

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

YourPeople, Inc. dba Zenefits FTW  
Insurance Services,  
Appellant.

Docket No. 02-2017-INS-00009

**INITIAL ORDER**

Agency: Office of the Insurance Commissioner  
Agency No. 16-0129

**FILED**

2017 OCT 26 A b: 13

HEARINGS UNIT  
OFFICE OF  
INSURANCE COMMISSIONER

**1. ISSUE**

1.1. Whether RCW 48.30.140 and RCW 48.30.150 prohibit a licensee like Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits free or at less than fair market value to the public, as discussed in the Consent Order entered into by the parties in November 2016 and the Demand for Hearing Filed by Zenefits on February 16, 2017?

**2. ORDER SUMMARY**

2.1. Contrary to the Consent Order entered into by the parties in November 2016 and the Demand for Hearing Filed by Zenefits on February 16, 2017, RCW 48.30.140 and RCW 48.30.150 do not prohibit Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits free or at less than fair market value to the public.

2.2. However, RCW 48.30.140 and RCW 48.30.150 prohibit Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits free or at less than fair market value to those who purchase insurance through Zenefits or otherwise designate Zenefits as Broker of Record, as discussed in the Consent Order entered into by the parties in November 2016 and the Demand for Hearing Filed by Zenefits on February 16, 2017.

**3. HEARING**

3.1. Hearing Date: July 11-14, 2017

3.2. Administrative Law Judge: Lisa N. W. Dublin

3.3. Appellant: YourPeople Inc., dba Zenefits FTW Insurance Services ("Zenefits")

3.3.1. Representatives: Peter Walsh, Jennifer Fleury and consultant Beth Berrendt of Hogan Lovells US, LLP; Rob McKenna, Orrick Herrington & Sutcliffe, LLP; Senior Counsel Doug Tilley, and General Counsel Joshua Stein, Zenefits

3.3.2. Witnesses:

- 3.3.2.1. Jeff Hazard, Vice President of Sales and Principal Agent for Zenefits
- 3.3.2.2. Carol Sureau, Former Deputy Commissioner of Legal Affairs for OIC
- 3.3.2.3. Stefan Kalb, Zenefits customer

3.4. Agency: Office of the Insurance Commissioner ("OIC")

- 3.4.1. Representative: Darryl Colman; observers: Ross Valore and Dave Jorgenson

3.4.2. Witnesses:

- 3.4.2.1. John Hamje, Former Deputy Commissioner for the Consumer Protection division of OIC
- 3.4.2.2. Debra Calhoun, OIC investigator

3.5. Exhibits: Exhibits A-BB, BE-BU, BX, CD-CU, 1-7, 11-12, 14, 15 p.1, 16 pp. 1-3, 17, 18 pp. 1-4, 19, 20 pp 1-48, and 21 were admitted. Exhibits 15 p.1, 16 pp. 1-3, 18 pp. 1-4, and 20 pp. 1-48 are subject to the protective order entered July 13, 2017.

#### 4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

*Jurisdiction*

- 4.1. On November 21, 2016, Zenefits and OIC entered into a Consent Order, which authorized Zenefits to request an administrative hearing within 90 days. Ex. CR.
- 4.2. On or about February 16, 2017, OIC received Zenefits' Demand for Hearing.

*Zenefits Products and Services*

- 4.3. Zenefits is an online human resources management company and insurance brokerage founded in 2013 that offers a cloud-based, software-as-a-service platform for the administration of human resources, payroll and employee benefits. Zenefits operates in all 50 states, and in Washington works primarily with small businesses. Zenefits refers to the software functions it offers as applications ("apps"). Zenefits offers a variety of apps, accessible by Smartphone; some of these apps are free to everyone, and others Zenefits charges a fee. Other third-party apps that Zenefits partners with, such as Google, Microsoft, and Uber, charge a fee to users directly.

- 4.4. Zenefits is also a licensed insurance broker in the state of Washington in the areas of health, dental, vision, life, disability, property and casualty insurance, and has been at all times relevant hereto. Ex. 3, p.1; Ex. AZ, p.5. As such, Zenefits negotiates insurance rates with carriers on employees' behalf, sells insurance products to employers for their employees, and manages these policies as part of its employee benefits management services. Zenefits then collects commissions from the insurance carriers on policies sold.
- 4.5. Under its Terms of Use Agreement dated May 23, 2017, Zenefits notifies customers they "are not required to use Zenefits for insurance services in order to obtain an account and use the Service." Testimony of Hazard.
- 4.6. For first quarter 2017, commissions on insurance sales allegedly amounted to 25% or less of Zenefits' new-customer revenue. However, as of August 2015, about 90% of Zenefits revenue companywide was generated through the insurance services it provided. Ex. AZ, p.14. Also as of August 27, 2015, approximately 31.2% of Zenefits' 657 Washington customers used the Zenefits HR platform as well as Zenefits as an insurance producer. Ex. 18, p.2.
- 4.7. Zenefits has four (4) tiers, or levels, of HR services available, which Zenefits has named after various metals. At the Bronze level, certain core HR services are free to all except (currently) Washington residents. These free HR services include account setup and access to the dashboard, on-boarding and off-boarding employees, PTO tracking, reports, and managing email accounts. See Exs. 5, BP. Anyone can go to the Zenefits website, create an account, and obtain the free HR services offered at the Bronze level. These HR services are available to employers regardless of whether they purchase insurance.
- 4.8. Also at the Bronze level, customers have access to the employee benefits management app, where they can purchase insurance products from amongst Zenefits' offerings, and obtain benefits management services. Ex. BP. Customers are not obligated to purchase insurance through Zenefits to take advantage of the other HR apps at this level. However, customers cannot obtain Zenefits' employee benefits management services unless they purchase insurance products through Zenefits.
- 4.9. At the next level, the Silver level, at a cost of \$5.00 per month per employee, customers have access to Premium HR applications including time-off management, managing and tracking federal compliance deadlines, and ACA assistance. Ex. BP, p.3. Customers may also access all Bronze-level offerings. At the next level, the Gold level, at a cost of \$8.00 per month per employee, customers have access to payroll management features, as well as all the apps available at the Silver level. For \$12.00 per month per employee, customers can

access the Platinum level of apps, which includes all the apps available at the Gold, Silver and Bronze levels as well as access to a live HR specialist. *Id.*

#### *Zenefits Marketing*

- 4.10. Zenefits markets itself primarily through its website – [www.zenefits.com](http://www.zenefits.com) -- as well as through printed materials and live demonstrations. During live demonstrations to employers, Zenefits uses a script, slides and talking points. Ex. 6. In its slide show, in answer to the question “So, what is Zenefits?”, Slide Three states most pertinently, “First and foremost, Zenefits is an insurance brokerage.” The “Intent” is to “Clarify Zenefits’ services and introduce Zenefits as an insurance brokerage in addition to being an HR platform.” Ex. 6, p.13. Zenefits’ Talking Points reiterate this later, stating “Zenefits’ core function is that of an insurance brokerage. We are a national broker managing over \$350 million in premiums.” *Id.*, p.15.
- 4.11. Zenefits’ Talking Points state most relevantly: “The best part is that our [sic] platform is free to use. We don’t license our technology, charge per month or per employee, or lock you into any contracts. Because we’re an insurance brokerage, we actually make all our money from existing broker commissions.” *Id.*, p.14.
- 4.12. For the HRIS & Onboarding Demo, Zenefits shows the following:
  1. Following the on-boarding process, we integrate to Payroll
  2. Now this is what it looks like when we sync with your company benefits. Your plans, license and insurance cards all stay the same, however we consolidate this into our platform for ease of use
  3. Go through medical – slowly – outline options + co-pay. Same for dental & vision
  4. And from an employee standpoint – he/she is done – Jeremy is done!
  5. Employee signs all your forms, start the payroll onboarding....
  6. \*Now if we go back to the beginning, the employer spent about 2 minutes entering in 10 fields and that’s it. The employee spent about 10-15 minutes and has electronically signed their offer letter, employee handbook, NDA, W4, benefit application, etc. As your broker, we get all of that information pushed directly into the carrier websites. We set up the employee’s profile in Zenefits and we push all their info into Payroll. So we completely eliminate the admin work associated with adding employees to those systems and we ensure the information is accurate across all systems.

Ex. 6, p.7.

So after employee is completed onboarding, Zenefits is: 1) Pushing the employee information into Payroll....2) Prompting the Employee to enroll in their benefits plans....3) Calculating the deductions from their plans...4) Push their deductions back to payroll....5) Store everything in 1 happy, central place so you have full and detailed records on every employee.

*Id.*, p.5.

- 4.13. Zenefits' marketing materials to Washington businesses provide, under the heading "**Here's how Zenefits works. We think you'll like it.**":

*Zenefits connects your HR systems together – from your payroll to your health insurance provider* – so you and your employees can manage all your HR in one online dashboard. That means you won't need to log in seven places just to manage your HR. But it also means that any changes you make in one system will automatically be pushed to the others.

Ex. 7, p.4 (Italics added). These same materials discuss how employees "**can easily**" ... "request vacation and time off", "view the full employee directory", "add dependents to insurance", "view insurance plans and pricing", and "clock-out and clock-in". *Id.*, p.5. Zenefits further explains that it is "the only software platform that *unifies* payroll, benefits and compliance without expensive software or complex integrations." *Id.*, p.9 (italics added). Similarly, Zenefits states, "**Get a single platform to manage all of your HR, benefits and compliance needs.**" *Id.*, p.19.

- 4.14. Zenefits admits that "PEOs<sup>1</sup> charge up to \$2,000.00 per year per employee" whereas "Zenefits offers all of the same services – end-to-end payroll, benefits, and HR outsourcing – without the steep fees or long-term contracts." *Id.*, p.7. According to Zenefits, "we don't rely on admin fees to be profitable." *Id.*, p.8. Rather, Zenefits "operates on broker commissions alone, which means that [Zenefits] can offer the same core services" that its competitors allegedly offer for approximately \$97.00-\$150.00 per employee per month, "with a better online interface, for free." *Id.*, pp.36, 51, 57, 63.
- 4.15. In a white paper, Zenefits identifies the "headache" of "juggling too many HR Systems", stating in particular part, "Chances are you've got payroll software (ADP, Zenpayroll, etc.), a health insurance portal (Blue Cross, Cigna, etc.), and some form of an HR document depository. The funny thing is that these systems

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<sup>1</sup> "PEOs" stands for Professional Employer Organizations. Ex. 1, p.8.

rely on a lot of the same information, and yet none of them are able to talk to one another. **YOUR HR SOLUTION SHOULD connect and sync your HR systems**". Ex. 7, p.100. This white paper then identifies the additional "headache": "Vendors are sucking up your time (and money)." Zenefits states in particular part, "You've got your payroll provider, your insurance broker, your carrier, your FSA administrator, your 401(k) manager, your time-tracking software partner ... (we could go on, but let's just skip ahead)...and your lawyer. And unless you invite them all to dinner, these folks will probably never meet one another. But it doesn't have to be this way – imagine if you could manage all of your vendors on one screen so that all of their systems look, act, and feel the same. **YOUR HR SOLUTION SHOULD help you manage your vendors**". Ex. 7, p.101. Zenefits then identifies itself as the remedy for these headaches. *Id.*, p.105.

- 4.16. In another white paper, regarding employee benefits, Zenefits identifies itself as the solution for millennials infuriated with repeatedly filling out the same information on various forms: "Zenefits connects your HR systems together in minutes so that you and your employees can manage all of your HR and benefits from a single online dashboard." Ex. 7, p.123.
- 4.17. Zenefits admits that most of its insurance customers use the HR platform. Testimony of Jeff Hazard. However, Zenefits insurance customers are not required to use any of the HR programs or cloud-based software. Ex. AZ, p.6.

#### *OIC Investigation*

- 4.18. OIC is comprised of several divisions that oversee investigative, compliance and enforcement matters. Following his election, Insurance Commissioner Kreidler began to streamline these divisions. Under the direction of Commissioner Kreidler and former Deputy Commissioner of Legal Affairs Carol Sureau, a culture change took place, ensuring OIC employed core values including predictability, consistency and transparency. This was deemed the "Kreidler Process." Ms. Sureau helped to develop a structure of management to implement the Kreidler Process. This included an emphasis on ensuring opinions and investigations were reduced to a written document.
- 4.19. A new policy for enforcement action went into place under the Kreidler Process. Once OIC identified an issue or complaint to investigate, it assigned an investigator to do a full and formal investigation into the issue or complaint and write an investigation report. That report would be sent to Legal Affairs for legal analysis by staff attorneys and potentially the division chair. The staff attorney would then write a memorandum ("memo") indicating whether or not there was a violation, outlining the facts and applying the law. If there was a violation, the memo would be sent to either one of two places. If it was a minor producer violation it would be sent to the Producer Enforcement Group ("PEG") comprised of a deputy from legal

affairs, a deputy from consumer protection and a senior staff attorney, for further review. If it was a major violation it would be sent to the Compliance Committee, comprised of all deputies and the assigned assistant attorney general. The Compliance Committee would also create a memo and make a recommendation for action. This memo would be sent to the staff attorney for enforcement.

- 4.20. In response to an inquiry in June 2014, OIC's Legal Affairs division conducted an informal review of Zenefits' business model which did not comply with the above investigative process. See Exs. F, W. Later in 2014, OIC's Consumer Protection Division led by Deputy Commissioner John Hamje received emails, including from the Independent Insurance Agents & Brokers of Washington ("IIABW"), alleging that Zenefits was providing unlawful inducements/rebates. See Exs. H, K, L. In October 2014, Legal Affairs Division Deputy Commissioner AnnaLisa Gellerman along with Commissioner Kreidler and Chief Deputy Commissioner Jim Odiorne met with Zenefits, to discuss this. See Exs. U, W.
- 4.21. On January 9, 2015, Assistant Attorney General (AAG) Marcia Stickler issued an "Informal Legal Opinion re compliance of Zenefits with RCW 48.30.150" ("Opinion"). Ex. T. This Opinion provided in relevant part:

Is the free human resources platform provided by Zenefits, one of which includes acting as an insurance producer, compliant with RCW 48.30.150?

Yes.

[RCW 48.30.150] requires that a prohibited inducement have some connection with an insurance transaction or otherwise be an inducement, or incentive, to the purchase of insurance. The prohibition on giving insureds or prospective insureds "any prizes, goods, wares or merchandise of an aggregate value in excess of \$25" in RCW 48.30.150 does not seem to apply because Zenefits offers the human resources applications without charge or obligation to the general public and does not depend on or seek insurance business as a result. *Those who do buy insurance through Zenefits get no special reward or privilege, i.e., a rebate.* Since the insurance and non-insurance products/services offered by Zenefits are available to the general public without cost and there is no inducement or relation to the insurance products it offers, Zenefits does not violate the illegal inducement statute.

...  
Inasmuch as small businesses and consumers benefit from this service, and the purchase of insurance is not connected to the

other services, and the user will get no enhanced benefit if he or she does purchase insurance from Zenefits, there is not a violation of the illegal inducement or rebate statute.

*Id.* (italics added).

- 4.22. Following this opinion, in February 2015, OIC commenced a formal investigation into Zenefits' offerings as they related to the anti-rebating and anti-inducement provisions of the state insurance code.
- 4.23. OIC assigned Investigator Debra Calhoun to conduct the formal investigation. As part of her investigation, Investigator Calhoun contacted Zenefits customers. One customer commented that he "was interested in the online dashboard that would allow employees to update their personal information (address/phone), schedule time off, and all this information could be updated throughout the payroll and insurance benefit sites without the need to fill out paperwork for each area." Ex. AI, p.12. Another customer similarly reflected that "the program gives the employees the ability to handle their own PTO, HR paperwork, and benefits through a portal with easy on screen comparisons. Now, they can monitor their own information without needing to contact her." Ex. AI, p.23. A third customer commented:

They did recently change their BOR to Zenefits, but that process is not up and running yet. She liked the idea that the software will generate all the needed health insurance notices directly to the employees. The system also tracks that the employee received the notice and logs that information to show the business is in compliance.

Ex. AI, p.29; Ex. 14, p.29. Yet another customer, who had not yet made Zenefits its broker of record ("BOR"), commented that "if an employee chooses to get insurance coverage the software would allow for an auto deduct from the employees paycheck." Ex. AI, p.32; Ex. 14, p.32.

- 4.24. Investigator Calhoun met with Zenefits, and also received written responses to her requests for information, from Zenefits legal counsel. In one such response dated April 3, 2015, Zenefits counsel wrote as follows:

**In information request No. 13(c) you ask "can the employer remain with their current broker of record, keep their insurance coverage the same, and receive all the benefits of Zenefits HR software free of charge? Or, would it be required that the broker of record for the company's insurance coverage be changed to Zenefits?**

Yes, an employer can maintain its current broker of record, keep its insurance the same and receive all the non-insurance benefits of the Zenefits HR platform – but not all of those other benefits are free. As noted above, many of the services available on Zenefits have a separate fee (e.g., 401(k)'s, commuter benefits, stock options tracking). The employer would have access to all of Zenefits' non-insurance related services, at the same price and on the same terms as if it used Zenefits for insurance. In this scenario, Zenefits would not administer the employer's insurance and could not offer insurance-related services (e.g., COBRA benefits, HSAs) as it would not have the necessary information to do so. The employer would continue to administer its insurance benefits as before with its existing broker of record.

Ex. 5, p.11 (underlines added).

In another response dated September 17, 2015, Zenefits counsel stated:

Here is how it works. Zenefits makes accounts available to everyone, for free. After the customer creates an account, the customer has immediate access to the Zenefits online HR platform and dashboard. Zenefits' platform offers an a la carte variety of services.... Because services are offered a la carte, an employer chooses only the services it wants. Access to the platform and its free services is **not conditioned in any way on the purchase of insurance** or any other fee-based service from Zenefits. Services that are offered for free are offered free to everyone. There are also no discounts on fee-based services or special benefits if the employer does purchase insurance.

...

In sum, Zenefits offers employers a menu of a la carte employee benefits services. Customers choose the services they want with no obligation or even incentive to use Zenefits for insurance.

Ex. 19, p.3 (underlines added); Ex. AR, pp. 3,7.

- 4.25. During this time, other states issued opinions regarding whether Zenefits violated their particular anti-rebating and anti-inducement statutes. Montana, North Carolina, Arizona, and Maryland issued opinions that Zenefits' practice of offering free software did not violate their state anti-rebating statutes, in important part because the software could be used for free with or without the purchase of insurance through Zenefits. See Exs. AG, AR p.26-27, AW.

4.26. Meanwhile, DC Hamje continued to respond to questions and concerns about Zenefits from the IIABW. DC Hamje also researched past attorney general opinions in Washington and other states regarding anti-inducement and anti-rebating statutes. In particular, DC Hamje was influenced by an April 1996 advisory letter written by an assistant attorney general for the state of Alaska, regarding the constitutionality of Alaska's anti-rebate statute, which set out several policy reasons in favor of anti-rebate laws. Ex. B. These policy reasons included the following:

- Unrestricted rebating keeps prices hidden and unavailable to government monitoring for discrimination.
- Rebating will jeopardize the livelihood of a small town producer, opening the door to concentration of business by the big players and monopolistic practices.
- Rebates will result in undue consumer emphasis on price over quality of products.
- Even well-intentioned deregulation in this area will result in unanticipated negative consequences for the general public, including, at minimum, a torrent of sharp business practices by producers.

Ex. B, pp. 9-10.

4.27. In December 2015, and again in February 2016, DC Hamje met with Zenefits representatives to determine whether the anti-inducement and anti-rebate statutes applied, and if so, whether Zenefits qualified for exception. With regard to the exception set out in RCW 48.30.157 for reduced charges for unrelated services, DC Hamje reviewed a bulletin prepared by former Insurance Commissioner Dick Marquardt which stated the purpose behind RCW 48.30.157. See Ex. 11. This bulletin stated in relevant part:

*Are there special precautions to be observed when an insurance licensee acts in a dual capacity part of which is non-insurance related? Yes, discounts or reductions in charges or the giving of other benefits or inducements to an insured, directly or indirectly, as a result of an insurance purchase may constitute rebating or a violation of the illegal inducement statute.*

*Id.* After quoting a 1978 state attorney general opinion illustrating these circumstances in the context of an insurance brokerage specializing in pension and profit-sharing plans, the bulletin went on to state the purpose of RCW 48.30.157:

As is evident, the statute permits a licensee who provides additional services to come up with an arrangement whereby the combined services may be considered in connection with the total fee. If insurance is part of the client's program, the agent could apply part of the commission against the overall charge because part of what he does as an estate planner, for example, would also have been done as an insurance agent. The statute permits a plan to avoid, in effect, a double charge for certain of the services involved in the overall transaction.

*Id.*; Ex. 11.

- 4.28. Ultimately, DC Hamje determined that Zenefits did not qualify for exception under RCW 48.30.157 because Zenefits offered HR services at no charge whatsoever, and turned his findings back over to DC Gellerman and Legal Affairs. On or around August 1, 2016, Investigator Calhoun issued her Final Investigative Report, which found in part: "The allegation that Your People Inc. – Dba: Zenefits FTW Insurance Services' (Zenefits) business model violates Washington's illegal inducement laws by offering a free online cloud-based human resource platform to Washington insurance clients is substantiated." Ex. AZ, p.2.
- 4.29. On November 21, 2016, OIC and Zenefits executed a Consent Order which stated that the Insurance Commissioner found that Zenefits offers core HR apps free, and certain premium non-insurance apps for a fee, to customers regardless of whether they designate Zenefits as BOR. Ex. CR, p.2. The Consent Order also stated that the Insurance Commissioner found that "for certain insurance-related features centered on insurance enrollment and administration, Zenefits requires a client to designate Zenefits as its broker of record. Once designated as broker of record, Zenefits imports the insurance information into its system and collects the insurance commissions related to those insurance products." *Id.* Under the Consent Order, Zenefits agreed these findings were accurate. *Id.*, pp.3-4.
- 4.30. The Consent Order stated the Insurance Commissioner concluded that "RCW 48.30.140 and RCW 48.30.150 prohibit a licensee like Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits for free or at less than fair market value to the public." *Id.*, p.3. Under the Consent Order, the parties agreed that Zenefits disputed OIC's legal interpretation and could challenge it through the administrative process. The parties also agreed that Zenefits would stop providing "free use of its online, cloud-based, software-as-a-service platform that integrates the administration of human resources, payroll, and employee benefits; or (2) engage in conduct that violates RCW 48.30.140 or RCW 48.30.150 or both" until the administrative or judicial process was complete or a legislative act clarified the legality of Zenefits' conduct at issue. *Id.*, pp. 4-5.

4.31. At the evidentiary hearing, Zenefits submitted into evidence the supporting declarations of certain customers unhappy with the Consent Order. One such unhappy customer decided to designate Zenefits as BOR “because I was frustrated with the experience I had had with the slow and unwieldy process of administering benefits through our previous insurance broker. They made the process of evaluating and selecting plans very time consuming and confusing, paper-based, and not integrated into any of our HR systems....” Ex. BQ, p.3. Another unhappy customer made Zenefits its BOR in part because Zenefits was “able to electronically feed premium information for any insurance plan into our existing QuickBooks accounting and payroll software for correctly calculating payroll contributions and deductions.” Ex. BR, p.3.

## 5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions by a preponderance of the evidence<sup>2</sup>:

### *Jurisdiction*

5.1. I have jurisdiction over the parties and subject matter under Chapters 34.05, 34.12 and 48.04 RCW.

5.2. The burden of proof in an administrative hearing is on the party seeking relief, in this case Zenefits. See *Schaffer v. Weast*, 546 U.S. 49 (2005).

### *Washington Anti-Rebating and Anti-Inducement Statutes*

5.3. Except to the extent provided for in an applicable filing with the commissioner then in effect, no insurer, insurance producer, or title insurance agent shall, as an inducement to insurance, or after insurance has been effected, directly or indirectly, offer, promise, allow, give, set off, or pay to the insured or to any employee of the insured, any rebate, discount, abatement, or reduction of premium or any part thereof named in any insurance contract, or any commission thereon, or earnings, profits, dividends, or other benefit, or any other valuable consideration or inducement whatsoever which is not expressly provided for in the policy. RCW 48.30.140.

5.4. No insurer, insurance producer, title insurance agent, or other person shall, as an inducement to insurance, or in connection with any insurance transaction, provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give, or promise,

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<sup>2</sup> Zenefits argues that a heightened, “clear and convincing” standard applies, and that OIC bears the burden of proof in this matter. However, Zenefits cites only to an unpublished, unpersuasive opinion from the state Court of Appeals, Division II (*Len v. Office of the Superintendent of Public Instruction*, 188 Wn.App. 1040 (2015)). Unless a statute or due process requires differently, the preponderance of the evidence standard applies to resolve disputes in administrative proceedings. *Fox v. State*, 154 Wn.App. 517, 525, citing *Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 797 (1999).

or allow to, or on behalf of, the insured or prospective insured in any manner whatsoever any prizes, goods, wares, gift cards, gift certificates, or merchandise of an aggregate value in excess of one hundred dollars per person in the aggregate in any consecutive twelve-month period. RCW 48.30.150(1)(c).

- 5.5. We give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *C.J.C. v. Corporation of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708 (1998), *citing Erection Co. v. Dept. of Labor and Industries*, 121 Wn.2d 513, 518 (1993). Substantial weight and deference should be given to an agency's interpretation of the statutes and regulations it administers. *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn.App. 495, 518 (1996).
- 5.6. It is well-established by both Zenefits and OIC that, prior to the November 21, 2016 Consent Order, any Washingtonian could access Zenefits' website, create an account, and have access to a limited array of core online HR services Zenefits offers, regardless of whether he or she bought insurance from Zenefits or otherwise made Zenefits BOR. Although (1) Zenefits may hope, if not intend, that such free HR service use will at some point lead users to purchase insurance services through Zenefits, and (2) Zenefits' viability as a company may depend on a number of such free HR service users and non-insurance service users ultimately purchasing insurance, Zenefits does not require these customers, directly or indirectly, to purchase insurance to use the free core HR services, and in fact the majority of Washington customers do not. Because Zenefits' free core HR services are available to all, regardless of whether insurance is purchased, such services do not violate RCW 48.30.140 and RCW 48.30.150 as an inducement to purchase insurance or as a rebate for purchasing insurance.
- 5.7. OIC argues that an inducement to insurance does not require a *quid pro quo*, and that the free HR services available to everyone are sufficiently connected with the purchase of insurance, even after insurance has been purchased, to satisfy RCW 48.30.140 and RCW 48.30.150. In fact, Zenefits markets itself as an insurance company when introducing customers to the free HR services. However, for the majority of Zenefits' Washington customers, the free core HR services are, in and of themselves, a significant value without the insurance offering, and the option to purchase insurance benefits through Zenefits or name Zenefits BOR is something possibly to consider sometime in the future. In addition, Zenefits' free core HR services promote innovation and help small businesses grow, which is good for Washington. The policy concerns for insureds that DC Hamje identified are outweighed by the value that free, mobile HR applications provide to Washington businesses. Because the connection between Zenefits' free core HR services to the public, and the purchase of insurance, is tenuous, Zenefits does not violate

RCW 48.30.140 and RCW 48.30.150 in offering and providing them to Washingtonians.

- 5.8. Zenefits' position vis-à-vis RCW 48.30.140 and RCW 48.30.150 falters, however, at the time customers purchase insurance through Zenefits, or make Zenefits their BOR. At that point, Zenefits makes available to its customers the full integration of their employees' insurance information with payroll and other HR services which (a) goes beyond the terms of the insurance contract, (b) goes beyond mere management of insureds' policies, and (c) is not available to those who do not purchase insurance through Zenefits or make Zenefits BOR. As Zenefits marketing materials proclaim and demonstrate, once customers use Zenefits for insurance, customers can authorize Zenefits to take and move employee information into payroll and other apps, fully integrating employees' insurance information into all relevant aspects of customers' HR services. As Zenefits admits, this full integration, marketed heavily as not just highly convenient, but valued at hundreds of dollars per employee per year, is not available to customers who do not use Zenefits as BOR.
- 5.9. Zenefits' references to other free benefits administration services provided by other Washington insurance brokers to their insurance customers, such as education seminars, a benefits helpline, secure 24/7 online access to employee benefits information and a client portal to an online service center, fall short of the full HR integration Zenefits freely offers only to its insurance customers. Nor has Zenefits persuasively shown that any statutory exceptions apply.
- 5.10. Zenefits argues that it is no different than Expedia, banks, Regence and others that allegedly integrate insurance products with other non-insurance offerings. However, these organizations' insurance offerings are not at issue in this matter, and no determination is made by this tribunal regarding these organizations' compliance with the anti-inducement and anti-rebating statutes of the state insurance code.
- 5.11. Contrary to Zenefits' counsel's representations, such full HR integration is a significant, heavily-promoted, special benefit, offered and freely given only after insurance through Zenefits has been effected, and thus amounts to an improper rebate under RCW 48.30.140. In addition, such full integration offered and freely given only in connection with the purchase of insurance through Zenefits, amounts to an improper inducement under RCW 48.30.150.

## 6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

- 6.1. The Office of the Insurance Commissioner action is MODIFIED.

- 6.2. RCW 48.30.140 and RCW 48.30.150 do not prohibit Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits free or at less than fair market value to the general public, regardless of whether insurance is purchased, as discussed in the Consent Order entered into by the parties in November 2016 and the Demand for Hearing Filed by Zenefits on February 16, 2017.
- 6.3. RCW 48.30.140 and RCW 48.30.150 prohibit Zenefits, acting directly or through affiliates, from offering valuable software functions or other valuable benefits free or at less than fair market value to those who purchase insurance through Zenefits or otherwise designate Zenefits as Broker of Record, as discussed in the Consent Order entered into by the parties in November 2016 and the Demand for Hearing Filed by Zenefits on February 16, 2017.

Issued from Tacoma, Washington on the date of mailing.



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Lisa N. W. Dublin  
Administrative Law Judge  
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

## **APPEAL RIGHTS**

### **FINAL ORDER:**

An initial order does not become a final order until the Insurance Commissioner reviews it.<sup>3</sup> The Insurance Commissioner's Chief Hearing Officer will automatically review this matter and issue a final order.

### **PETITION FOR REVIEW:**

In addition to the automatic review, any party may file a Petition for Review.<sup>4</sup> If you file a Petition for Review, the Chief Hearing Officer will consider your specific objections to the Initial Order and your arguments for a different result.

You must file your Petition for Review with the Office of the Insurance Commissioner (OIC) within twenty (20) days of the date OAH mailed the Initial Order.<sup>5</sup> "File" means served on all other parties and delivered during business hours.<sup>6</sup> Mail a copy to the other parties at the addresses in the Certificate of Mailing below.

The Petition for Review must specify all parts of the Initial Order that you dispute and the evidence that supports the Petition.<sup>7</sup> Other parties may file a reply to the Petition within 10 days after the petitioner serves the Petition.<sup>8</sup>

Deliver the Petition for Review and Reply to the following address:

Office of Insurance Commissioner  
Chief Hearing Officer  
Hearings Unit, OIC  
PO Box 40255  
Olympia, WA 98504-0255

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<sup>3</sup> WAC 284-02-070(2)(c)(i).

<sup>4</sup> RCW 34.05.464; WAC 10-08-211.

<sup>5</sup> WAC 10-08-211.

<sup>6</sup> WAC 10-08-110.

<sup>7</sup> WAC 10-08-211(3).

<sup>8</sup> WAC 10-08-211(4).

## CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 02-2017-INS-00009

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

<p>Joshua Stein, CCO and VP Legal Your People Inc. dba Zenefits FTW Insurance Services North Tower, 303 Second Street #401 San Francisco, CA 94107 <b>Appellant</b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Peter Walsh Hogan Lovells US LLP 80 South Eighth Street, Suite 1225 Minneapolis, MN 55402 <b>Appellant Representative</b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Jennifer Fleury Hogan Lovells US LLP 555 Thirteenth Street, N.W. Washington, DC, 20004 <b>Appellant Representative</b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Robert McKenna Orrick Herrington &amp; Sutcliffe LLP 701 5<sup>th</sup> Avenue, Suite 5600 Seattle, WA 98104 <b>Appellant Representative</b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Thomas Welsh Orrick Herrington &amp; Sutcliffe LLP 400 Capital Mall Suite 3000 Sacramento, CA 95814 <b>Appellant Representative</b></p>	<p><input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Darryl Colman Insurance enforcement Specialist MS: 40255 PO Box 40255 Olympia, WA 98504 <b>Agency Representative</b>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Dorothy Seabourne-Taylor Office of Insurance Commissioner MS: 40255 PO Box 40255 Olympia, WA 98504 <b>Agency Contact</b>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Chief Hearing Officer Hearings Unit, OIC MS:40255 PO Box 40255 Olympia, WA 98504 <b>Agency Contact</b>	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Wednesday, October 25, 2017

OFFICE OF ADMINISTRATIVE HEARINGS



Melanie Barnhill  
Legal Assistant