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**AB-435 Hearing aids: locked programming software: notice.** (2021-2022)

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**Assembly Bill No. 435**

**CHAPTER 266**

An act to amend Sections 2538.35, 2538.38, 2539.4, and 2539.10 of the Business and Professions Code, relating to healing arts.

[ Approved by Governor September 23, 2021. Filed with Secretary of State September 23, 2021. ]

**LEGISLATIVE COUNSEL'S DIGEST**

AB 435, Mullin. Hearing aids: locked programming software: notice.

Existing law, the Speech-Language Pathologists and Audiologists and Hearing Aid Dispensers Licensure Act, provides for the licensure and regulation of speech-language pathologists, audiologists, and hearing aid dispensers by the Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board, which is within the Department of Consumer Affairs. A violation of the act is a crime.

Existing law requires a licensed hearing aid dispenser or a licensed audiologist, upon the consummation of the sale of a hearing aid, to deliver to the purchaser a written receipt containing specified information, including, among other things, the address and office hours at which the licensee is available for servicing of the hearing aid and the terms of any guarantee or written warranty. Existing law requires a licensed hearing aid dispenser or a licensed audiologist to maintain certain records, including a copy of the written receipt, for 7 years and to permit inspection by the board upon reasonable notice.

This bill would refer to a licensed dispensing audiologist instead of a licensed audiologist in the above-described provisions. The bill would require a licensed hearing aid dispenser or a licensed dispensing audiologist, before the consummation of the sale of a hearing aid that uses proprietary programming software or locked, nonproprietary software, as those terms are defined, to provide the purchaser with a written notice in 12-point type or larger that contains specified language informing the purchaser that the hearing aid can only be serviced or programmed at specific facilities or locations. The bill would require the written notice to be signed by the purchaser before the sale and would require the licensed hearing aid dispenser or a licensed dispensing audiologist to maintain a copy of the notice in accordance with the record-keeping requirements described above. By expanding the scope of a crime, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 2538.35 of the Business and Professions Code is amended to read:

**2538.35.** (a) To the extent not inconsistent with federal law, a licensee shall, before the consummation of a sale of a hearing aid that uses proprietary programming software or locked, nonproprietary programming software, provide the purchaser with a written notice in 12-point type or larger that states the following: "The hearing aid being purchased uses proprietary or locked programming software and can only be serviced or programmed at specific facilities or locations." The written notice shall be signed by the purchaser before the sale. The licensee shall keep and maintain a copy of the notice in accordance with Section 2538.38.

(1) For purposes of this subdivision, the following definitions apply:

(A) "Proprietary programming software" means software used to program hearing aids that is supplied by a hearing aid distributor or manufacturer for the exclusive use by affiliated providers. This software is locked and inaccessible to nonaffiliated providers.

(B) "Locked, nonproprietary programming software" means software that any provider can render inaccessible to other hearing aid programmers.

(b) A licensee shall, upon the consummation of a sale of a hearing aid, deliver to the purchaser a written receipt, signed by or on behalf of the licensee, containing all of the following:

(1) The date of consummation of the sale.

(2) Specifications as to the make, serial number, and model number of the hearing aid or aids sold.

(3) The address of the principal place of business of the licensee, and the address and office hours at which the licensee shall be available for fitting or postfitting adjustments and servicing of the hearing aid or aids sold.

(4) A statement to the effect that the aid or aids delivered to the purchaser are used or reconditioned, as the case may be, if that is the fact.

(5) The number of the licensee's license and the name and license number of any other hearing aid dispenser, temporary licensee, or trainee licensee, who provided any recommendation or consultation regarding the purchase of the hearing aid.

(6) The terms of any guarantee or written warranty, required by Section 1793.02 of the Civil Code, made to the purchaser with respect to the hearing aid or hearing aids.

**SEC. 2.** Section 2538.38 of the Business and Professions Code is amended to read:

**2538.38.** A licensee shall, upon the consummation of a sale of a hearing aid, keep and maintain records in the licensee's office or place of business at all times and each record shall be kept and maintained for a seven-year period. All records related to the sale and fitting of hearing aids shall be open to inspection by the board or its authorized representatives upon reasonable notice. The records kept shall include:

(a) Results of test techniques as they pertain to fitting of the hearing aid.

(b) A copy of the written notice and the written receipt required by Section 2538.35 and the written recommendation and receipt required by Section 2538.36 when applicable.

(c) Records of maintenance or calibration of equipment used in the practice of fitting or selling hearing aids.

**SEC. 3.** Section 2539.4 of the Business and Professions Code is amended to read:

**2539.4.** (a) To the extent not inconsistent with federal law, a licensed dispensing audiologist shall, before the consummation of a sale of a hearing aid that uses proprietary programming software or locked, nonproprietary programming software, provide the purchaser with a written notice in 12-point type or larger that states the following: "The hearing aid being purchased uses proprietary or locked programming software and can only be serviced or programmed at specific facilities or locations." The written notice shall be signed by the purchaser before the sale. The licensed dispensing audiologist shall keep and maintain a copy of the notice in accordance with Section 2539.10.

(1) For purposes of this subdivision, the following definitions apply:

(A) "Proprietary programming software" means software used to program hearing aids that is supplied by a hearing aid distributor or manufacturer for the exclusive use by affiliated providers. This software is locked and inaccessible to

nonaffiliated providers.

(B) "Locked, nonproprietary programming software" means software that any provider can render inaccessible to other hearing aid programmers.

(b) A licensed dispensing audiologist shall, upon the consummation of a sale of a hearing aid, deliver to the purchaser a written receipt, signed by or on behalf of the licensed dispensing audiologist, containing all of the following:

(1) The date of consummation of the sale.

(2) Specifications as to the make, serial number, and model number of the hearing aid or aids sold.

(3) The address of the principal place of business of the licensed dispensing audiologist, and the address and office hours at which the licensed dispensing audiologist shall be available for fitting or postfitting adjustments and servicing of the hearing aid or aids sold.

(4) A statement to the effect that the aid or aids delivered to the purchaser are used or reconditioned, as the case may be, if that is the fact.

(5) The number of the licensed dispensing audiologist's license and the name and license number of any other hearing aid dispenser, temporary licensee, or audiologist who provided any recommendation or consultation regarding the purchase of the hearing aid.

(6) The terms of any guarantee or written warranty, required by Section 1793.02 of the Civil Code, made to the purchaser with respect to the hearing aid or hearing aids.

**SEC. 4.** Section 2539.10 of the Business and Professions Code is amended to read:

**2539.10.** A licensed dispensing audiologist shall, upon the consummation of a sale of a hearing aid, keep and maintain records in the licensed dispensing audiologist's office or place of business at all times and each such record shall be kept and maintained for a seven-year period. These records shall include:

(a) Results of test techniques as they pertain to fitting of the hearing aid.

(b) A copy of the written notice and the written receipt required by Section 2539.4 and the written recommendation and receipt required by Section 2539.6, when applicable.

**SEC. 5.** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.