

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1697 (Schiavo)
Version: April 27, 2023
Hearing Date: July 6, 2023
Fiscal: No
Urgency: No
CK

SUBJECT

Uniform Electronic Transactions Act

DIGEST

This bill removes the exemptions from the California Uniform Electronic Transactions Act for authorizations to release medical records and genetic test results. The bill amends the requirement that such authorizations have a specific end date, allowing for an “expiration event,” to be stated instead.

EXECUTIVE SUMMARY

The California Uniform Electronic Transactions Act (UETA) generally authorizes the transaction of business, commerce, and contracts by electronic means. (Civ. Code § 1633.1.) UETA does not apply to transactions that are subject to certain laws, such as laws governing the creation and execution of wills, codicils, or testamentary trusts. (Civ. Code § 1633.3(a).) UETA further lists a series of specific transactions to which it does not apply. Among the transactions exempted are authorizations for the release of medical information and authorizations for the disclosure of genetic test results. (Civ. Code § 1633.3(c).) In order to authorize the sharing of such records, current law requires written signatures.

As the people of California increasingly turn to telehealth options and other remote means of communicating, this bill relaxes the current patient and consumer protections by removing the exemptions within UETA for such authorizations and allowing for electronic signatures to suffice for authorizations to release genetic test results and medical records, including by an employer. The bill also removes the current requirement that such authorizations must have a specific end date. Instead, it allows for an “expiration event” to suffice.

The bill is sponsored by the author. It is supported by the California Dental Association. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Uniform Electronic Transactions Act (UETA), which generally authorizes the transaction of business, commerce, and contracts by electronic means. (Civ. Code § 1633.1 et seq.) UETA does not apply to transactions that are subject to certain laws, such as laws governing the creation and execution of wills, codicils, or testamentary trusts. (Civ. Code § 1633.3(a).)
- 2) Provides a series of specific transactions to which UETA does not apply. Among these exemptions are authorizations for the release of medical information and authorizations for the disclosure of genetic test results. (Civ. Code § 1633.3(c).)
- 3) Establishes, in federal law, the Electronic Signatures in Global and National Commerce Act (E-SIGN), which generally provides for the transmission of electronic signatures, but does not apply to a contract or other record that is governed by: (1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts; (2) a state statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law; or (3) the Uniform Commercial Code, as in effect in any State, as specified. (15 U.S.C. §§ 7001, 7003(a).)
- 4) Excludes from the application of E-SIGN the following specific transactions: (1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings; (2) any notice of (A) the cancellation or termination of utility services (including water, heat, and power), (B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual, (C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities), or (D) recall of a product, or material failure of a product, that risks endangering health or safety; or (3) any document required to accompany any transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. (15 U.S.C. § 7003(b).)
- 5) Requires any person or entity that wishes to obtain medical information, as specified, to obtain a valid authorization for the release of this information. The release must be handwritten by the person who signs it or be in a typeface no smaller than 14-point type. It must be clearly separate from any other language present on the same page and be executed by a signature which serves no other purpose than to execute the authorization. It must be signed and dated by the patient or another legally authorized individual, as specified. The release must

state a specific date after which the authority to disclose the medical information expires. (Civ. Code § 56.11.)

- 6) Subjects a person who improperly discloses, as provided, genetic test results contained in an applicant's or enrollee's medical records without written authorization of the applicant to civil penalties, as specified. A valid written authorization must be written in plain language in typeface no smaller than 14-point type and be dated and signed by the individual or another authorized individual. It must further specify the length of the time the authorization remains valid. (Civ. Code § 56.17.)
- 7) Provides that an authorization for an employer to disclose medical information shall be valid if it is handwritten by the person who signs it or is in a typeface no smaller than 14-point type; is clearly separate from any other language present on the same page and is executed by a signature that serves no purpose other than to execute the authorization; and is signed and dated by the patient or another legally authorized individual, as specified. The authorization must state a specific date after which the authority for the employer to disclose the medical information expires. (Civ. Code § 56.21.)

This bill:

- 1) Deletes the exemptions for the above-described authorizations for release of medical information and genetic test results under the Confidentiality of Medical Information Act.
- 2) Amends the requirement that such authorizations have a specific end date to allow for an "expiration event" to also suffice.
- 3) Provides that an expiration event shall relate to the individual or the purpose of the use or disclosure. The statement "end of the research study," "none," or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

COMMENTS

1. Electronic transactions

In 1999 with the passage of SB 820 (Sher, Ch. 428, Stats. 1999), California enacted the Uniform Electronic Transactions Act (UETA), which was based on a model law to set rules by which electronic commerce may be conducted across the country proposed by the National Conference of Commissioners on Uniform State Laws. One of the motivating factors for enacting a law validating electronic records was the Statute of

Frauds, which requires that certain contracts be in writing. In California, the Statute of Frauds is codified at Section 1624 of the Civil Code, which expressly states that certain contracts are invalid (i.e., unenforceable) unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent. Such contracts include, for example: an agreement that by its terms is not to be performed within a year from its making; an agreement for a lease lasting for a period longer than one year; an agreement for the sale of real property, or of an interest therein; or specified contracts, promises, undertakings, or commitments to loan money or to grant or extend credit, in an amount greater than \$100,000.

Subsequent to UETA's passage, the Electronic Signatures in Global and National Commerce Act (E-SIGN) was enacted at the federal level. E-SIGN generally provides for the transmission of electronic signatures, but contains a number of exemptions. However, it does allow for vehicle sales to be conducted electronically.

UETA provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form, that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation, and that an electronic record or signature satisfies a requirement in the law that a record be in writing or a signature be affixed or if a law provides consequences if there is no record or signature.

UETA, however, does not apply to all contracts. For example, expressly excluded from UETA are: transactions that are subject to a law governing the creation and execution of wills, codicils, or testamentary trusts; specified transactions in the Uniform Commercial Code that were specifically drafted in consideration of electronic records; and transactions subject to a law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed or initialed, such as real estate transactions.

2. Allowing for electronic signatures in connection with authorizations to release specified information

Relevant here, written authorizations for the release of medical information from a provider of health care, health care service plan, pharmaceutical company, contractor, or employer and for the release of genetic test results contained in an applicant's or enrollee's medical records by a health care service plan are exempt from UETA.

This bill removes these exemptions allowing patients to authorize the release of their medical information and genetic test results through electronically signing such authorizations.

Given the rise of telehealth services, especially in the wake of the COVID-19 pandemic, it is arguably appropriate to allow for such releases to be executed by electronic

signature. Removing these exemptions removes a barrier for patients seeking to provide the relevant authorizations. However, there is concern that with the move to electronically signing such authorizations, patients will be less aware of what exactly they are authorizing. To mitigate any concerns in this area, the author has agreed to an amendment that requires copies of these authorizations to be provided to the signatories thereto.

According to the author:

AB 1697 will reduce administrative barriers patients face in authorizing medical providers to share their medical history. As transactions have increasingly occurred online, and as digital security has expanded to support legally binding electronic signatures, electronic signatures are becoming a secure and commonplace method of providing an individual's legal authorization. With the advent of remote work and telehealth, allowing electronic signatures for medical release forms is an opportunity to reduce administrative barriers for patients. AB 1697 does so by ensuring that electronic signatures are given equal legal to physical signatures.

Writing in support, the California Dental Association states:

The use of telehealth services has significantly increased since the onset of the COVID-19 pandemic, which has included dentistry. As access to oral health through the use of teledentistry becomes more readily available, as in other areas of medicine, so should the availability of patient's ability to use electronic signatures. Without updating existing law, patients may be able to receive critical and much needed care remotely, but then face barriers on the administrative side, having to either go in person or mail release forms back to their providers. AB 1697 will reduce administrative barriers for patients while continuing to protect patients through HIPAA.

3. Relaxing the requirement for a specified end date

Currently, the above authorizations all require a specified end date upon which the authority to release records by the specified person or entity ends. For instance, Section 56.11 of the Civil Code provides that an authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor must state a specific date after which the provider of health care, health care service plan, pharmaceutical company, or contractor is no longer authorized to disclose the medical information. Section 56.21 imposes a similar requirement for an authorization for an employer to disclose medical information. Section 56.17 provides for specified penalties for improper disclosure of genetic test results contained in an applicant's or enrollee's medical records by a health care service

plan. Such disclosures must be made pursuant to a written authorization by the applicant that specifies the length of time the authorization shall remain valid.

This bill amends these requirements by alternatively allowing for specification of an “expiration event” to instead suffice. Such event must relate to the individual or the purpose of the use or disclosure. The statement “end of the research study,” “none,” or similar language is sufficient if the authorization is for a use or disclosure of protected health information for research, including for the creation and maintenance of a research database or research repository.

The ostensible goal appears to be to allow tailoring of authorizations to the purpose for which the information is being disclosed. For example, if medical information is being disclosed to determine whether one qualifies for a drug trial, it is arguably more efficient to allow the authorization to extend until one’s eligibility for the trial is determined or until the trial is complete, rather than an arbitrary period of time.

The purpose of the specified end date in current law is to protect the privacy of the signatories with respect to this incredibly sensitive personal information. The patient, enrollee, or applicant is also put on clear notice of how long the authorization will be in effect. However, allowing for such an expiration event severely weakens these protections as, by the plain language of the new provision, the authorization can exist in perpetuity. This could potentially allow the person or entity who gains authorization to access these medical records or genetic test results to request such information at any point into the future.

In order to provide some meaningful backstop against this outcome, the author has agreed to amendments that provide some outer temporal boundary for a stated expiration event. Pursuant to the amendments, an expiration event cannot extend beyond one year from the date of signing, except in the case of clinical trials or research studies. In the latter cases, the expiration event may extend longer than one year, but in no event can it extend beyond the end of the relevant clinical trial or study.

SUPPORT

California Dental Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1179 (Glazer, Ch. 39, Stats. 2022) amended UETA and allowed applications for Medicare supplement policies that are regulated by the California Department of Insurance to be signed electronically.

SB 361 (Umberg, 2021) would have authorized sellers of motor vehicles to offer buyers entering into a conditional sale or lease contract for the purchase or lease of a vehicle the option of signing their respective contracts electronically. The bill was later gutted and amended and died on the Assembly Inactive File.

AB 380 (Dababneh, 2017) *See Comment 1.*

AB 1743 (Dababneh, 2016) *See Comment 1.*

AB 1097 (Holden, Ch. 439, Stats. 2015) permits alarm companies, upon the consent of the contracting customer, to execute home solicitation contracts electronically, as specified, and allows for the execution of a notice of cancellation by electronic means pursuant to UETA.

AB 1131 (Dababneh, Ch. 638, Stats. 2015) amended the UETA to authorize an insurer, agent, broker, or any other person licensed by the Department of Insurance to send life insurance records by electronic transmission. This bill also allowed these licensees to send any written record by electronic transmission if not specifically excluded and if the licensee meets specified requirements.

SB 820 (Sher, Ch. 428, Stats. 1999) *See Comment 1.*

PRIOR VOTES:

Assembly Floor (Ayes 75, Noes 0)

Assembly Privacy and Consumer Protection Committee (Ayes 11, Noes 0)
