Sex, Drugs, And Other New Laws For 2023

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2022 Legislative Session

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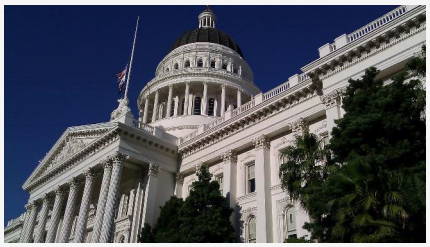
- 2353 bills considered in 2022
- CHA monitored/lobbied 464 bills potentially impacting hospitals and other healthcare providers
- 1442 bills passed out of both houses and made it to the Governor's desk
- 1273 were ultimately chaptered (bills signed plus constitutional amendments and resolutions not requiring Governor's signature)
- 169 vetoed



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Reproductive and Personal Rights

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AB 1666 (Bauer-Kahan): Abortion: Civil Actions

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Addresses any law of another state that authorizes a person to bring a civil action against a person or entity that:

- *Receives or seeks an abortion*
- *Performs or induces an abortion*
- *Knowingly engages in conduct that aids or abets the performance or inducement of an abortion*
- *Attempts or intends to engage in the above conduct*

- Any such law is **contrary to the public policy of California**
- Prohibits CA courts from:
  - Applying such out-of-state law to a case or controversy heard in CA state court
  - Enforcing or satisfying a civil judgment received through an adjudication under such a law

Adds Health & Safety Code §123467.5—URGENCY LEGISLATION effective 6/24/2022

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AB 2091 (M. Bonta): Disclosure of Information: Reproductive Health

Addresses subpoenas/requests for information based on either:

- *Another state's laws that interfere with a person's rights as set forth in CA's Reproductive Privacy Act, or*
- *A "foreign penal civil action": civil action authorized by the law of another state in which the sole purpose is to punish an offense against the public justice of that state*

- Prohibits **health care provider, health care service plan, contractor, or employer** from releasing medical information related to an individual seeking or obtaining an abortion
  - Does not apply when the release is pursuant to a subpoena not otherwise prohibited
  - Possible fines for insurer violation
- Prohibits compelling a person to identify or provide information related to an individual who sought or obtained an abortion
  - Applies to state, county, city, or local criminal, administrative, legislative, or other proceedings

Adds §56.108 to Civil Code; amends Code Civ. Proc. §§2029.200, 2029.300, and 2029.350; amends H & S Code §123466; amends Ins. Code §791.29; amends Penal Code §3408—URGENCY LEGISLATION effective 9/27/2022

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Licensing Boards: Abortions

Requirements for Medical Board, Osteopathic Medical Board, Board of Registered Nursing, Physician Assistant Board

AB 657 (Cooper): Requires these boards to expedite licensure process of an applicant who can demonstrate they intend to provide abortions within their scope of practice

AB 2626 (Calderon): Prohibits these boards from taking adverse licensure actions against a health care provider solely for performing an abortion in accordance with licensee's practice act and CA's Reproductive Privacy Act

- Also prohibits disciplining a licensee because they have been disciplined or convicted in another state in which they are licensed/certified solely for performing abortions in that state

Adds Chapter 1.2 to Division 2 of the Business and Professions Code

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SB 1375 (Atkins): Nursing: Abortion and Practice Standards

- Expands training options for NPs and CNMs to achieve clinical competency for purposes of performing abortion by aspiration techniques (AAT)
- Clarifies that NP functioning independently pursuant to B&P §§2837.103 or 2837.104 may perform AAT without supervision by a physician
- Neither NP nor CNM can perform AAT after first trimester

Amends Business & Professions Code §2725.4

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SB 107 (Wiener): Gender Affirming Care

Enacts safeguards against enforcing other state's laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California

- Prohibits **health care providers, health care service plans, or contractors** from releasing medical information related to a person or entity allowing a child to receive gender-affirming health/mental health care in response to any civil action or foreign subpoena based on another state's anti-gender affirming care laws
- Broadens the authority of CA courts to make decisions in cases involving a child present in CA to obtain gender-affirming health/mental health care
- Declares that taking specified steps to enforce another state's anti-gender affirming care law is against CA public policy

Adds §56.109 to Civil Code; amends Code Civ. Proc. §§2029.300 and 2029.350; amends §§3421, 3424, 3427, and 3428 of, and adds §3453.5 to, the Family Code; and amends §1326 of, and adds §819 to, Penal Code

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AB 2223 (Wicks): Reproductive Health Protections

- Strengthens and clarifies existing legal prohibitions on imposing civil and criminal penalties for pregnancy loss
- Creates a new civil action that can be brought by an individual's whose rights to be free of civil and criminal penalties for pregnancy loss are violated by a "state actor"
  - Allows award of actual damages + punitive damages + $25,000 penalty + injunction + attorneys fees to prevailing plaintiff
- Party whose rights have been violated can also bring an action under the Bane Civil Rights Act, including for an exercise of prosecutorial discretion

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AB 2223 (Wicks): Reproductive Health Protections

- Limits the duties of coroners to be consistent with these laws/CA's rights to reproductive privacy
  - Removes the duty to hold inquests for deaths related to or following known or suspected self-induced or criminal abortions
  - Coroner's statements on a certificate of fetal death regarding the causes/conditions of the fetal death cannot be used for a criminal prosecution or civil claim seeking damages against any person
  - Repeals law requiring all other fetal deaths to be handled as deaths without medical attendance

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Cannabis

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AB 1954 (Quirk): Patients Using Cannabis

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- Physician cannot automatically deny treatment or medication to a "qualified patient" (per Medical Marijuana Program) based solely on a positive drug screen for THC or report of medical cannabis use
  - Requires case-by-case evaluation that includes determining whether the patient's use of medical cannabis is "medically significant" (defined) to the treatment or medication
- Using medical cannabis as recommended by licensed physician does not constitute use of an illicit substance
- Physician cannot be punished or denied any right or privilege for having administered treatment/medication to qualified patient

Adds Business and Professions Code §2228.5

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SB 988 (Hueso): Medicinal Cannabis: Fixing Ryan's Law

RYAN'S LAW—ORIGINAL REQUIREMENTS	RYAN'S LAW—2023 CHANGES
Requires facility to "*reasonably restrict the manner in which a patient stores and uses medicinal cannabis, including requiring the medicinal cannabis to be stored in a locked container, to ensure the safety of other patients, guests, and employees of the health care facility, compliance with other state laws, and the safe operations of the health care facility*" (H&S Code § 1649.2(a)(4)	**Deletes this requirement**
Requires facility to "*develop and disseminate written guidelines for the use of medicinal cannabis within the health care facility*" (H&S Code § 1649.2(a)(4)	**Deletes this requirement**

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Medicinal Cannabis: Fixing Ryan's Law

RYAN'S LAW—ORIGINAL REQUIREMENTS	RYAN'S LAW—2023 CHANGES
"*. . . [H]ealth facilities permitting patient use of medicinal cannabis shall comply with drug and medication requirements applicable to Schedule II, III, and IV drugs and shall be subject to enforcement actions by [CDPH]*" (H&S Code § 1649.3)	**Deletes this requirement.**

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Medicinal Cannabis: Fixing Ryan's Law

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SB 988's new requirements for health facilities effective 1/1/2023

- Must require patient or primary caregiver to be responsible for acquiring, retrieving, administering, and removing medicinal cannabis
- Must require secure storage at all times in a locked container in patient's room or other designated area, or with patient's primary caregiver
- Must prohibit health care professionals and facility staff (including physicians, nurses, pharmacists) from administering or retrieving medicinal cannabis from storage
- Upon discharge, any remaining cannabis is to be removed by patient or patient's primary caregiver
  - If this isn't possible, it must be stored in a locked container until disposed of in accordance with the health facility policy and procedure governing medicinal cannabis

Health & Safety Code: amends §§1649.1, 1649.2, 1649.4, 1649.5; repeals and adds §1649.3

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Consent, Decision-Making, and Disclosure

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AB 2338 (Gipson): Health Care Decisionmakers and Surrogates

- If patient lacks capacity, the following may make health care decisions on the patient's behalf in descending order of priority:
  - Patient's surrogate chosen by the patient
  - Patient's agent pursuant to advance health care directive or health care power of attorney
  - Patient's conservator or guardian having the authority to make health care decisions
- If patient does not have a legally recognized decisionmaker, a health care provider or designee of the health care facility caring for the patient may choose a surrogate from any of the following (subject to patient disqualifying them):
  - Spouse or domestic partner
  - Child
  - Parent
  - Sibling
  - Grandchild
  - Relative or close personal friend

Probate Code: amend §4711, add §4712

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AB 2338: Health Care Decisionmakers and Surrogates (cont.)

- Surrogate qualifications:
  - Adult who has demonstrated special care and concern for patient;
  - Is familiar with patient's personal values and beliefs to extent known
  - Is reasonably available and willing to serve
- Allows patient to designate a surrogate by personally informing a **designee of the health care facility** (in addition to the supervising health care provider caring for the patient)

Probate Code: amend §4711, add §4712

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AB 2288 (Choi): Advance Health Care Directives: Mental Health Treatment

- Clarifies that "health care" and "health care decision" includes care, treatment, services, procedures, and decision making relating to mental health
- Modifies the statutory advance health care directive form to make clear that person executing it may provide for directions relating to, or empower a power of attorney to make decisions regarding, mental health issues
- Makes witnesses/notarization requirement more prominent on the statutory advance health care directive form

Probate Code: amends §§4615, 4617, 4701

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SB 1419 (Becker): Health Information

- Expands law requiring health care professionals to provide the patient with the results of clinical laboratory tests include **imaging scans**
- Expands existing limits on the ability of a representative of a minor to inspect or obtain copies of the minor's patient records to include **clinical notes**
- HIV test results or test revealing a malignancy: clarifies that legal provisions restricting disclosure by electronic means only apply to:
  - newly positive HIV cases or
  - new or recurrent malignancies
- Starting 1/1/2024, requires health plans and insurers to have specified application programming interfaces to facilitate patient and provider access to health information

Amends §§123115 and 123148, and adds §1374.196 to Health & Safety Code; adds §10133.12 to Insurance Code

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Behavioral Health

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AB 2275 (Wood): Involuntary Commitment

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Clarifies current LPS law:

- 72-hour clock starts when the person is first taken into custody on a 5150 hold

  "The 72-hour period begins at the time when the person is first detained. . . ." (Welf. & Inst. Code § 5150(a))

- Designated facilities cannot detain a person for longer than 72 hours from the time they were first detained

For the first time addresses what must happen after the first 72 hours, when a person has not yet been admitted into a designated LPS facility:

- If patient is not released within 72 hours of the involuntary detention, hospital must notify the county patients' rights advocate (Welf. & Inst. Code § 5500)
- If patient has not been certified for intensive treatment under § 5152 and remains detained, a **certification review hearing** (CRH) must be held within 7 days of initial detention (unless judicial review has been requested)
- Applies to minors

Welfare & Institutions Code: amends §§5150, 5151, 5256, 5275, 5350, 5354, and 5585.20

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AB 2275 (Wood): Involuntary Commitment (cont.)

Initiating CRH Process

- Inform detained person of their rights with respect to a hearing, including the right to assistance of another person, including the county patients' rights advocate (PRA), to prepare for the hearing
- Answer questions and address concerns regarding involuntary detention
- Inform them of their rights under § 5254.1 (judicial review by *habeas corpus*)
- Attorney or PRA required to meet with the patient
- CRH must occur within 4 days of the date the patient is certified for intensive treatment unless postponement is requested by patient or their attorney/advocate
- Facility to make reasonable attempts to notify family or others designated by patient of the time and place of the CRH hearing

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AB 2275 (Wood): Involuntary Commitment (cont.)

CRH Hearing

- Location of hearing
  - Compatible with, and least disruptive of, the treatment being provided
  - At an appropriate place at the facility where the person is receiving treatment
- Hearing to be conducted by court-appointed commissioner or referee, or a CRH hearing officer
- "Evidence in support of the certification decision shall be presented by a person designated by the director of the facility"
- DA or county counsel may present evidence
- Patient to be given oral notification of the decision (continued involuntary detention vs. not) at the conclusion of the hearing. Written notification to facility, attorney/advocate for the patient "as soon thereafter as practicable."

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AB 2275 (Wood): Involuntary Commitment (cont.)

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Patient's Rights at the CRH Hearing

- To be present unless, with the assistance of attorney or advocate, they waive this right
- To present evidence on own behalf
- To question evidence in support of certification decision
- To make reasonable requests for the attendance of facility employees who have knowledge of, or participated in, the certification decision
- Have the hearing officer informed if patient has received medication within 24 hours or more prior to the hearing and of the probably effects of the medication
- Rules of procedure/evidence don't apply; hearing is to be conducted in an impartial and informal manner

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SB 1227 (Eggman): Involuntary Commitment: Intensive Treatment

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- Permits an additional intensive treatment period of up to 30 days under specified circumstances
- Professional staff must file a petition in the superior court seeking approval for this additional intensive treatment
- Court may order that patient be held for up to an additional 30 days of intensive treatment if certain requirements are met
- Patient cannot be held beyond the original 30-day period unless a court has determined that an additional period of up to 30 days of treatment is required

Welfare & Institutions Code: amends §5270.55 and adds §52270.70

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Hospitals and Other Facilities

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AB 1394 (Irwin): General Acute Care Hospitals: Suicide Screening

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- No later than 1/1/2025, GACHs must routinely screen patients ≥ 12 for **risk of suicidal ideation and behavior**
- Must have Policies and Procedures that require:
  - **Identification**, as part of a medical screening, patient's risk for suicidal ideation and behavior
  - **Documentation** of the risk in the medical record
  - **Providing** patient who exhibits a sign of a risk a current referral list of private and public and community agencies that provide, or arrange for, evaluation, counseling, and care of persons experiencing such risk, including hotlines and locally available mental health services
  - **Designation** of licensed staff responsible for implementation

Adds Health & Safety Code §1259.5

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SB 864 (Melendez): General Acute Care Hospitals: Drug Screening

Requires a GACH treating a patient who is receiving a "urine drug screening" to include testing for fentanyl in the screening.

- Requirement in effect until 1/1/2028

Adds and repeals Health & Safety Code §1259.3

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AB 2185 (Akilah Weber): Forensic Exams: Domestic Violence

- Provides domestic violence victims access to free medical evidentiary exams by local Sexual Assault Response Teams or other qualified medical evidentiary examiners
- Makes changes to the examination forms; requires them to be in electronic format
- Permits victims receiving forensic medical exams for domestic violence to have a qualified social worker, victim advocate, or support person present
- Medical facilities where medical evidentiary exams are conducted must:
  - Have written P&P for maintaining the confidentiality of medical evidentiary examination reports, including proper preservation and disposition if the examination program ceases operation, in order to prevent reports' destruction
  - Implement system to maintain reports in a manner that facilitates release as required/authorized by law

Amends Penal Code §11161.2

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Providers

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AB 2085 (Holden): Crimes: Mandated Reporters

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- Amends/clarifies the definition of "**general neglect**" for purposes of the Child Abuse and Neglect Reporting Act to require that the child be at "**substantial risk of suffering serious physical harm or illness**"
- Specifies that "general neglect" does not include a parent's economic disadvantage
- Clarifies that the duty to report suspected child abuse is only required when the abuse is "reasonably" suspected

Amends Penal Code §§11165.2, 11166, and 11167

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AB 1278 (Nazarian): Physician Payments Notice

Applies to MBC- and OMBC-licensed physicians, except those who work in hospital ED

- Physician must provide, at a patient's initial office visit, a written or electronic notice of the CMS Open Payments database
  - Written notice must be signed and dated by patient/representative and copy provided to them
  - Record of notice must be kept in patient record (written or electronic)
- Physician must post a specified Open Payments database notice in each location where they practice and in area likely to be seen by all who enter the office
- Starting 1/1/2024, must conspicuously post notice on the website for the physician's practice (if there is one)
- If physician is employed by a health care employer, employer must comply with posting requirements.

Adds Article 6.5 to Chapter 1 of Division 2 of the Business & Professions Code

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SB 1259 (Laird): Pharmacists: Opioid Antagonists

Existing law authorizes a pharmacist to furnish naloxone hydrochloride in accordance with standardized procedures and protocols developed and approved by the Board of Pharmacy and the Medical Board of California, subject to completion by the pharmacist of specified continuing education on the use of naloxone hydrochloride.

SB 1259 authorizes pharmacists to furnish opioid antagonists in addition to naloxone hydrochloride by replacing references to naloxone hydrochloride in current law with "federal Food and Drug Administration-approved opioid antagonists."

Amends Business & Professions Code §4052.02

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AB 2098 (Low): Physicians: Unprofessional Conduct

- Makes it **unprofessional conduct** for a physician to **disseminate misinformation** or **disinformation** relating to COVID-19, including false or misleading information regarding the nature and risks of the virus, its prevention and treatment, and the development, safety, and effectiveness of COVID-19 vaccines
- As "unprofessional conduct," disciplinary action can be taken under the Medical Practice Act for violations

Lawsuits have been filed challenging this bill as impermissibly vague and an inappropriate restriction on free speech. So far at least one judge has issued a preliminary injunction prohibiting its enforcement. Consult with legal counsel before relying on this bill.

Adds Business & Professions Code § 2270

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MICRA Reform

CALIFORNIA HOSPITAL ASSOCIATION 36

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Medical Injury Compensation Reform Act (1975)

- **Limited non-economic damages to $250,000** (pain and suffering, loss of consortium (benefits of a family relationship, affection and sexual relations/ability to have children), disfigurement)
  - No cost-of-living adjustment
- Shortened statute of limitations
- Allowed periodic payments when future damages are ≥ $50,000
- Allowed introduction of evidence of benefits plaintiff receives from collateral source(s)
- Limited contingency attorney's fees

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2022 Ballot: "Fairness for Injured Patients Act" (FIPA)

FIPA, if it had passed, would have largely eliminated MICRA's protections for health care providers and their insurers by:

- Increasing noneconomic damages to approx. **$1.35M** on 1/1/2023, followed by annual CPI increases
- Eliminating (1) defendants' ability to introduce evidence of collateral payments and (2) option for periodic payments for future damages
- Increasing attorney's fee limits to reflect inflation since 1987 and annually thereafter
- Giving plaintiffs a longer time to file suit
- "**Catastrophic injury**" cases:
  - **No damages cap**
  - Court required to award **"reasonable attorney's fees" to the prevailing plaintiff in a catastrophic injury case** , with these fees **to be paid by defendant** in addition to damages

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2022: AB 35 - MICRA Reform

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Overview of Changes Effective Jan. 1, 2023

- Non-economic damages
  - Change in amount of cap
  - Different caps for injury cases vs. death cases
  - Separate caps for up to three categories of defendants
- Changes the formula for contingency attorney's fees; can petition for more
- Increases threshold for periodic payments from $50,000 to $250,000
- Enacts broad and absolute discovery and evidentiary protections for pre-litigation benevolent gestures, expressions, and statements of fault

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AB 35: MICRA Reform

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What Does Not Change

- No limit on economic damages
- Evidence of collateral payments still allowed
- No change in the (shortened) statute of limitations
- Option for binding arbitration
- 90-day advance notice of claim
- Option for periodic payments for future damages
- Contingent attorney's fees paid from plaintiff's recovery, never by defendant(s)

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AB 35: Non-Economic Damages

- **Increases cap for non-economic damages**
  - **Non-death cases**
    - Cap increased to $350,000 on 1/1/2023
    - Cap increases by $40,000/year beginning 1/1/2024 until it reaches $750,000
    - 2% annual increase for inflation thereafter
  - **Death cases**
    - Cap increased to $500,000 on 1/1/2023
    - Cap increases by $50,000/year beginning 1/1/2024 until it reaches $1 million
    - 2% annual increase for inflation thereafter

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AB 35: Three Possible Damages Caps

Creates separate caps for three categories of defendants

1. **"Health care provider"** (Civ. Code §3333.2(j)(1))
   - Primarily people licensed or certified under specified code provisions, including MD, DO, RN, NP, etc.
   - Does not include health care institutions as defined
2. **"Health care institution"** (Civ. Code §3333.2(j)(2))
   - One or more health care facilities licensed pursuant to Chapter 2 (§1250 et seq.) of Div. 2 of H&S Code owned or operated by the same entity or its affiliates
   - Includes "all persons and entities for which vicarious liability theories, including, but not limited to, the doctrines of respondeat superior, actual agency, and ostensible agency, may apply"

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AB 35: Separate Caps for Defendant Categories

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3. "Unaffiliated" health care institution or provider (Civ. Code §§ 3333.2(b)(3), (j)(3)

- **WHO**: Defendant must be "unaffiliated"
  - Basically unconnected with any other defendant: not in same health system, employed by, under contract with, etc.
  - Whether a defendant is "unaffiliated" is determined at the time of the professional negligence

AND

- **WHAT**: Defendant's liability must be based on acts of professional negligence **separate and independent** from the acts of any defendant in category (1) or (2)

AND

- **WHERE**: This defendant's acts must have occurred at, or in relation to medical transportation to, a health care institution unaffiliated with a health care institution described in (2)

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AB 35: Separate Caps

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- Each cap applies regardless of the number of defendants in that category or the number of causes of action (theories of recovery)
  - Combined liability for non-economic damages of all defendants in a single category cannot exceed the amount of the cap
- No defendant (provider or institution) can be liable in more than one category
- New caps apply to all cases filed or arbitrations demanded on or after 1/1/2023
- Cap(s) in effect at the time of judgment, arbitration award, or settlement apply

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AB 35: Benevolent Statements

- New discovery and evidentiary protection for all **pre-litigation expressions of sympathy, regret, or benevolence** (including statements of fault) by a health care provider
  - Broadly covers:
    - "Benevolent gestures": statements/gestures that convey a sense of compassion or commiseration, including sympathy, regret, acceptance of fault
    - That relate to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health outcome
    - Made to that person or the family or representative of that person
    - Prior to the filing of a lawsuit or demand for arbitration
  - **These statements are confidential, privileged, and not subject to discovery or disclosure**
  - **Cannot be used/admitted in any civil, administrative, licensing, or other proceeding**

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Questions?

Raise your hand to ask a question.

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Thank you!

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