LFC Requester:	Ruby Ann Esquibel

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 02/20/2025

Bill Number: HB430

Check all that apply:

Original X Correction ___

Amendment ___ Substitute ___

Sponsor: Rep. Debra M. Sariñana, Rep. Marianna Anaya, Rep. Elizabeth Thomson, Rep. Joanne J. Ferrary

Short Title: HEALTH DATA PRIVACY ACT

Agency Name and Code Number: 305 – New Mexico Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	**FY26**		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	**FY26**	**FY27**		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis:

House Bill 430 ("HB430" or the "Bill") would establish the Health Data Privacy Act (the "Proposed Act"), which would establish

Section 1 establishes the short title of the proposed statutes within the Bill as the "Health Data Privacy Act."

Section 2 defines terms as used throughout the Bill. Notable definitions include, among others, "regulated entity," "regulated health information," and "de-identified data."

Section 3 establishes requirements of regulated entities. Section 3(A) requires that regulated entities shall provide concise and easy to understand public notices concerning privacy information, provide tools to help individuals exercise privacy rights, and establish administrative practices to ensure security and confidentiality of regulated health information. Section 3(B) requires that regulated entities communicate with people with disabilities in reasonably accessible ways, including ensuring accessibility complies with standards set by the world wide web consortium and providing information to individuals with disabilities about how they may access communication in an alternative format.

Section 4 outlines prohibited practices of regulated entities. Section 4(A) prohibits entities from processing regulated health information of individuals except with the individual's consent for processing for a specified purpose and as is strictly necessary for the entity to provide the product, service, or feature requested. Section 4(A) further prohibits processing an individual's precise geolocation information, processing regulated health information for purposes of advertising, or obtaining consent in a way that obscures or impairs the individual's decision-making capabilities with regard to the consent sought. Section 4(B) identifies the information regulated entities must provide to an individual for their consent, including (among other information): the type of information, the nature of the processing activity, the names of service providers or third parties the entity would disclose to, and any monetary consideration associated with the processing. Section 4(C) requires an entity that obtains consent to provide an easy-to-use mechanism for revocation of that consent. Section 4(D) requires an entity to provide individuals with online accounts a conspicuous listing of all consents that the individual has provided and a "click-to-cancel" requirement for revoking those consents. Section 4(E) requires an entity to provide an individual a copy of the consent after it has been obtained. Section 4(F)

requires that an entity limit its processing activities to that information which was disclosed in the consent obtained. Section 4(G) requires that an entity that wishes to change its processing activity obtain new consent for the new activity.

Section 5 concerns the rights of individuals with respect to their data. Section 5(A) requires that entities provide individuals the right to access any regulated health information that is process by the entity, access information pertaining to the collection and processing of that information, obtain their regulated information, transmit the regulated health information to another entity when technically feasible, correct inaccurate regulated health information, and delete all regulated health information stored by the entity. Section 5(B) requires that the entity provide individuals with a clear, easily accessible form the right to revocation. Section 5(C) requires that when an individual revokes consent, the entity stop all processing activity and delete the regulated health information, except as necessary to comply with legal obligations. Section 5(D) requires that an entity make available mechanisms to request access to or to delete information. Section 5(E) requires that entities must honor access requests or data deletion requests within thirty days of receipt of the request. Section 5(F) requires that service providers and third parties honor deletion requests within thirty days as well.

Section 6 requires that servicer providers and third parties to whom regulated entities disclose data must enter into a data processing agreement with the regulated entity to ensure compliance with the provisions of the Health Data Privacy Act. Sections 6(A) through 6(E) delineate the requirements of data processing agreements for service providers and third parties.

Section 7(A) prohibits retaliation against individuals exercising rights under the Proposed Act. Section 7(B) prohibits waiver of rights conferred under the Proposed Act via contract, agreement, or terms of service.

Section 8 establishes a cause of action for violation of the Proposed Act. Section 8(A) provides that a violation of the Health Data Privacy Act constitutes rebuttable presumption of harm and shall subject the entity to injunctive relief, a $2,500 penalty per individual affected by a negligent violation, and a $7,500 penalty per individual affected by an intentional violation. Section 8(B) provides for a private cause of action that would permit an affected individual to recoup damages and equitable or injunctive relief. Section 8(C) provides for attorney general or district attorney enforcement. Section 8(D) provides that an action brought under Subsection (A) permits a court to assess equitable/injunctive relief and a civil penalty of $5,000 or actual damages resulting from each violation, whichever is greater.

Section 9 provides several caveats/limitations on the application of the Bill. Section 9(A) provides that the Bill is not intended to impose liability inconsistent with Section 230 of the federal Communications Decency Act of 1996. Section 9(B) provides that the Bill does not apply to local, state, or federal governments or municipal corporations. Section 9(C) provides that the Bill does not restrict a regulated entity, service provider, or third party from complying with laws, cooperating with subpoenas or law enforcement agencies, engaging in discovery for lawsuits, taking steps to protect life or physical safety, preventing or detecting network or physical security threats, preventing or detecting illegal activity involving the regulated entity, assisting another entity with compliance with the Proposed Act, pursuing lawful business transactions (such as mergers or acquisitions), requesting the deletion of regulated health information, or conducting medical research.

Section 10 is a severability clause providing that, if any part of the Proposed Act is held invalid, the remainder of the Proposed Act shall not be affected.

<u>Section 11</u> provides that the effect date of the Bill is July 1, 2025.

FISCAL IMPLICATIONS
None.

SIGNIFICANT ISSUES
<u>Internal Conflict</u>
Certain sections of the Bill provide for prohibitions on processing data. For instance, Section 4(A) prohibits regulated entities from processing regulated health information of an individual without their consent, as well prohibits regulated entities from instructing service providers or third parties from doing so. However, Section 2(B), defining "processing," provides that processing includes both "destruction," "deletion," and "de-identification of regulated health information. In some instances, this creates an internal inconsistency. Section 5(C) requires that "Upon an individual's revocation of consent, the regulated entity shall immediately cease all processing activities and delete all regulated health information." If processing includes deletion, this is inherently contradictory. Further, Section 5(C)(2) provides that "a regulated entity shall not de-identify an individual's regulated health information during the sixty-day period beginning on the date the regulated entity receives a request for correction or deletion from the individual." If, after a request for deletion, a regulated entity must cease processing and delete the regulated health information, a) de-identifying would constitute "processing" which Section 5(C) prohibits after such a request, and b) there is, ostensibly, no such data to de-identify at that point.

<u>Section 3(B)(1)</u>
Section 3(B) requires that communications between regulated entities in the possession of regulated health information and individuals with disabilities be performed in a manner that is "reasonably accessible." Section 3(B)(1) provides that notices shall be in accordance with accessibility standards set by the world wide web consortium "or other similar standards-setting bodies as determined appropriate by the attorney general." The phrase "as determined appropriate" appears in only two places in the New Mexico Statutes Annotated: NMSA 1978, Sec. 10-7C-7(F) (concerning the duties of the Board of the Retiree Health Care Authority) and Sec. 22-29-7(I) (concerning the duties of the Public School Insurance Authority). In both instances, the statutes state that the respective boards have the authority to negotiate "insurance policies covering additional or lesser benefits as determined appropriate[…]." As such, the determination of propriety is with respect to benefits coverage for insurance contracts.

With respect to this Bill, the statement "as determined appropriate" appears to refer a policymaking decision authority that the Legislature intends to imbue in the attorney general. However, the Bill contains no grant of rulemaking authority to the attorney general to execute this policymaking decision. *Compare* HB430, § 3(B)(1) *with* NMSA 1978, § 57-12-13 ("The attorney general is empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of the Unfair Practices Act.").

Additionally, the attorney general has not historically had a policymaking role with respect to disability rights. *See, e.g.*, NMSA 1978, § 28-1-7(A) ("The secretary [of workforce solutions] may adopt, promulgate, amend and repeal rules and regulations to carry out the provisions of the Human Rights Act."); NMSA 1978, § 28-7-17(G) (providing the Commission for the Blind to "promulgate rules and regulations necessary to effectuate the provisions of the Commission for the Blind Act"); NMSA 1978, § 28-10-12 ("The [State] personnel board shall establish rules and procedures consistent with the state policy of employment of persons with a disability."). As

drafted, it is unlikely that the phrase conveys the requisite authority for the attorney general to promulgate a rule with respect to determining appropriate standards-setting bodies for the purposes of compliance with the Proposed Act.

Section 8
Section 8(D) states, "In an action brought pursuant to Subsection A of this section, the court may award . . . civil penalties . . . of five thousand dollars ($5,000) or actual damages resulting from each violation, whichever is greater." However, Subsection A provides for penalties in the amount of $2,500 for negligent violations and $7,500 for intentional violations. This creates a direct conflict with the bill's own terms. Additionally, Section 8(D) provides for injunctive relief, which Section 8(A) already provides for.

Given the reference to damages resulting from violations, drafters may have intended to state, "In an action brought pursuant to Subsection B…", which provides for the private right of action. However, again, Subsection B already provides for injunctive relief and damages. Additionally, if the intent is to provide a minimum amount for an individual injured by a violation, typically, monetary amounts for private plaintiffs are referred to as "liquidated damages" rather than "civil penalties." Civil penalty implies a state-enforcement action. *See, e.g.*, NMSA 1978, 57-12-10 (providing that only the attorney general may bring an action for civil penalties under the Unfair Practices Act).

Other than explicitly providing that a court may impose a civil penalty as an alternative to damages, Subsection D provides no remedy otherwise not provided for elsewhere in the Section, in addition to the aforementioned conflict.

Additionally, given the low-dollar figure for violations, private attorneys are unlikely to take cases of private plaintiffs injured by such violations, potentially leading to under-enforcement.

PERFORMANCE IMPLICATIONS
None.
ADMINISTRATIVE IMPLICATIONS
None.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB307 conflicts with HB430. HB307 would establish the "Internet Privacy and Safety Act," which creates provisions intended to protect consumer data privacy. While HB307 predominantly targets internet-based data practices, the definition of "covered entity" under HB307 may overlap with "regulated entities" under HB430. Covered entities under HB307 include for-profit entities that *offer* online features, products, or services, and collect personal data directly from consumers. HB430 defines "regulated entities as entities that control the processing of regulated health information of New Mexico residents or individuals who are physically present in New Mexico. As such, there may be entities that fall under the definition of both. Data contemplated under HB307 may overlap with regulated health information contemplated under HB430. Both bills require affirmative consent/opt-in provisions, and both bills generally give individuals the right to access or to delete their data. However, specific provisions may have competing requirements as to processes for how entities must execute these provisions.

HB410 may conflict with HB430. HB410 would establish the "Consumer Information and Data Protection Act," which also creates provisions intended to protect consumer data privacy.

HB410 has provisions that apply to "consumer health data" in addition to other types of "sensitive data." While "covered entities," as defined under the federal Health Insurance Portability and Accountability Act, are not subject to HB410, entities in the possession of consumer health data and sensitive data are required to comply with the obligations of HB410. Under HB410, regarding consumer health data and sensitive data, entities must also receive affirmative consent comparable to HB430. However, HB410's definition of "personal data" seemingly also includes consumer health data and sensitive data, and therefore may have conflicting provisions with respect to deletion or access.

SB404 relates to HB430. SB404 amends the Patient Records Privacy Act, Chapter 24, Article 14B. SB404 expands the protections of the Patient Records Privacy Act regarding electronic health data, gender-affirming health care, and reproductive health care.

TECHNICAL ISSUES
None.

OTHER SUBSTANTIVE ISSUES
None.

ALTERNATIVES
None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL
Status quo.

AMENDMENTS
See Significant Issues, *supra*.