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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/11
 LAST UPDATED 03/15/11 **HB** _____

SPONSOR McSorley

SHORT TITLE Protection of Genetic Information in Employment **SB** 205/aSCORC/aSJC

ANALYST Hoffmann

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 State Personnel Office (SPO)
 Department of Workforce Solutions (DWS)
 Department of Health (DOH)
 Corrections Department (NMCD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to Senate Bill 205 as amended by the Senate Corporations and Transportation Committee makes the following changes.

The Senate Corporations and Transportation Committee amendment is stricken.

The act would apply to employers having fifteen or more employees, instead of five.

The amendment clarifies that the act applies to the employee and his or her family members.

It clarifies that genetic information, voluntarily given by an employee for health or genetic services, may only be disclosed to the employee or selected health care providers.

It clarifies that an employee authorizing genetic testing may only make one choice whether to receive a personal copy of the test results, and also with regard to the party to receive the results of genetic testing.

For voluntary disclosures of genetic information the employee must choose either to make a single disclosure, an indefinitely ongoing disclosure, or a time-limited ongoing disclosure.

Synopsis of SCORC Amendment

The Senate Corporations and Transportation Committee Amendment to Senate Bill 205 changes the minimum number of employees from five to twenty-five that an employer must have in order to fall under the requirements of SB205.

Synopsis of Original Bill

Senate Bill 205 proposes to adopt the Uniform Protection of Genetic Information in Employment Act, a model law adopted by the National Conference of Commissioners on Uniform State Laws in 2010. The bill parallels the federal Genetic Information Nondiscrimination Act, a federal law that purports to achieve the same goals. The bill would amend the Genetic Information Privacy Act (codified at Section 24-21-1 *et. seq.* NMSA 1978) by providing for regulation of employee access to, and employer acquisition, confidentiality, retention, and disclosure of genetic information. Under the proposed bill, an employment entity (defined as an employer, employment agency, labor organization, credentialing authority, or labor-management committee), is generally prohibited from acquiring genetic information of an employee or a family member of the employee. Sections 6-12 of the bill provides for various exceptions to this prohibition, including genetic information acquired pursuant to: 1) an employee's voluntary submission of genetic information; 2) a request in connection with the certification provisions of the federal Family and Medical Leave Act; 3) public documents (not including medical or court record databases containing genetic information that the employer purchases); 4) employer-provided voluntary health or genetic services, under certain specified circumstances; 5) employer-provided genetic testing to conduct genetic monitoring of the biological effects of workplace conditions, provided such monitoring complies with federal and state law and written notice is provided to the employee; 6) employer-conducted DNA analysis for law enforcement/forensic purposes; and 7) a legal proceeding whereby the employee places his/her health at issue, and the employer is a party to such proceeding. Genetic information inadvertently obtained by an employer would not be a violation.

Section 13 of the proposed bill sets forth requirements for employers that provide genetic testing to employees and their family members, including providing genetic counseling regarding risks and benefits (or a knowing and voluntary waiver), destruction of the biological sample and certain information as soon as practicable after the test is completed. The bill sets forth the requirements for and a form of an employee authorization for employer acquisition of genetic information in the case of voluntary submission. Employees would be permitted access to any employer record containing genetic information. The bill requires employers to treat any employee genetic information as a confidential record retained separately from the employee's personnel file, and limits disclosure to certain specified instances such as employee authorization (a form of which is included in the bill). The proposed bill provides for a state law private cause of action for money damages and reasonable attorney's fees, and does not require the exhaustion of administrative remedies prior to filing a lawsuit.

FISCAL IMPLICATIONS

Senate Bill 205 makes no appropriation.

SIGNIFICANT ISSUES

According to the AOC, SB 205 parallels the provisions of the Uniform Protection of Genetic Information in Employment Act, drafted and agreed to by Genetic Information Nondiscrimination Act (GINA) of 2008. A memorandum accompanying the release of the uniform state law indicates that 37 states have some form of genetic information privacy legislation, and there is little inconsistency among these laws. Notably, the memorandum also states that there is uncertainty around the question of whether the federal law pre-empts state laws. The federal law does not cover credentialing while the uniform law, and SB 205, does. The question is whether the absence of protection under federal law ought to be read to prohibit the states from protecting those interests. SB 205 appears to work in tandem with the Genetic Information Privacy Act, at NMSA 1978, Section 24-21-1. The former protects against use of genetic information to affect employment interests while the latter protects against unwanted analysis of genetic information and against use of genetic information to affect insurability.

The DWS points out the New Mexico Human Rights Act (codified at Section 28-21-1 et. seq. NMSA 1978) prohibits discriminatory practices by employers (dependent upon the number of employees the employer has) based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity. The Human Rights Bureau of DWS is charged with investigating and enforcing the New Mexico Human Rights Act. Genetic information is not encompassed within the protections outlined in the New Mexico Human Rights Act. Given that the proposed bill does not implicate the Human Rights Act, however, DWS would have neither the mandate nor the authority to investigate and/or enforce alleged violations (note: as defined in the bill, “genetic information” does not include information regarding age or sex). Therefore, there would be no fiscal impact on DWS, as no FTE or other resources would be implicated by the proposed bill. The DOH reports SB205 would foster uniformity among states. The Act would provide for counseling, consent, and confidentiality and, through these mechanisms, giving the employees control over their genetic information. This Act mirrors the recommended Uniform Protection of Genetic Information in Employment Act that was adopted, approved, and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws On July 16, 2010. The majority of states are introducing legislation to follow the recommendation.

The AOC identified the following technical issue.

SB 205 Section 2(C) defines an employee as including someone seeking employment. This works for purposes of prohibitions against employment agencies using genetic information adversely. However, Section 2(D) defines an employer as someone who employs an employee. It is factually impossible to employ someone who is seeking employment with you. It is suggested that Section 2(D) might be amended to also include an entity with which a person is seeking employment.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AOC states that it is foreseeable that some employers will use a person's genetic information to adversely affect that person's employment status out of concerns for insurance costs, on-the-job accidents and so on. Some employers may use the information for irrational discrimination unassociated with business purposes. With federal law coverage, a person adversely affected by an employer would have to seek federal remedies.

JCH/bym:mew