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FISCAL IMPACT REPORT

ORIGINAL DATE 02/15/13

SPONSOR McSorley LAST UPDATED _____ HB _____

SHORT TITLE Uniform Genetic Info in Employment Protection SB 445

ANALYST Soderquist

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal	Minimal	Minimal	Minimal	Recurring	All Operating Budgets

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Workforce Solutions Department (WSD)
 Department of Public Safety (DPS)
 New Mexico Corrections Department (NMCD)
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Bill 445 (SB 445) proposes to amend the Genetic Information Privacy Act (codified at Section 24-21-1 *et. seq.* NMSA 1978) by providing for regulation of employee access to, and employer acquisition, confidentiality, retention, and disclosure of genetic information (GI). Under the proposed bill, an employment entity (defined as an employer, employment agency, labor organization, credentialing authority, or labor-management committee), is generally prohibited from acquiring genetic information of an employee or a family member of the employee. Sections 6-12 of the bill provide for various exceptions to this prohibition, including genetic information acquired pursuant to: 1) an employee's voluntary submission of genetic information and the authorization of its use; 2) a request in connection with the certification provisions of the federal Family and Medical Leave Act or under an employment policy applicable to all employees of an employment entity that permits an employee to use leave to care for a sick family member; 3) public documents (not including medical or court record databases containing genetic information that the employer purchases); 4) employer-provided voluntary health or genetic services, under certain specified circumstances; 5) employer-

provided genetic testing to conduct genetic monitoring of the biological effects of workplace conditions, provided such monitoring complies with federal and state law and written notice is provided to the employee; 6) employer-conducted DNA analysis for law enforcement/forensic purposes; and 7) a legal proceeding whereby the employee places his/her health at issue, and the employer is a party to such proceeding. Genetic information inadvertently obtained by an employer would not be a violation.

Section 13 of the proposed bill sets forth requirements for employers that provide genetic testing (GT) to employees and their family members, including providing genetic counseling regarding risks and benefits (or a knowing and voluntary waiver), destruction of the biological sample and certain information as soon as practicable after the test is completed. The bill sets forth the requirements and a form for employee authorization for employer acquisition of genetic information in the case of voluntary submission. Employees would be permitted access to any employer record containing genetic information. The bill requires employers to treat any employee genetic information as a confidential record retained separately from the employee's personnel file, and limits disclosure to certain specified instances such as employee authorization (a form of which is included in the bill). The proposed bill provides for a state law private cause of action for money damages and reasonable attorney's fees, and does not require the exhaustion of administrative remedies prior to filing a lawsuit.

Section 15 provides draft authorization forms that would satisfy the provisions of the proposed legislation.

SB 445 proposes to adopt the Uniform Protection of Genetic Information in Employment Act, a model law adopted by the National Conference of Commissioners on Uniform State Laws in 2010. The bill parallels the federal Genetic Information Nondiscrimination Act, a federal law designed to achieve the same goals.

The effective date of the proposed legislation is January 1, 2014.

FISCAL IMPLICATIONS

The responding agencies identified no significant fiscal implications deriving from the proposed legislation. An indeterminate impact would occur in operating budgets as a result of training and other associated activities related to the required enforcement of the proposed legislation.

SIGNIFICANT ISSUES

The response from the Administrative Office of the Courts (AOC) made the following observations:

First, SB 445 differs from the Uniform Protection of Genetic Information in Employment Act in the following ways: 1) the definition of employee in both the Act and the proposed legislation means an individual who was formerly employed or is applying for employment with a person having 5 or more employees – SB 445 raises the qualifying number of employees from 5 to 15 (Section 2(C)(1)); 2) SB 445 includes an agent of an employer and employment agency within the scope of the Act (Section 2(E)), and; 3) SB 445 provides guidance to an employment entity of the actions to take upon learning that it has inadvertently acquired genetic information of an employee or a family member of the employee (Section 5(C)).

Second, in their prefatory note to the model Act, the commissioners note that:

“Approximately 37 states have statutes that regulate how employment entities collect, use, retain, or disclose employees’ genetic information. State policy decisions to legislate in this area reflect the need to encourage beneficial uses of genetic information while protecting individuals’ privacy and preventing misuse of that information. Scientific developments in the field of genetics bring with them the promise of a new era in understanding human biology and new approaches to medicine that offer individual treatments tailored to one’s genetic characteristics. For these promises to become reality, however, individuals must be willing to take genetic tests. For that, individuals must have confidence that they can control the privacy of their genetic information and that it will not be used to harm them in the workplace for reasons that are not related to their ability to do the job.

This need for regulation of genetic information and the desirability of uniformity in the area was recognized at the federal level with the enactment of the Genetic Information Nondiscrimination Act (GINA) of 2008. 42 U.S.C. §§ 2000ff to 2000ff-11 (Supp. II 2008). However, much in the same way that states have supplemented federal employment nondiscrimination acts with their own fair employment acts, there is a role for states in the regulation of genetic information in the workplace. This role is explicitly contemplated by GINA; its employment provisions do not preempt state legislation that provides equal or greater protection to individuals. 42 U.S.C. § 2000ff-8(a)(1) (Supp. II 2008).

For full citation see:

http://www.uniformlaws.org/shared/docs/protection%20of%20genetic%20information%20in%20employment/upgiea_final_10.pdf

Third, it is foreseeable that some employers will use a person’s genetic information to adversely affect that person’s employment status out of concerns for insurance costs, on-the-job accidents and so on. Some employers may use the information for irrational discrimination unassociated with business purposes. With federal law coverage only, a person adversely affected by an employer’s use of genetic information would have to seek federal remedies. The proposed legislation provides alternatives to federal remedies (Section 23).

The response from the Attorney General’s Office (AGO) stated concerns that the numerous exceptions outlined in the proposed legislation, including the allowances for inadvertent requests, requirement or acquisition of genetic information through genetic testing provides many loopholes and opportunities to avoid prosecution.

The response from the Workforce Solutions Department (WSD) stated concerns about the relationship of the New Mexico Human Rights Act to the proposed legislation. Specifically, The New Mexico Human Rights Act (codified at Section 28-1-1 *et. seq.* NMSA 1978) prohibits discriminatory practices by employers (dependent upon the number of employees the employer has) based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity. The Human Rights Bureau of the WSD is charged with investigating and enforcing the New Mexico Human Rights Act. Genetic information is not encompassed within the protections

outlined in the New Mexico Human Rights Act. Given that the proposed legislation does not reference the Human Rights Act, however, the WSD would have neither the mandate nor the authority to investigate and/or enforce alleged violations.

As defined in the proposed legislation, “genetic information” does not include information regarding age or sex. Additionally, the proposed legislation states that use of medical information that is not genetic information about a manifested disease, disorder or pathological condition, even if the manifested disease, disorder or pathological condition may have a genetic basis, is not a violation of the proposed legislation. Thus, even though the Human Rights Bureau may investigate claims regarding physical or mental handicaps or serious medical conditions, such a violation would not necessarily be a violation of the proposed legislation.

PERFORMANCE IMPLICATIONS

According to the AOC response, enactment of this legislation would potentially affect results in some of their performance measures.

ADMINISTRATIVE IMPLICATIONS

The only potential impact identified by the responding agencies would be as a result of training and other associated activities related to the required enforcement of the proposed legislation (see Fiscal Implication section above).

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 149, DNA Administrative Center

TECHNICAL ISSUES

The AOC response observes that Section 2(C) of the proposed legislation defines an employee as including someone seeking employment. This works for purposes of prohibitions against employment agencies using genetic information adversely. However, Section 2(D) defines an employer as someone who employs an employee. It is factually impossible to employ someone who is seeking employment with you. It is suggested that Section 2(D) might be amended to also include an entity with which a person is seeking employment.

ALTERNATIVES

According to the AGO response, laws concerning genetic information and genetic testing are aimed at preventing employers and insurance companies from requiring otherwise healthy individuals, as a condition for employment or insurance coverage, to undergo genetic testing to determine whether they are predisposed to developing a disease or disability in the future and denying employment or coverage because of such predisposition. New Mexico already has the Genetic Information Privacy Act, NMSA 1978, §§ 24-21-1 through 7 (GIPA), which already prohibits the acquisition of GI or samples for genetic analysis without first obtaining informed and written consent. It also prohibits the collection, retention, transmission or use of GI without informed and written consent, and allows disclosure of GI and GT under limited circumstances, many of which are contemplated by UPGIE. GIPA also prohibits discrimination by and insurer and makes “unlawful to use on the basis of genetic information in employment, recruiting,

housing or lending decisions or in extending public accommodations or services.” See § 24-21-4. Therefore, the AGO argues it might be more legislatively effective and efficient to amend GIPA than to enact a separate UPGIE.

Other states include discrimination based on genetic information or genetic testing – Section 17 of UPGIE - in their anti-discrimination laws. See, e.g., N.C. Gen. Stat. § 95-28.1A; La. R.S. 23:302; Wis. Stat. § 111.39 (2012). The Human Rights Act, NMSA 1978, §§ 28-1-1 et seq., may be amended to include discrimination based on genetic information or genetic testing as an unlawful discriminatory practice.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the agencies responses, the consequences of inaction are unclear. New Mexico already has the Genetic Information Privacy Act, NMSA 1978, §§ 24-21-1 through 7 (GIPA), which affords some of protections sought under the proposed legislation. In addition, the federal Civil Rights Act of 1964 Title VII prohibits discrimination on the basis of GI and GT. See P.L. 110-233, 42 U.S.C.S. §§ 2000ff et seq. (2008).

RS/svb:blm