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FISCAL IMPACT REPORT

ORIGINAL DATE 01/22/08
 LAST UPDATED 02/13/08

SPONSOR HJC HB CS37/aSJC/aSFI#1

SHORT TITLE Electronic Medical Records Act SB _____

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$0.1significant			Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)
 Health Policy Commission (HPC)

SUMMARY

Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 strikes all Senate Judiciary Amendments and restores the bill to its original version.

Synopsis of SJC Amendment

Senate Floor Amendment #1 strikes all Senate Judiciary Amendments and restores the bill to its original state.

The Senate Finance Committee Amendment inserts “providing for a private right of action” in the title of the bill; and, provides for such in the body of the bill. The Amendment requires a health information exchange maintaining a record locator service to include the identity of “persons and other entities” accessing information; requires a health care provider or health care institution to also maintain an audit log of persons and entities accessing information; and, inserts a new subsection under “use and disclosure of electronic health care information” to allow an individual to annually request a copy of the audit log of their medical record.

The Amendment inserts a new section “breach of the security system” with the following provisions:

- A. disclosure of a breach of an individual’s medical record to that person, upon discovery;
- B. disclosure shall be made without unreasonable delay, allowing for time to restore integrity or accommodate law enforcement;
- C. disclosure shall be made by written notice; electronic notice; or by substitute notice (email, posting on web site, notification by publication) if the cost of providing notice exceeds \$250 thousand, class of subject persons to be notified exceeds \$500 thousand, or not sufficient contact information; and
- D. allows for disclosure to be delayed if impedes a criminal investigation.

The Amendment inserts a new section “law enforcement access” with the following provisions:

- A. disclosure of a medical record to a law enforcement agency by administrative or trial subpoena, or court order for disclosure;
- B. disclosure of a medical record to a law enforcement agency if contents are relevant and material to an ongoing criminal investigation;
- C. law enforcement agency must disclose it has requested an individual’s medical record unless a court determines otherwise;
- D. a delayed disclosure for up to ninety days if a court determines disclosure may result in endangering life, flight from prosecution, tampering with evidence, witness intimidation, or jeopardizes an investigation or delays a trial;
- E. a court may quash or modify an order for disclosure, if records are voluminous or compliance would cause an undue burden; and
- F. willful disclosure to unauthorized persons of a medical record a violation of the act.

The Amendment inserts a new section “right to civil action-defenses-limitations” with the following provisions:

- A. allows a person aggrieved by a willful violation of the act to pursue civil action;
- B. in a civil action, relief may include preliminary relief, damages, attorney fees and litigation costs;
- C. damages awarded shall not be less than \$1 thousand;
- D. court may assess punitive damages;
- E. states good faith reliance on a subpoena, court order or legislative authorization for disclosure a complete defense to any civil action; and
- F. a civil action shall not be commenced later than two years after the discovery of a violation of the act.

SIGNIFICANT ISSUES

The addition of any new penalty assessment has the potential to negatively impact the judiciary. Any fiscal impact on the judiciary will be proportional to the enforcement of this law, related case filings, and commenced prosecutions. There will be an increase in the amount of work that needs to be done by the courts, thus requiring additional resources to handle the increase.

QUESTION

Are these new patient privacy provisions more restrictive than HIPAA?

Synopsis of Bill

House Bill 37 enacts the Electronic Medical Records Act which authorizes the creation, use and maintenance of electronic medical records; clarifies individual rights with respect to the disclosure of information contained in electronic medical records; and, clarifies the protection of privacy of electronic medical records.

Specific provisions within the bill include:

Sections 1, 2 and 3 site the title and the purpose of the act; and, provides for definitions as used within the act to include a “health care group purchaser” and excludes a person licensed as a property and casualty, life, disability income, or workers’ compensation insurer from the definition.

Sections 4 and 5 require the New Mexico Telehealth and Health Information Technology Commission (THITC) to first develop and present a plan for the implementation of electronic medical claims by November 1, 2008; and, develop and present a plan for the implementation of electronic medical records by November 1, 2009 for all health care providers, health care institutions and health care group purchasers doing business in New Mexico. The plan for medical electronic claims, and plan for electronic medical records shall address security issues; and, will require an audit log that includes the date and identify of any person accessing information.

All implementation plans will be presented to the legislature regarding any specific legislation or necessary appropriations to implement the plans.

Section 6 establishes provisions recognizing the legal equivalent of electronic records and signatures, for hard copy records and original signatures.

Section 7 provides for the retention of an electronic medical record as it was first generated; and, provides for one that can be accessed and/or accurately reproduced for later reference.

Section 8 provides for use and disclosure of electronic health care information to be only in accordance with state or federal law; allows for disclosure only in connection with the treatment of an individual; requires an audit log to include the date and identify of any person accessing information; and, provides a mechanism for an individual health care consumer to exclude certain private information.

Section 9 provides for both in-state and out-of-state disclosure of information.

Section 10 excludes from civil liability any health care provider, institution or group purchaser from either complying with a request or declining to comply with a request as long as pursuant to the act.

Section 11 requires an effective date of the provisions of Sections 6 through 10 to be January 1, 2009.

FISCAL IMPLICATIONS

The Executive had requested a FY08/09 special appropriation of \$1.3 million for start-up costs associated with the original HB 62 that included the planning work for a statewide electronic medical record system as described in the original HB 37. It is unclear what portion of this special appropriation will be still applicable to HB 37/HJCS.

The activities within this bill have the potential to require significant annual General Fund appropriations not only for start-up costs and maintenance of a statewide system for electronic submissions, but also for any extensive training and on-going technical support needs of required users statewide.

Relates to the Executive General Fund Budget Recommendation that includes \$909.2 thousand for Information Technology Investment in Telehealth & Electronic Health Transactions in FY09.

SIGNIFICANT ISSUES

DOH reports that the substitute bill conforms to the federal Health Portability and Accountability Act (HIPAA) in providing for the transfer of electronic medical records, the preservation of patient medical health information, and the requirements for patient authorization prior to disclosure. Clauses that were deemed more restrictive than HIPAA were removed from the substitute bill.

DOH further reports that the substitute bill will establish guidance for how information contained in electronic medical records systems could be disclosed under a record locator service or a health information exchange, including provisions for how an individual might elect to exclude certain information from such disclosure.

A little less than 25% of office-based physicians nationwide have gone digital, and only 10% write their prescriptions electronically according to the most recent Center for Disease Control data. Health care providers have reported that the primary barriers to health information technology adoption are high initial acquisition and implementation costs and the disruptive effects on their practices during implementation.

PERFORMANCE IMPLICATIONS

The HPC reports that the New Mexico Health Information Collaborative (NMHIC) is an effort by public and private health systems, insurers and employers in New Mexico to develop a common, electronic, health information exchange network. NMHIC will address both urban and rural areas of New Mexico in its initial three-year phase, specifically the Albuquerque Metropolitan area and the Taos community.

ADMINISTRATIVE IMPLICATIONS

DOH reports the bill supports the Department's strategy of expanding the use of electronic medical records.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

A statewide electronic medical claims submission and electronic medical records implementation plan will not be initiated by way of this bill.

QUESTIONS

Will there be the ability to exchange medical information with providers in other states that do not have electronic medical record or electronic claims submission capability?

Is it anticipated that there will be emotional costs for older providers who are not comfortable with the information technology age? Could these providers be discouraged from continuing to care for patients and leave or close their practices?

Could the cost to implement a computerized system push fixed costs for small providers beyond current reimbursement rates?

AHO/mt