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FISCAL IMPACT REPORT

SPONSOR	Serrato/Little/Ortez/Szczepanski/ Anyanonu	LAST UPDATED	03/06/2023
		ORIGINAL DATE	02/01/2023
SHORT TITLE	Reproductive and Gender-Affirming Health Care	BILL NUMBER	House Bill 7/aHJC/aSJC
		ANALYST	Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		Indeterminate, probably small	Indeterminate, probably small	Indeterminate, probably small	Recurring	General Fund

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
New Mexico Attorney General (NMAG)
Administrative Office of the District Attorneys (AODA)
Human Services Department (HSD)
Department of Health (DOH)
New Mexico State University (NMSU)

SUMMARY

Synopsis of SJC Amendment to House Bill 7

The Senate Judiciary Committee amendments makes several more distinct changes:

- Those not permitted to discriminate against a person are now designated as “a public body or an entity or individual acting on behalf of or within the scope of the authority.”
- They are prohibited from discriminating either indirectly or directly.
- A new Section 3E is inserted to state that health care providers have no duty to provide care if it is
 - not required under state or federal law,
 - against the provider’s medical judgement, or
 - the patient doesn’t pay, unless the provider is required to provide the service regardless of ability to pay.
- A new Section 3F is inserted to note that managed care organizations and health insurers are not obligated to pay for any procedures not covered in their contract with a patient and not required by state or federal law.

- A previous Section 3E (from the HJC amendment) is replaced by the new sections 3E and 3F.
- In Section 4B, which deals with court actions brought by a district attorney or the attorney general due to alleged infractions against this bill, the court is no longer authorized to provide compensatory damages, punitive damages, costs of suit or attorney fees.
- The wording of Section 4C has been altered, having to do with claims regarding this act: they may still be brought against public bodies and entities, but not against individuals.
- In Section 5, which deals with private actions against a public body or entity for alleged violations of the act, “appropriate relief” can be provided in the forms of injunctive relief, compensatory or punitive damages or in the amount of \$5,000, whichever is greater, for violations of the act. It is noted that claims can be brought against an entity or public body, but not against an individual.
- Section 6, on severability, is deleted.

Synopsis of HJC Amendment to House Bill 7

The House Judiciary Committee amendment makes several distinct changes:

- In Section 3 of the original bill, discrimination by a “public body or agent” is prohibited. The amendment replaces the word “agent” in each subsection with the words “entity or individual acting on behalf of or within the scope of the authority” in each of the four subsections, defining more precisely those who cannot discriminate.
- Responding to a comment by AODA, the amendment replaces the word “right” in Section 3C with “ability” in the phrase “a person’s ability to act or refrain from acting.”
- It adds a new subsection E to Section 3, making certain that health care providers will not be obligated by the act to provide care if it is not otherwise required of the health provider that she/he provide that service (as, for example, in an emergency situation), if the service is thought by the provider to be against his/her medical judgement, or if the patient could not pay for the service.
- In both the section on claims under this act brought by the attorney general or district attorney (Section 4) and Section 5, on actions brought by an individual, identical subsections D are added stating that claims made are made against an institution or public body, not against an individual.

Synopsis of Original House Bill 7

House Bill 7, Reproductive and Gender-Affirming Health Care, adds sections to Chapter 24, NMSA 1978 (which is entitled “Health and Safety”), the effect of which is to prohibit public bodies from discriminating against persons based on their use or non-use of reproductive or gender-affirming care.

Section 1 of the bill names the new sections the “Reproductive and Gender-Affirming Health Care Freedom Act.”

Section 2 establishes definitions, including defining “gender-affirming care” as encompassing psychological, behavioral, surgical, medication, and other medical services to support a person’s gender identity. “Public bodies” are defined to include state and local governments, commissions, or boards established by the state and any branches of state government, such as

school districts and universities, that receive state funding. “Reproductive health care” is defined as medical, behavioral, pharmaceutical, or surgical services bearing on a person’s reproductive system. A non-inclusive list of such services includes pregnancy prevention, abortion, managing stillbirth or miscarriage, managing menopause, managing infertility, treating reproductive tract cancers, and prevention or treatment of sexually transmitted infections.

Section 3 of the bill prohibits public bodies from discriminating against those choosing to use or not use reproductive health services and from interfering with a person’s right to access or provide either reproductive or gender-affirming care. It prohibits public bodies from acting against persons who choose either to act or not to act regarding a woman’s pregnancy. It prohibits public bodies from passing laws, regulations, or rules that conflict with this act.

Section 4 permits the attorney general or a district attorney to sue the entity responsible for a violation of the act, and the court may apply appropriate remedies, including monetary damages. The court may also assess a civil penalty of \$5,000 or actual damages against the entity responsible for deviation from the provisions of the act.

Section 5 allows persons allegedly subjected to prohibited actions of public bodies to take action in district court and receive monetary awards, to include “reasonable attorney fees and costs.” The same civil penalty as in the previous section can be applied in actions brought by an aggrieved person.

Section 6 invokes the principle of severability.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

There is no appropriation in House Bill 7. AODA indicates there may be costs, commenting as follows: “The state or a local public body may be required to defend and pay a judgment if there is a violation of the Reproductive and Gender-Affirming Health Care Freedom Act, or include this in their insurance coverage. The District Attorneys’ office would need funding for additional personnel and training to practice civil law.”

SIGNIFICANT ISSUES

In a 2021, federal Equal Employment Opportunity Commission summary paper entitled “Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity”, reference is made to a Supreme Court decision in the 2020 case of *Bostock v. Clayton County*. In that case, which consolidated three cases involving two gay men and one transgender female, the Supreme Court ruled that their firing was discriminatory and therefore unlawful. (<https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>).

The Williams Institute at the UCLA School of Law studied the problem of employment discrimination toward LGBT individuals indicates in its analysis of surveys made of LGBT (“Questioning” persons were not included) individuals one year after the *Bostock* decision that

45 percent of those individuals reported experiencing discrimination or harassment in the workplace. Nine percent of these individuals reported that they had been fired or not hired as a result of their sexual orientation. Clearly, from their data, workplace discrimination against these individuals has not gone away in the wake of the *Bostock* decision.

HSD notes the very high proportion of LGBTQ persons having dysphoric and suicidal thoughts – 54 percent within the past year, according to one study. HSD also mentions that, like many insurances sold in New Mexico, Medicaid covers gender-affirming care, including surgery. HSD goes on to say “Studies show that gender-affirming care decreases depression, self-harm, and anxiety. In a blinded study, participants were more likely to identify transgender women post facial feminization surgery as women, increasing their likelihood of “passing” as their gender. Passing as a woman could potentially increase their safety, as transgender people are over four times more likely to be victims of violent crime than cisgendered people.”

Regarding discrimination related to reproductive care decisions, it is likely that the most common reproductive care decision that could trigger discrimination or harassment would be stillbirth or abortion. According to the “Pregnant at Work” initiative of the Center for WorkLife Law, “In most circumstances, it is illegal for your employer to fire, harass, or penalize you at work because you experienced a miscarriage or stillbirth, or because you had an abortion, are thinking about having one, or decided against having one. This applies in all states, including states that have abortion bans and restrictions. If your employer has 15 or more employees, taking actions against you may violate the Pregnancy Discrimination Act. It may also violate the Americans with Disabilities Act if your abortion or pregnancy loss is caused by or related to your disability. Even if your employer has fewer than 15 employees, you may still have protections under the laws of the state, city, or county where you work.” However, the Dobbs ruling by the Supreme Court in 2022 has caused this opinion to be questioned, especially in states where abortion is illegal.

TECHNICAL ISSUES

AODA recommends changing “and” in the inclusive definition phrases “psychological, behavioral, surgical, pharmaceutical, and medical care...” to “or”, so as to make any one of these services provided part of the defined term rather than all having to be present.

LC/al/ne/rl