



April 21, 2022

The Honorable Anthony Portantino
Chair, Senate Appropriations Committee
California State Senate
1021 O Street, Suite 7630
Sacramento, CA 95814

The Honorable Patricia Bates
Vice Chair, Senate Appropriations Committee
California State Senate
1021 O Street, Suite 7130
Sacramento, CA 95814

RE: ATA COMMENTS ON SENATE BILL 1189

Dear Chair Portantino and Vice Chair Bates:

On behalf of ATA Action, I am writing to comment on and offer amendments to Senate Bill 1189 relating to biometric information and consumer privacy.

ATA Action, the American Telemedicine Association's affiliated trade association focused on advocacy, advances policy to ensure all individuals have permanent access to telehealth services across the care continuum. ATA Action supports the enactment of state and federal telehealth coverage and fair payment policies to secure telehealth access for all Americans, including those in rural and underserved communities. ATA Action recognizes that telehealth and virtual care have the potential to truly transform the health care delivery system – by improving patient outcomes, enhancing safety and effectiveness of care, addressing health disparities, and reducing costs – if only allowed to flourish.

Among other provisions, Senate Bill 1189 would require private entities in possession of biometric information as defined to develop and make available to the public a written policy establishing a retention schedule and guidelines for permanently destroying the collected biometric information. It would also require private entities to obtain a written release and consent to the collection and use of the biometric information. Finally, the proposed legislation would grant California consumers legal status to bring civil action against private entities which violate these provisions.

Our organization understands the public policy imperative to protect consumers' sensitive biometric data, and we wholeheartedly support the Legislature's efforts to protect Californians' private information. However, we believe that certain provisions within this bill would create confusion for and place unnecessary burdens on providers delivering health care services via telehealth technologies in California.

ATA ACTION

901 N. Glebe Road, Ste 850 | Arlington, VA 22203
Info@ataaction.org



First, ATA Action has some concerns with the understanding of “biometric information” defined in §1798.300 of the bill.

Our organization supports the Legislature’s decision to amend the bill to exclude information captured by a provider of health care for the purpose of health care treatment, payment or operations under the federal Health Insurance Portability and Accountability Act (HIPAA) from what is considered biometric information. Per the wording of the provision, however, it is unclear whether the definitions of “treatment, payment and operations” contained in HIPAA apply or whether the intent is only to exclude information gathered by HIPAA-covered entities. We would like to emphasize that not all providers of high-quality virtual care are covered by HIPAA when delivering telehealth services to patients. HIPAA provisions apply to “covered entities” only if they transmit health information electronically in conjunction with covered transactions. Such transactions typically relate to health insurance reimbursement for services.

Our organization believes that health care providers should be permitted to use the full range of innovative telehealth modalities – including those to which the provisions of HIPAA do not apply – without being forced to comply with the additional consumer privacy requirements contemplated in this bill. Any California-licensed provider who has access to a patient’s private health care information is already subject to California’s existing laws regarding the collection and treatment of such information and could be held accountable by the appropriate regulatory boards were he or she to breach the patient’s confidentiality. In the interest of ensuring that providers are able to utilize all of the appropriate telehealth technologies available to them in an efficient manner, ATA Action suggests adding another health-related exception to what is considered biometric information. Such an exception could read as follows:

(2) *“Biometric information” does not include any of the following:*

(H) Information collected, used, or stored to treat or diagnose a patient in a healthcare setting.”

Finally, we approve of the Legislature’s amendment in §1798.306(a)(1) which strikes individuals’ ability to collect statutory damages of up to \$1000 *per violation* per day as part of civil actions brought against entities which violate the provisions of this bill. The Legislature instead allows plaintiffs to collect statutory damages of up to \$1000 per day. As previously written, this provision would have resulted in plaintiffs being awarded grossly disproportionate damages, often for mere procedural violations of the provisions in the bill. Even with the change to per-day damages, individual plaintiffs could collect up to \$364,000 in one year alone for mere procedural violations. As has been the case in Illinois since the passage of its Biometric Information Privacy Act (BIPA), approving any type of per-day damages would likely result in lawsuits being brought against private entities, often for frivolous reasons or due to inadvertent noncompliance, and potentially significant financial costs being levied against businesses large and small. Per-violation damages would seem to most adequately protect all parties.

ATA ACTION



We thank you for the opportunity to comment. We urge you and your colleagues to consider our proposed amendments to Senate Bill 1189 and the effect that passing the bill in its current form would have on access to high-quality, affordable health care in California. Please do not hesitate to let us know how we can be helpful in your efforts to advance common-sense telehealth policy in your state. If you have any questions or would like to discuss the telehealth industry's perspective further, please contact me at kzebley@ataaction.org.

Kind regards,

A handwritten signature in black ink that reads "Kyle Zebley". The signature is fluid and cursive, with the first name "Kyle" and last name "Zebley" clearly distinguishable.

Kyle Zebley
Executive Director
ATA Action