

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2021-2022 Regular Session**

SB 858 (Wiener)  
Version: January 19, 2022  
Hearing Date: April 26, 2022  
Fiscal: Yes  
Urgency: No  
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**SUBJECT**

Health care service plans: discipline: civil penalties

**DIGEST**

This bill increases various civil and administrative penalties under the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene), provided. The bill also authorizes the Department of Managed Health Care (DMHC) to impose a corrective action plan to require future compliance by the health plan, and requires failure by the health plan to comply in a timely manner to be monitored through medical surveys, financial examinations, or other means necessary to assure timely compliance.

**EXECUTIVE SUMMARY**

The DMHC protects the health care rights of approximately 26 million Californians through regulation of health plans pursuant to the provision of Knox-Keene. Knox-Keene authorizes the DMHC to assess various civil penalties and administrative fines for violations of its provisions, including a civil penalty not to exceed \$2,500 on any person who violates any provision of Knox-Keene. This bill seeks to increase those civil and administrative fines, as provided. The bill also requires the DMHC to impose a corrective action plan to require future compliance by the health plan with Knox-Keene, and requires failure by the health plan to comply in a timely manner to be monitored, as specified.

The bill is sponsored by Health Access California. The bill is supported by various health care advocacy organizations and labor organizations. The bill is opposed by the California Association of Health Plans. The bill passed out of the Senate Health Committee on a vote of 8 to 1.

**PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Requires the Department of Managed Health Care (DMHC) to regulate health plans under the Knox-Keene Health Care Service Plan Act of 1975 (Knox-Keene), and the Department of Health Care Services (DHCS) to administer the Medi-Cal program. (Health & Safe. Code §1340, et seq.<sup>1</sup>; Welf. & Inst. Code § 14000, et. seq.)
- 2) Requires DMHC to conduct periodic and follow-up surveys of the health delivery system of each plan and authorizes DMHC to issue deficiencies and correction plans. (§ 1346.)
- 3) Authorizes the Director of DMHC (director), after appropriate notice and opportunity for a hearing, to order suspend or revoke any license issued under Knox-Keene to a health care service plan or assess administrative penalties if the director determines that the licensee has committed any of the acts or omissions constituting grounds for disciplinary action, and establishes 18 specific acts or omissions in the Knox-Keene Act that constitute grounds for disciplinary action. (§ 1386.)
- 4) Provides that any person who violates any provision of Knox-Keene, or who violates any rule or order adopted or issued pursuant to Knox-Keene, is liable for a civil penalty not to exceed \$2,500 for each violation, which is to be assessed and recovered in a civil action brought in the name of the people of the State of California by the director in any court of competent jurisdiction within 4 years after the act or transaction constituted the violation. (§ 1387.)
- 5) Requires, pursuant to existing regulation, the director to determine the appropriate amount of the penalty for each violation of the Knox-Keene Act when assessing administrative penalties based on one or more specified factors, including, among others:
  - a) the nature, scope and gravity of the violation;
  - b) the plan's history of violations;
  - c) the willfulness of the violation;
  - d) the financial status of the plan;
  - e) the financial cost of the plan; and
  - f) the amount of the penalty necessary to deter similar violations in the future. (Tit. 28 Cal. Codes Reg. § 1300.86.)

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<sup>1</sup> All further references are the Health and Safety Code unless specified otherwise.

This bill:

- 1) Increases the civil penalty for a violation of Knox-Keene to not less than \$25,000 for each day that the violation continues, whether continuous or not.
  - a) Requires each enrollee harmed by a violation to constitute a separate and distinct violation subject to a civil penalty not less than \$25,000.
  - b) Provides that a civil penalty is to be computed by multiplying the number of enrollees affected by the number of days that the violation continues.
  - c) Requires the civil penalty amount to be adjusted annually based on the average rate of change in rates for the individual and group markets in the prior calendar year beginning on January 1, 2024, and each January 1 thereafter. Rates include premiums and cost sharing for purposes of these requirements.
  
- 2) Requires, on or after January 1, 2023, the amounts of civil and administrative penalties enumerated in Sections 1367.01, 1367.03, 1368, 1368.04, 1371.37, 1374.27, 1374.34, 1374.9, 1380, 1387, 1388, 1389.8, 1390, and 1393.6, and any other section in Knox-Keene that enumerates a specific penalty amount, to be multiplied by four.
  - a) On January 1, 2024, and each January 1 thereafter, those civil and administrative penalty amounts are required to be adjusted annually based on the average rate of change in rates for the individual and group markets in the prior calendar year. For purposes of this requirement, rates include premiums and cost sharing.
  
- 3) Codifies existing regulations that require the director to determine the appropriate amount of the penalty for each violation of the Knox-Keene Act when assessing administrative penalties based on certain factors. Expands some of those existing factors and adds additional factors, including:
  - a) the financial status of the plan including reserves, financial solvency, revenues in excess of expenditures, and other factors relating to the financial status of the domestic corporation and any parent company, subsidiary, affiliate, or other financially connected entity;
  - b) the financial cost of the health care service that was denied, delayed, or modified, including whether the penalty is commensurate with or exceeds the avoided cost based on the number of enrollees estimated to be affected and the cost of the care denied, delayed, or modified;
  - c) whether the violation is an isolated incident;
  - d) the number of enrollees estimated to be affected;
  - e) the frequency of the violation based on the number of days for a continuous violation or the estimated number of incidents with potential harm to enrollees; and
  - f) the severity of the potential harm in terms of loss of life, loss of health, or financial harm to the enrollee.

- 4) Authorizes the DMHC to impose a corrective action plan to require future compliance by the health plan with additional provisions of the Knox-Keene Act, and requires failure by the health plan to comply in a timely manner appropriate for rectifying noncompliance to be monitored by the DMHC through medical surveys, financial examinations, or other means necessary to assure timely compliance.

### COMMENTS

#### 1. Stated need for the bill

The author writes:

Senate Bill 858 improves patient access to care and health plan accountability by updating and increasing the penalties for health plan violations of California’s consumer protections. The fines levied by the Department of Managed Health Care – which haven’t been adjusted even for inflation since the late 1970s – should be adjusted to prevent health plans from making calculated decisions to pay fines as an alternative to covering needed care. When health plans fail to comply with state law, those actions can pose significant – and even life-threatening – health challenges. By strengthening California’s ability to levy behavior-changing fines on non-compliant health plans, access to health care and quality of care will improve.

#### 2. This bill seeks to increase existing penalties under Knox-Keene

The author argues that increasing the minimum amount of the civil penalty will lead to Californians being able to better access health care and that quality of care in the state will improve. As evidence for the need of this bill, the author points to a recent situation in 2020 where the DMHC fined Blue Cross of California Partnership Plan, Inc. \$1.2 million dollars for its “failure to timely implement two Independent Medical Review (IMR) determinations to authorize coverage for medically necessary services.”<sup>2</sup> The DMHC noted that “the Medi-Cal managed care plan confirmed receiving the Department’s notifications of the IMR decisions but failed to timely authorize the enrollees’ services” for gender-affirming care.<sup>3</sup> The Senate Committee on Health analysis of this bill noted that in 2020 the DMHC “assessed \$3,720,750 in fines [which included the \$1.2 million fine against Blue Cross] for enforcement actions taken against health plans, involving many diverse legal issues, including failures to timely implement IMR decisions, wrongfully denying emergency services claims payment, violations of state and federal mental health parity laws and improperly denying basic

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<sup>2</sup> *Blue Cross of California Partnership Plan Fined \$1.2M for Failing to Authorize Medically Necessary Services*, Dept. of Managed Health Care (Oct. 28, 2020), available at [California Department of Managed Health Care > About the DMHC > Newsroom > October28,2020](#) (as of Apr. 19, 2020).

<sup>3</sup> *Id.*

health care services.<sup>4</sup> Additionally, “in March of 2022, DMHC and DHCS jointly imposed fines on the Local Initiative Health Authority for Los Angeles County (L.A. Care) totaling \$55 million.”<sup>5</sup>

The California Health Benefits Review Program (CHBRP) conducted an evidence-based assessment of this bill upon the request of the California Senate Committee on Health. The CHBRP report states that “the imposition of increased financial sanctions is one of a number of distinctive (but often mutually compatible) regulatory enforcement and compliance strategies identified in legal scholarship,” but it is “unclear if and how financial exposures pressure companies to change their behavior to comply with the law.”<sup>6</sup> The report noted that “large penalties often draw the attention of business entities, changing the long-term behavior of regulated entities requires cooperation between the regulator and the regulated entity, and an understanding of how best to align the entity’s internal rules and culture with existing regulations.”<sup>7</sup>

Under existing law, a person who violates any provision of Knox-Keene is liable for a civil penalty not to exceed \$2,500 for each violation. (§ 1387.) As noted by the author, this amount has not been increased since it was enacted in 1986. (S.B. 718 (Royce) Ch. 718; Stats. 1986.) The bill provides that each enrollee harmed by a violation is to constitute a separate and distinct violation subject to a civil penalty not less than \$25,000, and that the civil penalty assessed is to be computed by multiplying the number of enrollees affected by the number of days that the violation continues. The bill also requires that the civil penalty amount be adjusted annually based on the average rate of change in rates for the individual and group markets in the prior calendar year beginning on January 1, 2024, and each January 1 thereafter, and specifies that rates include premiums and cost sharing for purposes of these requirements.

The bill additionally provides that, beginning on January 1, 2023, the amounts of civil and administrative penalties enumerated in Sections 1367.01, 1367.03, 1368, 1368.04, 1371.37, 1374.27, 1374.34, 1374.9, 1380, 1387, 1388, 1389.8, 1390, 1393.6, and any other section under Knox-Keene that enumerates a specific penalty amount, is to be multiplied by four. The bill also requires that the civil penalty amount be adjusted annually based on the average rate of change in rates for the individual and group markets in the prior calendar year beginning on January 1, 2024, and each January 1 thereafter, and specifies that rates include premiums and cost sharing for purposes of these requirements. The bill codifies existing regulations that require the director to determine the appropriate amount of the administrative penalty for each violation of

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<sup>4</sup> Sen. Health Com. Analysis of Sen. Bill 858 (Wiener, 2021-22 reg. session) as introduced Jan. 1, 2022 at pp. 4-5.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *California Health Benefits Review Program (CHBRP). Abbreviated Analysis: California Senate Bill 858: Health Care Service Plans: Discipline: Civil Penalties*, Cal. Health Benefits Review Program (Aor. 5, 2022) at 8 available.

<sup>7</sup> *Id.* at 9.

the Knox-Keene Act when assessing administrative penalties based on certain factors, and also expands on some of these existing provisions and adds additional factors.

### 3. Proposed Amendment

As the bill is currently drafted, it is unclear if the bill is intended to increase the civil penalty in Section 1387 to \$25,000 or to \$100,000 because Section 1387 is also specifically included in the provision of the bill that multiplies all existing civil and administrative penalties as of January 1, 2023 by four. If the bill is enacted it will become operative on January 1, 2023. The new operative civil penalty of \$25,000 in Section 1387 would have to be multiplied by four per the requirements in Section 1388.5, making the civil penalty \$100,000. The CHBRP report highlights this confusion as it concluded that the civil penalty under Section 1387 would be \$100,000 when the bill is enacted.<sup>8</sup> The author should amend the bill to make it clear that the civil penalty amount in Section 1387 is intended to be \$25,000. The specific amendment is:

#### Amendment<sup>9</sup>

**SEC. 4.** Section 1388.5 is added to the Health and Safety Code, to read:

**1388.5.** (a) For violations occurring on or after January 1, 2023, the amounts of the civil and administrative penalties enumerated in Sections 1367.01, 1367.03, 1368, 1368.04, 1371.37, 1374.27, 1374.34, 1374.9, 1380, ~~1387~~, 1388, 1389.8, 1390, 1393.6, and any other section in this chapter that enumerates a specific penalty amount, shall be multiplied by four.

(b) For violations occurring on or after January 1, 2024, the amounts of the civil and administrative penalties in subdivision (a) shall also be subject to the annual adjustments described in subdivision (b) of Section 1387.

(c) *This section shall not apply to Section 1387.*

### 4. Statements in support

Health Access California, the sponsor of the bill, writes:

[...]When health plans don't follow the law, the DMHC investigates and is able to impose corrective action plans, along with civil or administrative penalties.

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<sup>8</sup> *Id.* at pp. 1-3.

<sup>9</sup> The amendments may also include the technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

SB 858 will increase most civil penalties from a maximum of \$2,500, an amount set in 1975, to a minimum of \$25,000 per enrollee per violation. Penalties with specific amounts in statute, most of which were enacted in 1999 or 2000 and have remained unchanged since, will be multiplied by four starting in 2024. Penalties will also increase along with plan premiums, to ensure accountability keeps pace with consumer costs.

Most DMHC fines are relatively small, especially given the health plan's finances. Even for the biggest, headline-making penalties in recent years, the fines don't necessarily match the severity and breadth of the violations. Just this year, L.A. Care was fined a historic \$35 million by DMHC for failure to appropriately handle grievances and severe backlog of authorization requests for services over a five year span. However, with over 67,000 grievances and over 9,000 requests for authorization, this seemingly large fine amounts to only a few hundred dollars per instance. [...]

#### 5. Statements in opposition

California Association of Health Plans writes in opposition:

[...] We disagree with the premise of this bill which is based on the logic that making penalties more and more punitive will somehow improve our health care system. California's health plans are heavily regulated under the Knox Keene Act including granting the Director of the Department of Managed Health Care (DMHC) wide authority to levy penalties or revoke licenses of plans in violation of the Act. We believe that current law already grants sufficient enforcement authority to DMHC, which has allowed itself considerable latitude in assessing penalties and demonstrated its willingness in recent years to issue significant fines. In addition to penalties, the DMHC also issues "corrective action plans" which require health plans to remedy problems or face further sanctions.

SB 858 would increase penalties from \$2,500 per violation to a floor amount of \$25,000 per violation, which would then be adjusted annually. This represents a whopping increase in civil penalties by a factor of ten with no limit. The bill would also multiply the amounts of other specified civil and administrative penalties by four and would also annually adjust those penalties. It removes the flexibility of the DMHC to tailor penalties to the situation and creates a new complex layering of considerations it would use as it assesses even more administrative penalties on our members.

The goal of regulatory enforcement should be to correct conduct, when warranted. This leads to improved care for enrollees and ensures providers are afforded their rights under law. An increase in penalties in the amount established by SB 858 appears to be purely punitive. This will backfire by pitting

plans and the DMHC against each other when solutions could otherwise be found that will improve our health care system. The purely punitive penalty structure created by this bill will increase health care costs, jeopardize plan solvency, and mire our system in more complication instead of encouraging collective solutions to challenging problems in health care. [...]

**SUPPORT**

Health Access California (sponsor)  
California Alliance for Retired Americans  
California Labor Federation  
California Pan-Ethnic Health Network  
California State Association of Psychiatrists  
Community Health Initiative of Orange County  
Depression and Bipolar Support Alliance  
Latino Coalition for a Healthy California  
National Health Law Program  
National Union of Healthcare Workers  
Western Center on Law and Poverty  
Young Invincibles

**OPPOSITION**

California Association of Health Plans

**RELATED LEGISLATION**

Pending Legislation: None known.

Prior Legislation: None known.

**PRIOR VOTES:**

Senate Health Committee (Ayes 8, Noes 1)

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