



**Committee:** Joint  
**Committee Review:** At a future date  
**Staff:** Christine Wellons, Senior Legislative Attorney  
**Purpose:** To receive testimony – no vote expected

AGENDA ITEM #8  
January 16, 2024  
**Public Hearing**

## SUBJECT

Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy

Lead Sponsors: Councilmembers Albornoz and Luedtke

Co-Sponsors: Councilmember Katz, Council Vice-President Stewart, and Councilmember Jawando

## EXPECTED ATTENDEES

Members of the public.

## COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- N/A; to receive testimony

## DESCRIPTION/ISSUE

Bill 44-23 would:

- (1) limit inquiries by employers regarding certain health information of prospective employees;
- (2) prohibit inquiries by employers regarding certain sexual and reproductive health information of prospective employees;
- (3) limit consideration by employers of certain health information of prospective employees;
- (4) permit enforcement by the Office of Human Rights and the Commission on Human Rights;  
and
- (5) generally amend the laws regarding human rights and health care privacy.

## SUMMARY OF KEY DISCUSSION POINTS

The bill will be considered by the Economic Development and Health and Human Services Committees.

### This report contains:

Staff Report	Pages 1-2
Bill 44-23	© 1
Fiscal Impact Statement	© 5
Climate Assessment	© 7
Racial Equity and Social Justice Impact Statement	© 10

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**MEMORANDUM**

January 11, 2024

TO: County Council

FROM: Christine Wellons, Senior Legislative Attorney

SUBJECT: Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy

PURPOSE: Public hearing – to receive testimony

Council Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy, sponsored by Lead Sponsors Councilmembers Albornoz and Luedtke and Co-Sponsors Councilmember Katz, Council Vice-President Stewart and Councilmember Jawando, was introduced on December 5, 2023. A public hearing is scheduled for January 16, 2024, and a joint Economic Development (ECON) and Health and Human Services (HHS) Committee worksession is scheduled for February 1, 2024.

Bill 44-23 would:

- (1) limit inquiries by employers regarding certain health information of prospective employees;
- (2) prohibit inquiries by employers regarding certain sexual and reproductive health information of prospective employees;
- (3) limit consideration by employers of certain health information of prospective employees;
- (4) permit enforcement by the Office of Human Rights and the Commission on Human Rights; and
- (5) generally amend the laws regarding human rights and health care privacy.

**BACKGROUND/PURPOSE**

On March 31, 2023, Council Bill 5-23, Personnel and Human Resources – Prospective Employees – Health Care Privacy, was signed into law. Under Bill 5-23, the County government may not ask prospective County employees certain questions about the individual’s healthcare or reproductive health information. Council Bill 44-23 would extend similar protections to prospective employees of private employers in the County.

Under Maryland law, employers may not “require” prospective employees to provide certain healthcare information when the information is unrelated to job duties. *See* Md. Code Ann., Labor & Employment § 3-701. In addition, Title I of the Americans with Disabilities Act (ADA) restricts employers (with 15 or more employees) from asking job applicants about their disabilities prior to extending the applicant a conditional offer.

Bill 44-23 would supplement these state and federal requirements<sup>1</sup> by prohibiting an employer in the County from even asking for, or seeking, healthcare information that is unrelated to job qualifications. In addition, the bill would flatly prohibit asking applicants about sexual or reproductive health information.

### **BILL SPECIFICS**

Under Bill 44-23, employers in the County would be permitted to ask prospective employees about health care information only to the extent information is “business-related” in that it bears on the individual’s ability to meet published minimum job qualifications.

The bill would explicitly prohibit employers from requesting or considering applicants’ sexual or reproductive health information, such as information related to abortion care, miscarriage, contraception, sterilization, pregnancy, or family planning.

The requirements of the bill would be included within Chapter 27, Human Rights and Civil Liberties, of the County Code. Provisions of Chapter 27 are enforceable by the Office of Human Rights and the Commission on Human Rights by awarding damages and assessing civil penalties. *See* County Code, §§ 27-7, 27-8, and 27-9.

This packet contains:

	<u>Circle #</u>
Bill 44-23	© 1
Fiscal Impact Statement	© 5
Climate Assessment	© 7
Racial Equity and Social Justice Impact Statement	© 10

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<sup>1</sup> The ADA expressly allows for state or local law that “provides greater or equal protection” to persons with disabilities. 42 U.S.C. Section 12201(b) (“Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision ... that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.”).

The Maryland Supreme Court has held that counties may adopt employment discrimination laws that are more protective of employees than the state law. *See Nat’l Asphalt Pavement Ass’n.*, 292 Md. 75 (1981) (holding that the State did not preempt the field of employment discrimination, and that Prince George’s County could adopt more stringent anti-discrimination protections for employees than the state).

Bill No. 44-23  
Concerning: Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy  
Revised: 12/18/2023 Draft No. 4  
Introduced: December 5, 2023  
Expires: December 7, 2026  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Alborno and Luedtke  
Co-Sponsors: Councilmember Katz, Council Vice-President Stewart, and Councilmember Jawando

**AN ACT** to:

- (1) limit inquiries by employers regarding certain health information of prospective employees;
- (2) prohibit inquiries by employers regarding certain sexual and reproductive health information of prospective employees;
- (3) limit consideration by employers of certain health information of prospective employees;
- (4) permit enforcement by the Office of Human Rights and the Commission on Human Rights; and
- (5) generally amend the laws regarding human rights and health care privacy.

By adding

Montgomery County Code  
Chapter 27, Human Rights and Civil Liberties  
Article XVI. Employee Health Care Privacy  
Section 27-86

*The County Council for Montgomery County, Maryland approves the following Act:*

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

1           **Sec. 1. Article XVI, Section 27-86 is added as follows:**

2                   **ARTICLE XVI. EMPLOYEE HEALTH CARE PRIVACY.**

3           **27-86. Prospective Employees – Health Care Privacy.**

4           (a)    *Definitions.* As used in this section:

5                   *Americans with Disabilities Act* means the federal *Americans with*  
6                   *Disabilities Act* of 1990, as amended.

7                   *Applicant* means an individual seeking or applying for employment by  
8                   an employer.

9                   *Business-related health information* means health care information that  
10                   is necessary to evaluate whether an applicant meets a minimum  
11                   qualification for a position.

12                   *Director* has the meaning stated in Section 27-6.

13                   *Employee* has the meaning stated in Section 27-6.

14                   *Employer* has the meaning stated in Section 27-6.

15                   *Health care* means any care, treatment, or procedure by a health care  
16                   provider:

17                   (1)    to diagnose, evaluate, rehabilitate, manage, treat, or maintain  
18                   the physical or mental condition of a patient or recipient; or

19                   (2)    that affects the structure or any function of the human body.

20                   *Health care information* means any individually identifiable  
21                   information related to health care.

22                   *Minimum qualification* means a mandatory qualification that:

23                   (1)    must be met to perform the required job functions of the position;  
24                   and

25                   (2)    was posted publicly prior to the acceptance of any application for  
26                   the position.

27 Sexual and reproductive health information means health care  
 28 information related to any aspect of reproductive health, including  
 29 abortion care, miscarriage, contraception, sterilization, pregnancy,  
 30 sexually transmitted disease, fertility treatment, gender affirming care,  
 31 and family planning.

32 (b) Requesting or considering health care information - Limitations.

33 Except as provided in subsection (d), an employer must not:

- 34 (1) request or seek health care information regarding an applicant; or  
 35 (2) consider health care information as a factor in determining  
 36 whether to hire an applicant.

37 (c) Requesting reproductive health information - Prohibited. The  
 38 employer must not request or consider an applicant's sexual and  
 39 reproductive health information.

40 (d) This Section does not prohibit:

- 41 (1) an employer from requesting or seeking business-related health  
 42 care information;  
 43 (2) an employer from considering business-related health care  
 44 information solely to determine whether an applicant meets a  
 45 minimum qualification;  
 46 (3) an applicant from voluntarily submitting, or an employer from  
 47 processing, a request for a reasonable accommodation under the  
 48 Americans with Disabilities Act related to the job application  
 49 process; or  
 50 (4) if the applicant is already employed by the employer, an applicant  
 51 from disclosing, or the employer from requesting, health care  
 52 information necessary for:  
 53 (A) enrolling in or processing employee benefits;

54                    (B) making or processing workers' compensation claims;

55                    (C) making or processing leave requests; or

56                    (D) complying with applicable state or federal law.

57                    (e) An applicant aggrieved under this section may file a complaint with the  
58                    Director under Section 27-7.

59                    **Sec. 2. Effective date.** This Act takes effect 120 days after it becomes law.



# Fiscal Impact Statement

Office of Management and Budget

## Bill 44-23

## Human Rights and Civil Liberties - Prospective Employees - Health Care Privacy

### Bill Summary

Council Bill 44-23 limits and restricts inquiries by private employers in the County, regarding certain health information from prospective employees when the information is unrelated to job duties. In addition, the bill would explicitly prohibit employers from requesting or considering applicants' sexual or reproductive health information, such as information related to abortion care, miscarriage, contraception, sterilization, pregnancy, or family planning. This bill also allows applicants to appeal a violation of the bill's provisions to the Office of Human Rights. In March 31,2023, Bill 5-23 the Personnel and Human Resources - Prospective Employees - Health Care Privacy was signed into law. Under this bill, the County government may not ask prospective County employees certain questions about the individual's healthcare or reproductive health information. Council bill 44-23 extends similar protections to prospective employees of private employers in the County.

### Fiscal Impact Summary

The proposed regulation is not expected to impact County revenues or expenditures.

Fiscal Year	2024	2025	2026	2027	2028	2029	Total
Personnel Costs	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Operating Expenses	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Expenditures	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Revenues	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Total Impact	\$0	\$0	\$0	\$0	\$0	\$0	\$0
FTE	0.00	0.00	0.00	0.00	0.00	0.00	

### Fiscal Impact Analysis

The Office of Human Rights asserts that this bill would have no fiscal impact as the current investigation process could be used to investigate complaints and assess civil penalties and award damages as necessary.

### Staff Impact

Implementation of the bill is expected to have a minimal impact on staff time or duties, as there is not expected to be a significant increase in caseload for the six investigators in the department.

### Actuarial Analysis

The bill is not expected to impact retiree pension or group insurance costs.

### Information Technology Impact

The bill is not expected to impact the County Information Technology (IT) or Enterprise Resource Planning (ERP) systems.

### Other Information

*Later actions that may impact revenue or expenditures if future spending is projected*

The bill does not authorize future spending.







# Climate Assessment

Office of Legislative Oversight

## Bill 44-23: Human Rights and Civil Liberties – Prospective Employees – Health Care Policy

### SUMMARY

The Office of Legislative Oversight (OLO) anticipates Bill 44-23 will have no impact on the County’s contribution to addressing climate change as it is proposing to limit inquiries by County government regarding health information of prospective employees.

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### BACKGROUND AND PURPOSE OF BILL 44-23

“Health information privacy” concerns the collection, storage, and use of individually identifiable information on health care or reproductive health and examines whether this “data can be collected in the first place, as well as the justifications, if any, under which data collected for one purpose can be used for another (secondary) purpose.”<sup>1</sup>

On March 21, 2023, the Council enacted legislation to protect the health information privacy of prospective County employees. Bill 5-23, Personnel and Human Resources – Prospective Employees – Health Care Privacy, prohibits the County government from asking prospective County employees certain questions regarding their healthcare or reproductive health information.<sup>2</sup>

The goal of Bill 44-23 is to protect the healthcare or reproductive health information of job applicants in the County “from unwarranted, intrusive questions by employers.”<sup>3</sup> It would do so by extending similar protections codified in Bill 5-23 to private employers in the County. More specifically, private employers in the County would be prohibited from:

- requesting health care or reproductive health information from applicants, and
- considering this information as a factor in determining whether to hire applicants.

Employers would only be permitted to request and consider “business-related health care information.” The Office of Human Rights and the Commission on Human Rights would enforce the Bill.<sup>4</sup>

The Council introduced Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy, on December 5, 2023.

## ANTICIPATED IMPACTS

As the bill proposes limits to inquiries by County government regarding health information of prospective employees, OLO anticipates the bill will have no impact on the County's contribution to addressing climate change, including the reduction and/or sequestration of greenhouse gas emissions, community resilience, and adaptative capacity.

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## RECOMMENDED AMENDMENTS

The Climate Assessment Act requires OLO to offer recommendations, such as amendments or other measures to mitigate any anticipated negative climate impacts.<sup>5</sup> OLO does not offer recommendations or amendments as Bill 44-23 is likely to have no impact on the County's contribution to addressing climate change, including the reduction and/or sequestration of greenhouse gas emissions, community resilience, and adaptative capacity.

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## CAVEATS

OLO notes two caveats to this climate assessment. First, predicting the impacts of legislation upon climate change is a challenging analytical endeavor due to data limitations, uncertainty, and the broad, global nature of climate change. Second, the analysis performed here is intended to inform the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

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## PURPOSE OF CLIMATE ASSESSMENTS

The purpose of the Climate Assessments is to evaluate the anticipated impact of legislation on the County's contribution to addressing climate change. These climate assessments will provide the Council with a more thorough understanding of the potential climate impacts and implications of proposed legislation, at the County level. The scope of the Climate Assessments is limited to the County's contribution to addressing climate change, specifically upon the County's contribution to greenhouse gas emissions and how actions suggested by legislation could help improve the County's adaptative capacity to climate change, and therefore, increase community resilience.

While co-benefits such as health and cost savings may be discussed, the focus is on how proposed County bills may impact GHG emissions and community resilience.

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## CONTRIBUTIONS

OLO staffer Kaitlyn Simmons drafted this assessment.

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<sup>1</sup> [Sharyl J. Nass et al., "The Value and Importance of Health Information Privacy," in Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research \(National Academies Press, 2009\).](#)

<sup>2</sup> ["Introduction Staff Report on Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy", Montgomery County Council, December 5, 2023.](#)

<sup>3</sup> ["Press Release: Councilmembers Albornoz and Luedtke Introduce Legislation to Protect the Privacy of Employee Health Information," Montgomery County Council, December 5, 2023.](#)

<sup>4</sup> ["Introduction Staff Report on Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy", Montgomery County Council, December 5, 2023.](#)

<sup>5</sup> Bill 3-22, Legislative Branch – Climate Assessments – Required, Montgomery County Council, Effective date October 24, 2022

# Racial Equity and Social Justice (RESJ) Impact Statement

Office of Legislative Oversight

## **BILL 44-23: HUMAN RIGHTS AND CIVIL LIBERTIES – PROSPECTIVE EMPLOYEES – HEALTH CARE PRIVACY**

### **SUMMARY**

The Office of Legislative Oversight (OLO) finds the anticipated impact of Bill 44-23 is indeterminant. All people applying for jobs in the County – regardless of race, ethnicity, sex, or disability status – would benefit from increased health care privacy from prospective employers not requesting health care information. However, it is unknown the extent to which employers in the County currently ask for health care information and how this practice affects hiring decisions by race, ethnicity, sex, or disability status.

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### **PURPOSE OF RESJ IMPACT STATEMENTS**

The purpose of RESJ impact statements (RESJIS) is to evaluate the anticipated impact of legislation on racial equity and social justice in the County. Racial equity and social justice refer to a **process** that focuses on centering the needs, leadership, and power of communities of color and low-income communities with a **goal** of eliminating racial and social inequities.<sup>1</sup> Achieving racial equity and social justice usually requires seeing, thinking, and working differently to address the racial and social harms that have caused racial and social inequities.<sup>2</sup>

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### **PURPOSE OF BILL 44-23**

“Health information privacy” refers to the collection, storage, and use of individually identifiable information on health care. Health information privacy also considers whether health “data can be collected in the first place, as well as the justifications, if any, under which data collected for one purpose can be used for another (secondary) purpose.”<sup>3</sup>

On March 21, 2023, the Council enacted Bill 5-23, Personnel and Human Resources – Prospective Employees – Health Care Privacy, which aimed to protect the health information privacy of prospective County employees. Bill 5-23 prohibited the County government from asking prospective County employees certain questions regarding their healthcare or reproductive health information.<sup>4</sup>

According to the Bill’s sponsors, the goal of Bill 44-23 is to protect the healthcare or reproductive health information of job applicants in the County “from unwarranted, intrusive questions by employers.”<sup>5</sup> If enacted, Bill 44-23 would extend similar protections codified in Bill 5-23 to private employers in the County. Specifically, private employers in the County would be prohibited from:<sup>6</sup>

- requesting health care or reproductive health information from applicants; and
- considering this information as a factor in determining whether to hire applicants.

Employers would only be permitted to request and consider “business-related health care information.” The bill defines business-related health care information as “health care information that is necessary to evaluate whether an applicant meets a minimum qualification for a position.”<sup>7</sup> The Office of Human Rights and the Commission on Human Rights would enforce the Bill.

# RESJ Impact Statement

## Bill 44-23

The Council introduced Bill 44-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy, on December 5, 2023.

In February 2023, OLO published a RESJIS for Bill 5-23, Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy.<sup>8</sup> Please refer to this RESJIS for background on the Americans with Disabilities Act (ADA) and workplace discrimination.

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### ANTICIPATED RESJ IMPACTS

Bill 44-23 aims to protect two broad types of health care information for job applicants: general health care information and reproductive health information.

- **General health care information.** Bill 44-23 would completely prohibit employers in the County from asking applicants for any health care information that is unrelated to job duties following a conditional offer. After an applicant is hired, employers could request health care information necessary for employee benefits, worker’s compensation claims, leave requests, or complying with state or federal law.<sup>9</sup>

Currently, under the ADA, “[a]n employer may not ask a job applicant to answer medical questions or take a medical exam before making a job offer.”<sup>10</sup> After a conditional offer is made, employers can ask applicants for medical information “as long as all individuals selected for the same job are asked the same questions.”<sup>11</sup> Under Maryland law, following a conditional offer, employers can ask job applicants to provide health care information that is unrelated to job duties, but applicants can choose to not provide this information.<sup>12</sup>

- **Reproductive health information.** Bill 44-23 would also completely prohibit employers in the County from specifically asking applicants for sexual or reproductive health information.<sup>13</sup> Currently, under Title VII of the Civil Rights Act of 1964, questions related to a job applicant’s sex, including reproductive health questions, “are generally viewed as not job-related and problematic.”<sup>14</sup>

Of note, at any stage in the hiring process, federal law prohibits an employer from discriminating against an applicant “because of [their] race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.”<sup>15</sup>

To consider the anticipated impact of Bill 44-23 on RESJ in the County, OLO recommends the consideration of two related questions:

- Who are the primary beneficiaries of this bill?
- What racial and social inequities could passage of this bill weaken or strengthen?

OLO finds the anticipated impact of Bill 44-23 is indeterminant. All people applying for jobs in the County – regardless of race, ethnicity, sex, or disability status – would benefit from increased health care privacy from prospective employers not requesting health care information. However, it is unknown the extent to which employers in the County currently ask for health care information and how this practice affects hiring decisions by race, ethnicity, sex, or disability status.

# RESJ Impact Statement

## Bill 44-23

### RECOMMENDED AMENDMENTS

The Racial Equity and Social Justice Act requires OLO to consider whether recommended amendments to bills aimed at narrowing racial and social inequities are warranted in developing RESJ impact statements.<sup>16</sup> OLO finds the anticipated impact of Bill 44-23 is indeterminant. As such, OLO does not offer recommended amendments.

### CAVEATS

Two caveats to this racial equity and social justice impact statement should be noted. First, predicting the impact of legislation on racial equity and social justice is a challenging analytical endeavor due to data limitations, uncertainty, and other factors. Second, this RESJ impact statement is intended to inform the legislative process rather than determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

### CONTRIBUTIONS

OLO staffer Janmarie Peña, Performance Management and Data Analyst, drafted this RESJ impact statement.

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<sup>1</sup> Definition of racial equity and social justice adopted from “Applying a Racial Equity Lens into Federal Nutrition Programs” by Marlysa Gamblin, et.al. Bread for the World, and from Racial Equity Tools. <https://www.racialequitytools.org/glossary>

<sup>2</sup> Ibid.

<sup>3</sup> Sharyl J. Nass, et. al., [“The Value and Importance of Health Information Privacy.”](#) In *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research* (National Academies Press (US), 2009).

<sup>4</sup> [Introduction Staff Report for Bill 44-23](#), Montgomery County Council, Introduced December 5, 2023.

<sup>5</sup> [“Councilmembers Albornoz and Luedtke Introduce Legislation to Protect the Privacy of Employee Health Information,”](#)

Montgomery County Council, December 5, 2023.

<sup>6</sup> Introduction Staff Report for Bill 44-23.

<sup>7</sup> Bill 44-23, Introduction Staff Report for Bill 44-23.

<sup>8</sup> [RESJS for Bill 5-23](#), Office of Legislative Oversight, February 17, 2023.

<sup>9</sup> Bill 44-23, Introduction Staff Report for Bill 44-23.

<sup>10</sup> [Pre-Employment Inquiries and Medical Questions & Examinations](#), U.S. Equal Employment Opportunity Commission.

<sup>11</sup> [Pre-Employment Inquiries and Disability](#), U.S. Equal Employment Opportunity Commission.

<sup>12</sup> Introduction Staff Report for Bill 44-23.

<sup>13</sup> Ibid.

<sup>14</sup> [Pre-Employment Inquiries and Gender](#), U.S. Equal Employment Opportunity Commission.

<sup>15</sup> [Prohibited Employment Policies/Practices](#), U.S. Equal Employment Opportunity Commission.

<sup>16</sup> Bill 27-19, Administration – Human Rights – Office of Racial Equity and Social Justice – Racial Equity and Social Justice Advisory Committee – Established, Montgomery County Council.