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

SPONSOR Schmedes **ORIGINAL DATE** 02/05/21 **LAST UPDATED** 02/08/21 **HB**

SHORT TITLE Health Care Workers Protection Act **SB** 323

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	$80.0-$120.0	NFI	$80.0-$120.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to identical bills House Bill 7 and Senate Bill 10.

SOURCES OF INFORMATION

LFC Files

Responses Received From
Attorney General (NMAG)
Medical Board (MB)
Board of Nursing (BON)
University of New Mexico Health Sciences Center (UNM-HSC)
Department of Health (DOH)

No Response Received
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Bill 323 would establish that medical care providers, hospitals, and healthcare insurers have the right to refuse to provide or participate in a procedure (e.g., abortion). It provides for penalties against those who violate provisions in the act and whistleblower protection for those who report violations of the act.

Section 2 provides extensive definitions, including broad definitions of "health care institution," "health care service," which includes any part of a medical visit; "medical practitioner," which includes nursing home employees, counselors, and lab technicians; and "participate in a health care service," which includes providing or assisting in a service and counseling or advising for or

against a service. SB323 also defines "conscience" as applied both to individuals and institutions and "discrimination," the definition of which details types of action that might be taken by employers or others against individuals or instructions that might decline to participate in a healthcare service.

Section 3 of the bill establishes the right of medical practitioners, hospitals, and payers to refuse to participate in any healthcare service violating that person or institution's conscience; that individual or institution would not be held legally responsible for such refusal and could not be discriminated against in any of the ways in the act's broad definition of discrimination.

Individuals and institutions with religious beliefs could make hiring, staffing, contracting and admitting privilege decision based on their beliefs.

This section also states that emergency medical treatment would still be required to all patients as required in 42 U.S.C. 1395 and other federal laws.

Section 4 establishes whistleblower protection for a medical practitioner who calls attention to any violation of this act. Section 4B appears to apply whistleblower protection more widely to include the release by a medical practitioner of information suggesting (1) violation of a law, rule, or regulation, (2) violation of ethical guidelines, or (3) gross mismanagement, waste of funds, or "a substantial and specific danger to public health and safety."

Section 5 authorizes medical institutions, individuals, and insurers to bring civil suits for violation of this act. Additional burdens on other providers, institutions, or insurers arising fomr "the exercise of the right of conscience" would not be a defense in such a case. However, cases could not be brought against individuals choosing to avoid individuals, institutions, or insurers exercising rights embodied in the act. Cases could be brought by individuals alleging a violation of this act with recovery of damages of at least $1,000 and costs and attorney fees specified, as well as possible injunctive relief.

There is a severability clause, and the effective date of this bill is July 1, 2021.

FISCAL IMPLICATIONS

There is no appropriation in Senate Bill 323.

DOH states that it would have the following estimated costs to implement the bill's provisions:: An extra .025 for 3 FTE in the first year (FY 22) at an estimated cost of $80-$120 thousand, to write amendments to approximately 15 regulations and for the NMDOH,Office of General Counsel to review and promulgate those rule amendments. Included in this FY22 estimate are the estimated costs to appoint hearing officers to hold rule hearings on each amended regulation and to provide reports and recommendations on the amendments to the Secretary.

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SIGNIFICANT ISSUES

The Board of Nursing states:

> While the intent of the Bill as understood by the agency is to allow the defined parties to not have to violate their "ethical, philosophical, moral, or religious beliefs", in practice this could become very complex for regulatory boards. Conscience can be an evolving concept, hard to prove, and may conflict with current standards of care. This would create difficulties for regulatory bodies as clearly substandard care provided by a licensee could easily be explained away as being against the licensee's conscience.

Similarly, UNM-HSC asserts:

> SB323 jeopardizes payment for all health care except emergency services because the definition of conscience includes such a wide range of items that payment could be withheld for myriad reasons that are difficult to predict. … SB323 may also remove protections from a patient seeking the care they may need because a patient may not know in advance the pre-existing objections of conscience for a medical practitioner, health care institution or health care payer.

DOH also makes note of multiple effects passage of this bill would have on existing procedures and requirements, as well as on regulations regarding ongoing referral if a provider refuses to perform a given procedure:

> Significant treatment problems may arise for New Mexico patients as SB323 does not require the health care provider to exercise an obligation to inform the patient about the availability of legal medical services and to refer patients to other willing clinicians, along with transferring the patient's records.
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> Section 24-7A-1 NMSA (1978) Uniform Health-Care Decisions Act, involving advanced health care directives, allows health care practitioners to decline to comply with individual instructions or health-care decisions for reasons of conscience but also requires that the practitioner make efforts to assist in the transfer of the patient to another health-care practitioner.
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> SB323 may affect the licensing boards for those licensed health care providers defined within the bill as "medical practitioner" as those licensing boards may need to amend their license regulations to allow their licensees to object to providing medical services for reasons of conscience, and to amend their licensing regulations to remove any administrative liability for exercising the right of conscience created by the bill with respect to a health care service.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 7 and Senate Bill 10, identical bills that decriminalize abortion, in the process removing a conscience clause (Section 30-5-2 NMSA 1978) specifically applying to abortion. The issue (with respect to abortion) is also addressed in federal legislation, the Church Amendment, 42 U.S.C. § 300a-7, which would appear to make moot the state actions under House Bill 7, Senate Bill 10, and this bill, at least as regards abortion.

ADMINISTRATIVE IMPLICATIONS

The Department of Health states that it "will be required to amend each health facility licensing regulation to adopt amendments for licensing of health care facilities to provide for administrative-liability immunity for claims related to or arising from the exercise of the conscience right, as provided for in the proposed bill."

TECHNICAL ISSUES

NMAG raises the following issues:

> The definition of "medical practitioner" could be read to include caregivers, guardians, and family members who do not require a license under current law. SB 323's definition of "medical practitioner," therefore, conflicts with the definition of "practice of medicine" as found in the Medical Practice Act (NM Stat. § 61-6-6(K)). For the sake of consistency and accuracy, the author might consider harmonizing the definition "medical practitioner" with that found in the Medical Practice Act while providing a secondary definition for non-licensed individuals whom the author wishes to cover through SB 323.

And because the statute may conflict with other state and federal law regarding religious freedom including the state's Religious Freedom Restoration Act (§ 28-22-3 NMSA 1978) , "to avoid future conflict with RFRA, the author might consider connecting SB 323 to RFRA to strengthen SB 323's exception position."

POSSIBLE QUESTIONS

As noted by UNMHSC, "Regarding the right of a health care payer to choose to not pay a medical practitioner or health care institution based on their right of conscience, would the Act allow the denial of payment to entities who conduct animal research or subscribe to certain political philosophies?"

UNM HSC continues:

> A Medicaid agency could not attempt to not pay due to conscience as governmental entities are said not to have a conscience. Could HSD in its Medicaid MCO RFP have a provision that might override the terms of this Act? Could it disqualify a respondent who has conscience objections to certain procedures? Can the Health Insurance Exchange disqualify a plan that has conscience objections to certain procedures?

LAC/sb