BOARD OF SUPERVISORS OPPOSE PROPOSITION 46
- A BALLOT MEASURE WHICH PROPOSES TO INCREASE THE MEDICAL INJURY
COMPENSATION REFORM ACT OF 1975 CAP LIMITS (ITEM NO. 46-A,
SUPPLEMENTAL AGENDA OF SEPTEMBER 16, 2014)**

Item No. 46-A on the September 16, 2014 Supplemental Agenda is a motion by Supervisor Ridley-Thomas and Supervisor Knabe recommending that the Board of Supervisors oppose Proposition 46.

Background

In 1975, doctors and other health care providers were leaving California due to the rapidly rising costs of medical liability insurance. In response to this issue, the Legislature, with bipartisan support, enacted the Medical Injury Compensation Reform Act (MICRA) of 1975. This measure was signed by then Governor Jerry Brown in September 1975, and sought to improve access to health care by stabilizing medical liability and limiting the rate of growth in health care costs.

The Medical Injury Compensation Reform Act capped the amount for noneconomic damages such as: pain, suffering, inconvenience, emotional stress, loss of companionship, and loss of enjoyment of life for medical malpractice, at \$250,000. MICRA also established a cap on plaintiff attorneys' fees based on the percentage of the amount of damages awarded, with the percentage declining as the amount of the award increases. Under MICRA, there is no cap or limit on the amount of economic or punitive damages an injured patient may be awarded in a medical malpractice case.

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Since the enactment of MICRA, attempts have been made to increase the \$250,000 cap on noneconomic damages. Most recently, in February 2014, Senate President pro Tempore Darrell Steinberg introduced SB 1429, which cited legislative intent to bring interested parties together to develop a solution to issues surrounding medical malpractice injury compensation. However, this measure did not move forward because the parties could not reach an agreement. Concurrently, proponents seeking to increase the MICRA cap successfully gathered sufficient voter signatures to qualify an initiative to increase the cap for placement on the November 2014 Statewide General Election ballot. This measure is Proposition 46.

Proposition 46 Overview

Proposition 46, the Troy and Alana Pack Patient Safety Act of 2014 is a measure on the November 4, 2014, State General Election ballot, which, if approved by the voters, would enact the following provisions:

- **Increase the MICRA Cap.** The measure would increase the current \$250,000 cap on non-economic damages due to medical malpractice established in the Medical Injury Compensation Reform Act of 1975. The cap would increase to \$1.1 million effective January 1, 2015 based on the rate of inflation since 1975 and would be adjusted annually thereafter to reflect any increase in inflation as measured by the Consumer Price Index.
- **Require Drug and Alcohol Testing of Physicians.** The measure would require hospitals to conduct drug and alcohol testing of physicians affiliated with the hospital as follows: 1) on a random basis; 2) immediately upon the occurrence of an adverse event on physicians responsible for the care and treatment of the patient during or 24 hours prior to the event; and 3) at the direction of the State Medical Board upon receipt of a referral from a third party indicating that a physician may have been impaired by alcohol or drugs while on duty. The hospitals would be required to bill the physician for the cost of the test. In addition, this measure would require every health care practitioner to report to the State Medical Board information regarding a physician who is impaired by drugs or alcohol while on duty, or who was responsible for the treatment of a patient during an adverse event and failed to follow the appropriate level of care. Physicians found to be drug or alcohol impaired while on duty, or who refuse or fail to comply with testing provisions, would be subject to disciplinary action.
- **Tracking Prescriptions for Controlled Substances.** The measure would require health care practitioners and pharmacists to consult the Controlled

Substance Utilization Review and Evaluation System (CURES) prior to prescribing or dispensing controlled drugs that have a higher potential for abuse, such as OxyContin, Vicodin, or Adderall, to a patient for the first time. If the check on CURES finds that the patient has an existing prescription for one of these drugs, the health care practitioner must determine if there is a legitimate need for an alternative medication. Failure to do so would be cause for disciplinary action by the practitioner's licensing board.

Legislative Analyst's Office Report on Proposition 46. According to the Legislative Analyst's Office (LAO), Proposition 46 would have a wide variety of fiscal effects on State and local governments, as described below:

- **Increasing the MICRA Cap.** The LAO notes that raising the MICRA cap on non-economic damages would result in higher costs due to an increase in the amount of awards and settlements in medical malpractice cases, and higher costs due to an expected increase in the number of injury claims filed. The LAO indicates that higher malpractice costs would, in turn, increase costs for health care providers that self-insure and increase premiums for providers who purchase malpractice insurance. The LAO estimates that raising the cap on non-economic damages would increase medical malpractice costs for State and local government health care purchasers and providers by an average of 10 percent resulting in increased costs for health care at least in the low millions of dollars annually, potentially ranging to over \$100.0 million.
- **Drug and Alcohol Testing of Physicians.** The LAO indicates that the requirement to test physicians for alcohol and drugs could have different fiscal effects. The testing could prevent some medical errors, thus resulting in reduced medical costs. According to the LAO, this could offset some of the costs of increasing the MICRA cap. Conversely, while hospitals would be required to bill physicians for the cost of testing, the LAO assumes that these costs could be passed on to the State and local governments in the form of higher prices for health care services provided by the physicians.
- **Tracking Prescriptions of Controlled Substances.** As reported by the LAO, the Department of Justice (DOJ) administers California's prescription drug monitoring program, known as CURES. Pharmacies are required to provide the DOJ with specified information on patients who are prescribed controlled drugs that have a potential for abuse. Currently, physicians and pharmacists have the option to register on CURES if they wish to review a patient's drug history prior to dispensing a controlled substance. This is intended to prevent prescription drug abuse and improve clinical care. Effective January 1, 2016, all health care

providers will be required to register on CURES; however, they will not be required to check the database prior to prescribing or dispensing a controlled substance. The State is currently in the process of updating the CURES database to handle the higher level of use expected to occur when health care providers are registered in 2016.

If Proposition 46 is approved by voters, the LAO notes that many health care providers will not be able to check the CURES database until at least the summer of 2015, when system upgrades are scheduled to be complete.

The LAO also notes that Proposition 46 would require health care providers to take additional time to check CURES. As a result, the providers would have less time for other patient-care activities. The LAO estimates that this could result in additional costs for hospitals and pharmacies to hire additional staff to care for the same number of patients. However, the LAO indicates that checking the CURES database could reduce costs by lowering the number of prescription drugs dispensed and costs associated with drug abuse.

County Impact

The Department of Health Services (DHS) reports that judgments and settlements arising from medical malpractice claims are generally incurred as net County costs. DHS indicates that any increase in the current MICRA cap would increase County costs and would inevitably result in reduced resources available for every facet of patient care. DHS is committed to providing vital, high-quality health services to vulnerable populations, and diverting funds to pay for increased litigation expenses would not necessarily improve patient outcomes or produce higher quality medical care.

County Counsel reports County costs of approximately \$36.5 million in medical malpractice claims and settlements from September 2008 through March 2013, and concurs that an increase in the MICRA cap would result in significant increased County costs and exposure to additional claims for medical malpractice.

County Counsel indicates that the drug and alcohol testing provisions of Proposition 46 could result in employment issues for the County. For example, this could expand the ability of the County to discipline or discharge physicians who fail to submit a required drug or alcohol test. With regard to the requirement that every health care practitioner report suspected drug or alcohol abuse while on duty to the State Medical Board,

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County Counsel notes that it is unclear whether or not these reports would be made anonymously. Some physicians who are reported may claim that the accusation is false and that they are the subject of retaliation or harassment.

Support and Opposition

Proposition 46 is supported by: U.S. Senator Barbara Boxer; Consumer Watchdog; Consumer Federation of California; Congress of California Seniors; Consumer Attorneys of California; 38 Is Too Late; California Teamsters Public Affairs Council; and California Conference Board-Amalgamated Transit Union.

Proposition 46 is opposed by over 75 doctors and health care groups including: the California Hospital Association; California Medical Association; California Dental Association; the Los Angeles County Medical Association; Community Clinics Association of Los Angeles County; and over 100 hospitals including: the California Hospital Medical Center; Cedars-Sinai Medical Center; Community Hospital of Long Beach; Glendale Adventist Medical Center; Good Samaritan Hospital; Hollywood Presbyterian Hospital; Long Beach Memorial Medical Center; Palmdale Regional Medical Center; USC Norris Cancer Hospital; USC Verdugo Hills Hospital; White Memorial Medical Center; and over 300 entities including: the California State Association of Counties; League of California Cities; Urban Counties Caucus; California Special Districts Association; California Chamber of Commerce; Service Employees International of California; AFSCME California PEOPLE; California NAACP; American Civil Liberties Union; California Republican Party; and the Los Angeles County Democratic Party.

Recommendation

While there is existing Board-approved policy to oppose legislation that would revise MICRA to impede access, increase health care costs, and/or divert health care dollars from patients, positions on ballot measures are matters for Board policy determination. **Therefore, opposition to Proposition 46 is a matter for Board policy determination.**

We will continue to keep you advised.

WTF:RA
MR:VE:lm

c: Executive Office, Board of Supervisors
County Counsel