# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** Miera **DATE TYPED** 2/28/2005 **HB** 699/aHLHRC

**SHORT TITLE** Conscientious Health Care Employee Protection **SB**

**ANALYST** Dunbar

## APPROPRIATION

| Appropriation Contained | | Estimated Additional Impact | | Recurring or Non-Rec | Fund Affected |
|---|---|---|---|---|---|
| FY05 | FY06 | FY05 | FY06 | | |
| | | | $164.8 See Narrative | Recurring | General Fund |

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with SB174

**SOURCES OF INFORMATION**
LFC Files

Responses Received From
New Mexico Department of Corrections (NMDOC)
Department of Labor (DOL)
Health Policy Commission (HPC)

**SUMMARY**

Synopsis of HLHRC Amendment

The House Labor and Human Resources Committee amendment to House Bill 699 inserts the correct term as recommended in the second bullet under "significant issues" below. The amendment also addresses a contradiction to the open meetings act described in the third bullet under "significant issues". Additionally, the amendment tracks language of proposed legislation (SB174) which suggests a change in the process of "Orders of Non-Determination and formulates the process consistent with federal law (reference bullet four under "significant issues" below). Finally, the amendment addresses the changes recommended by DOL in bullets five and six under "significant issues" below>

Synopsis of Original Bill

House Bill 699 proposes to protect licensed health care professionals who are employed by a medical care organization, and who report improper quality of patient care, from retaliation by

employers. The act specifies which actions an employee may report without fear of retaliation, and promulgates a grievance procedure for those who feel they are the victims of retaliation. It also establishes the right of the employee to seek a hearing by the human rights commission or to seek a trial de novo in district court. It authorizes an appeal process and requires that this law must be posted by employers. This bill applies to mental health providers and social workers in addition to medical professionals.

Significant Issues

DOL indicates the language poses many issues because of conflicts with the Human Rights Act and case law. There are also places where the Act incorrectly uses the names of the Division and the Commission interchangeably.

The following are the significant issues and proposed changes proposed by DOL:

- Page 3, Section C (2) – the burden of proving the elements of a case of retaliation is on the complaining party by "clear and convincing evidence" (pursuant to case law). This section would require that the complaining party prove that they objected to or refused to participate in an activity that constitutes "improper quality of patient care". There is no definition of improper quality of patient care which presumably would then have to be argued by expert testimony. It is unlikely a complaining party could ever meet their burden of proof for this element.

- Page 4, line 4 – the word "Commission" should be replaced by "Division" as the Commission would not have access to or would not require any information at the investigatory stage. Case law (and Rules and Regulations) require that the investigation information not be shared with the trier of fact (Commission) to avoid tainting the hearing process. Additionally, the Commission has no jurisdiction until a Probable Cause determination has been made.

- Page 4 Line 21 and 22 states that information divulged during a hearing before the Commission not be divulged prior to final action. This language is confusing and also contradicts the Open Meetings Act which provides that all hearings of the Commission are public hearings.

- Page 5, Section D – This section is consistent with the Human Rights Act as currently written. However, legislation has been introduced this session to amend this language. The proposed language in Senate Bill 174 proposes to change the language to have Orders of Nondetermination issued immediately at the request of the Complainant, or in joint filed cases, when a federal Right to Sue Notice has been issued. This intent of Senate Bill 174 is to speed up this process and make it consistent with federal law in cases that are jointly filed with the Human Rights Division.

- Page 8, Section 8 states that the parties may amend their complaint or answer at the time of hearing before the Commission. It appears that a party could amend to include issues not raised at the Division level which were not investigated or considered based on Probable Cause.

- Page 8 Line 25, provides that the Director can be called as a witness in a case in front of the Commission. This is contrary to current Human Rights cases where the Division is a neutral investigatory entity and is not involved in the hearing process. Neither the Director nor Division investigators can be called as witnesses. Currently, Rules and Regulations provide that a hearing is de novo and the Complainant must produce and provide evidence in their case. Additionally, the Director has no independent knowledge of the case, as the Director's role is merely to make determinations on evidence provided by Division investigators.

## FISCAL IMPLICATIONS

HB 699 does not contain an appropriation. However, DOL is concerned that the provisions of this Act would add additional responsibilities to an investigative staff that is struggling to keep up with the number of cases filed with the Division. The Division averages 200 calls and walk-ins per week by individuals alleging violations of the Human Rights Act. The Division has 9 investigators who average 45 new cases per month for investigation. The Division also employs only one full time mediator who must attempt mediation on all cases. The Division would require at least 2 new investigators for these new investigation and mediation responsibilities at a cost of $164 thousand.

## ADMINISTRATIVE IMPLICATIONS

As indicated by DOL the legislation would require at least 2 new FTEs. The division has eliminated the backlogged in the processing of human rights complaints. The division has also met or exceeded all performance measures. This has been accomplished with an increasing caseload.

## CONFLICT, RELATIONSHIP

The proposed language in Senate Bill 174 proposes to change the language to have Orders of Nondetermination issued immediately at the request of the Complainant, or in joint filed cases, when a federal Right to Sue Notice has been issued.

NMDOC notes that page three, section C.2 could lead to potential conflicts in the Department due to situations in which security needs are in conflict with standards of patient care. Standards of care for patients are established based on community-based care in clinics or hospitals. The unique needs of the correctional setting at times may render it impossible to provide clinical care that is identical to community standards. This act should be amended to add language that specifies that the NMCD is allowed to weigh security needs when establishing quality of standards of care for inmates in their custody.

## TECHNICAL ISSUES

HPC suggests the sponsor consider the following proposals in amending the bill:

- Page 5,section E beginning with line 9 notes "in the case of a complaint filed by or *on behalf of a person* who has an urgent medical condition and has notified the director in writing of the test results, the director shall make the determination of whether probable cause exists for the complaint…" Test results are not defined in HB699 and would be subject to interpretation if not defined.

There is incongruence between an urgent medical condition as defined in this section and the director having ninety days to resolve a complaint. If the complaint is urgent, should it not be addressed very quickly?

- This disclosure *on behalf of a person* may be a violation of the privacy provisions of the federal Health Insurance Portability and Accountability Act of 1996, which has very strict confidentiality restrictions. Without written release by the person, neither the employee nor the employer can release any medical records to a third party. An amendment would either delete this section of HB699 or modify this section to comply with the federal law.

- Also, HB699 excludes employers with four or fewer employees, which appears to be discriminatory for very small employers such as home care agencies.

- HB699 could be amended to include reporting to voluntary accreditation bodies such as the Joint Commission on the Accreditation of Health Care Organizations in addition to employers and public bodies such as the Division of Health Improvement of the Department of Health.

- HB699 could be amended such that an employee will be protected against retaliatory action only if the alleged illegal activity is brought to the attention of a supervisor and the employer has a reasonable opportunity to correct it and did not do so.

- HB699 also needs to provide adequate protections for employee confidentiality and the confidentiality of the peer review processes already in place such as is the case with physicians via the Review Organizational Immunity Act (41-9-1).

**OTHER SUBSTANTIVE ISSUES**

Quality of care is a significant issue in health care and becoming more so every day.
The stated purpose of HB699 is to maintain and improve a high level of health care throughout New Mexico by encouraging health care employees to notify appropriate public bodies of suspected improper quality of patient care.

Many professional organizations have codes of ethics that encourage their members to report illegal activities to authorities. Some professions by the very nature of their responsibilities are required to look out for the safety of patients, but, in reporting illegal activities, the employees risk retaliation by employers including demotion, suspension or termination.

HPC indicates that employees in health care are not currently protected from employer retaliation in the event of reporting quality issues to authorities. The states of Kentucky, Minnesota, New Jersey, New York, Arkansas, California, Colorado, Connecticut, Florida, Illinois, North Dakota, Texas, Utah, Washington, and Wisconsin have passed job protection laws within the recent past.

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