ATRA American Tort Reform Association

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May 13, 2019

The Honorable Maxine Grad
House Judiciary Committee
Vermont House of Representatives
115 State Street
Montpelier, VT 05633

RE: Opposition to Unsound Medical Monitoring Legislation (S. 37)

Dear Chairwoman Grad:

I am writing on behalf of the American Tort Reform Association (ATRA), which represents a broad-based coalition of businesses and other entities concerned about abuse of the civil justice system, to respectfully urge you to reject S. 37. This legislation proposes to create a new legal right for people who are not sick and may never become ill to recover damages based on mere exposure to a substance that is only *potentially* harmful. If adopted, this legislation would be the most expansive "medical monitoring" law in the country, and would subject countless Vermont businesses and other entities to potentially massive new liability exposure.

Over the last twenty years, most states and the Supreme Court of the United States have rejected invitations to award damages to mere "exposure only" claimants who do not have any present physical injury. These courts have appreciated that awards for so-called medical monitoring raise a host of serious policy problems, including the depletion of resources for future claimants who become sick. The U.S. Supreme Court, for example, said that such claims, if permitted, could produce a "flood" of cases and result in "unlimited and unpredictable liability."

In addition to inviting these overarching policy concerns, S. 37 suffers numerous specific defects that make it particularly unsound public policy. Under the version of the legislation approved by your Committee, "any disease, illness, ailment, or adverse physiological or chemical change *linked* with exposure to a toxic substance" could give rise to a lawsuit. A person could, for instance, argue that feeling uneasy or apprehensive about any exposure to a potentially harmful substance constitutes an "ailment" deserving of lifetime medical monitoring compensation.

In addition, the bill's inclusion of any "adverse physiological or chemical change" in the definition of "disease" could similarly give rise to medical monitoring lawsuits alleging a potentially harmful exposure simply resulted in stress. The full scope of what may constitute an "adverse physiological or chemical change" allowing for medical monitoring compensation is also ambiguous.

The bill's definition of a "toxic substance" adds to the legislation's extraordinarily broad scope. S. 37 defines a toxic substance to include "any substance, mixture, or compound that *may cause*

personal injury or disease" and can be shown by expert testimony to increase any risk of disease. This definition would include exposures to countless substances, many of which are not ordinarily thought of as "toxic" or recognized as toxic under state or federal law.

In addition, the bill's substantive provisions continue to ignore the basic principle of toxicology that the "dose makes the poison," meaning there needs to be an assessment of whether the amount of an exposure is sufficient to actually cause an injury. The legislation, instead, would allow a person to recover medical monitoring damages for *mere exposure* to a toxic substance where the person shows that the exposure results only in "a greater risk" of disease – regardless of whether that increase in risk is marginal.

The result is a broad new statutory cause of action with relatively few safeguards to protect against abusive litigation. This concern for abuse is also heightened by several other bill provisions, including a requirement that a claimant recover his or her attorney fees in any successful medical monitoring action and an express provision stating that employees exposed to a substance outside the workplace may bring medical monitoring claims. Even more troubling is the recent inclusion of an express provision stating that the legislation can be applied *retroactively* to any exposure to a toxic substance discovered by a person over the past six years, regardless of whether the applicable statute of limitations for such a claim has expired.

The adverse impacts of this legislation on businesses and other entities throughout the state could be enormous. The legislation would introduce potentially massive new liability exposure upon businesses overnight and could produce a flood of litigation that strains judicial resources, drives up costs, leads to fewer jobs, and causes businesses to relocate or avoid setting up shop in Vermont. In 2018, Governor Phil Scott vetoed legislation similar to S. 37 due to concerns it would have a "catastrophic" impact on the state's economy. The full consequences of S. 37 may be difficult to predict because, again, no state has ever adopted such a broad cause of action for medical monitoring.

For these reasons, ATRA strongly urges you to reject S. 37.

Sincerely,

Matt Fullenbaum
Director of Legislation