

MEMORANDUM

February 26, 2024

TO: Health & Human Services Committee
Economic Development Committee

FROM: Christine Wellons, Senior Legislative Attorney

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

PURPOSE: Worksession – recommendation expected

Expected Attendees

James Stowe, Director, Office of Human Rights

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 occurred on January 16, 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 already 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 requirements¹ by prohibiting an employer in the County from even asking for, or seeking, healthcare information that is unrelated to published job qualifications. In addition, the bill would flatly prohibit asking applicants about sexual or reproductive health information. The bill would apply to all employers, not just those with 15 or more employees, and would be enforceable through civil penalties and damages by the County Office of Human Rights.

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 is necessary to determine if the individual meets 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.

SUMMARY OF IMPACT STATEMENTS

Racial Equity and Social Justice. “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

¹ 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).

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.”

Fiscal Impact. “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.”

Economic Impact. “The Office of Legislative Oversight (OLO) anticipates that Bill 44-23 would have an indeterminate impact on economic conditions in the County in terms of the Council’s priority economic indicators.”

Climate Assessment. “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.”

SUMMARY OF PUBLIC TESTIMONY

An individual testified in opposition to Bill 44-23, stating their view that the bill is unnecessary because of existing protections under the Americans with Disabilities Act and other federal anti-discrimination laws.

ISSUES FOR THE COMMITTEE’S CONSIDERATION

1. Clarification of How the Bill Would Supplement Existing Law

An individual providing public testimony raised the question of why Bill 44-23 would be necessary given the extensive existing state and federal protections of employees’ and job applicants’ health information.

While it is true that Bill 44-23 would overlap with federal and local protections in important respects, it would also provide additional protections. Specifically, Bill 44-23 goes above and beyond the requirements of state and federal law in that it:

- *Applies to all employers*, not just those with 15 or fewer employees;
- Allows medical questions only if they are *necessary* to determine whether the candidate meets job qualification that have been *published prior to the acceptance of applications*;
- Bans asking applicants any questions about reproductive or sexual health; and
- Permits enforcement of the law by the County’s Office and Commission on Human Rights under Chapter 27 of the County Code.

Additional background. To understand how these additional protections might be relevant, it is helpful to revisit the Council’s consideration of Bill 5-23. Bill 5-23 was prompted by an arguably intrusive form the County required all job candidates with conditional offers to complete regardless of specific job duties. That form, while permissible under federal and state law, asked for detailed and unnecessary information about mental health and reproductive/sexual health. For a sample of the form and discussion of Bill 5-23, see Action Staff Report (3/21/23), [Bill template \(montgomerycountymd.gov\)](https://montgomerycountymd.gov).

As a practical matter, it might be rare for a private employer to use a form that is as extensive as the County’s prior form. However, the purpose of Bill 44-23 would be to ensure that private employers review their own practices and revise any policies or procedures that – like the County’s former form – ask arguably unnecessary medical questions of all prospective employees. It also would ensure that employers revisit policies to ensure they are not asking about individuals’ reproductive or sexual health – an issue that has taken on new importance in light of the recent Supreme Court decision restricting health care rights, *Dobbs v. Jackson Women’s Health Organization* (2022), [19-1392 Dobbs v. Jackson Women’s Health Organization \(06/24/2022\) \(supremecourt.gov\)](https://supremecourt.gov).

Additional Information on Current State and Federal Law. Under Maryland law, employers may ask but may not require prospective employees to provide health information when unrelated to job duties. See Md. Code Ann., Labor & Employment § 3-701.

The Americans with Disabilities Act (ADA) is a federal law that protects the rights of people with disabilities by eliminating barriers to their participation in many aspects of working and living in America. In particular, Title I of the ADA prohibits covered employers from discriminating against people with disabilities in the full range of employment-related activities, from recruitment to advancement to pay and benefits. With respect to hiring practices, an employer must not ask disability-related questions of an applicant prior to extending a conditional job offer. See [Pre-Employment Inquiries and Medical Questions & Examinations | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](https://www.eeoc.gov).

This packet contains:

	<u>Circle #</u>
Bill 44-23	(c)1
Fiscal Impact Statement	(c)5
Climate Assessment	(c)7
Racial Equity and Social Justice Impact Statement	(c)10
Economic Impact Statement	(c) 13

****No written public testimony was received****

Bill No. 44-23
Concerning: Human Rights and Civil Liberties – Prospective Employees – Health Care Privacy
Revised: 11/15/23 Draft No. 4
Introduced: December 5, 2023P
Expires: December 7, 2026
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: 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:

Boldface	<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.

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.”¹

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.²

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.”³ 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.⁴

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.

RECOMMENDED AMENDMENTS

The Climate Assessment Act requires OLO to offer recommendations, such as amendments or other measures to mitigate any anticipated negative climate impacts.⁵ 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.

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.

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.

CONTRIBUTIONS

OLO staffer Kaitlyn Simmons drafted this assessment.

¹ [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 \(National Academies Press, 2009\).](#)

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

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

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

⁵ 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.

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.¹ 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.²

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.”³

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.⁴

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.”⁵ 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:⁶

- 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.”⁷ 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.⁸ Please refer to this RESJIS for background on the Americans with Disabilities Act (ADA) and workplace discrimination.

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.⁹

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.”¹⁰ 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.”¹¹ 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.¹²

- **Reproductive health information.** Bill 44-23 would also completely prohibit employers in the County from specifically asking applicants for sexual or reproductive health information.¹³ 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.”¹⁴

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.”¹⁵

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.¹⁶ 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.

¹ 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>

² Ibid.

³ 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).

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

⁵ [“Councilmembers Albornoz and Luedtke Introduce Legislation to Protect the Privacy of Employee Health Information,”](#) Montgomery County Council, December 5, 2023.

⁶ Introduction Staff Report for Bill 44-23.

⁷ Bill 44-23, Introduction Staff Report for Bill 44-23.

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

⁹ Bill 44-23, Introduction Staff Report for Bill 44-23.

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

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

¹² Introduction Staff Report for Bill 44-23.

¹³ Ibid.

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

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

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

Economic Impact Statement

Montgomery County, Maryland

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

SUMMARY

The Office of Legislative Oversight (OLO) anticipates that Bill 44-23 would have an indeterminate impact on economic conditions in the County in terms of the Council’s priority economic indicators. Based on a qualitative assessment of peer-reviewed articles and working papers on the economics of privacy, OLO anticipates that prohibiting businesses from requesting and considering health care information from applicants may prevent certain businesses from using this information to screen for certain characteristics they believe may impact medical claims or job performance. If this occurs, the policy may prevent income losses that can occur through job rejections, lower compensation, promotion denial, or job termination. However, preventing certain businesses from using this information for screening may increase operating expenses or reduce business income. For reasons discussed below, OLO is unable to determine the direction of the net effect on overall economic conditions in the County.

BACKGROUND AND PURPOSE OF BILL 44-23

“Health information privacy” refers to the collection, storage, and use of individually identifiable information on health care or reproductive health. 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.”¹

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.²

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.”³ 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:

- requesting health care or reproductive health information from applicants, and

¹ Nass, Levit, and Gostin, “The Value and Importance of Health Information Privacy.”

² “Introduction Staff Report on Bill 44-23.”

³ “Press Release: Councilmembers Albornoz and Luedtke Introduce Legislation.”

- 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.”⁴ The Office of Human Rights and the Commission on Human Rights would enforce the Bill.⁵

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

INFORMATION SOURCES, METHODOLOGIES, AND ASSUMPTIONS

Per Section 2-81B of the Montgomery County Code, the purpose of this Economic Impact Statement is to assess, both, the impacts of Bill 44-23 on residents and private organizations in terms of the Council’s priority economic indicators and whether the Bill would have a net positive or negative impact on overall economic conditions in the County.⁶

OLO was unable to identify *impact evaluations* on the economic effects of prohibiting businesses from requesting health care or reproductive health information from applicants and considering this information as a factor in determining whether to hire applicants. Impact evaluations are a core tool of evidence-based policymaking. They strive to answer cause-and-effect questions regarding the impact of a policy or program on a specific outcome(s).⁷

To assess the Bill’s impacts on the Council’s priority indicators, OLO performs a qualitative assessment based on peer-reviewed articles and working papers related to the economics of privacy.⁸ Drawing on these sources of information, this analysis examines the policy’s effects on the potential costs and benefits of health information privacy for employees and businesses.

VARIABLES

The primary variables that would affect the economic impacts of enacting Bill 44-23 are the following:

- employee screening;
- workforce productivity; and
- employee medical claims.

⁴ Bill 44-23, “Introduction Staff Report on Bill 44-23.”

⁵ “Introduction Staff Report on Bill 44-23.”

⁶ Montgomery County Code, Sec. 2-81B, Economic Impact Statements.

⁷ Gertler et al., *Impact Evaluation in Practice, Second Edition*.

⁸ Ordway, “White Papers, Working Papers, Preprints”; “Difference between Peer-Reviewed Literature and Material like White Papers and Policy Briefs.”

IMPACTS

WORKFORCE ■ TAXATION POLICY ■ PROPERTY VALUES ■ INCOMES ■ OPERATING COSTS ■ PRIVATE SECTOR CAPITAL INVESTMENT ■ ECONOMIC DEVELOPMENT ■ COMPETITIVENESS

Residents

OLO anticipates that Bill 44-23 may positively impact certain residents in the County in terms of the Council’s priority economic indicators.

The Bill would primarily impact residents employed by private businesses based in the County. The share of residents who work within the County has consistently remained around 60 percent, and the share of residents who work in the private sector has hovered around 70 percent.⁹ Thus, the Bill likely would cover most of the County’s 1.05 million (2021) residents.¹⁰

By prohibiting businesses from requesting and considering health care information from applicants, the Bill may prevent income losses that can occur through job rejections, lower compensation, promotion denial, or job termination. In her survey of the economics of health data privacy, Amalia Miller explains that disclosing health information “can make a worker less attractive to employers, which can have negative labor market effects in areas of hiring, compensation, promotion, and termination.”¹¹ Employers may use this information to screen for certain characteristics they believe impact medical claims, job performance, or other characteristics for which health conditions are proxies, like sexual orientation.¹² (Proxy refers to data that can be used to represent the value of something else that is unmeasured.) If the Bill prevents this form of screening, affected residents would not experience income losses that can occur through job rejections, lower compensation, promotion denial, or job termination.

While the Bill likely would cover most residents, OLO is unable to anticipate how many residents would experience these impacts on a yearly basis. First, it is unknown how often employers use the information that the Bill would prohibit from screening applicants and employees. Second, the policy’s effectiveness in reducing screening is uncertain. Indeed, businesses may try to circumvent the policy by using non-protected information as proxies, aided by machine learning and other Artificial Intelligence technologies.¹³

Beyond this potential impact, OLO cannot anticipate the Bill’s impacts on residents in terms of the Council’s other priority indicators.

⁹ McCarthy, “Montgomery County Demographic Trends”; “Montgomery County Trends.”

¹⁰ McCarthy, “Montgomery County Demographic Trends.”

¹¹ Miller, “Privacy of Digital Health Information.”

¹² Ibid; Schwarcz, “Health-Based Proxy Discrimination, Artificial Intelligence, and Big Data Symposium Articles”; Tilmes, “Disability, Fairness, and Algorithmic Bias in AI Recruitment.”

¹³ See note 13.

Businesses, Non-Profits, Other Private Organizations

OLO anticipates that Bill 44-23 may negatively impact on certain private organizations in the County in terms of the Council's priority economic indicators.

The Bill would impact private employers in the County across all industries. The Census estimates that there were 27,586 employer establishments in the County in 2021.¹⁴ By prohibiting businesses from requesting and considering health care information from applicants, the Bill may prevent certain businesses from using this information to screen for certain characteristics they believe may impact medical claims or job performance. As a result, certain businesses may experience higher operating expenses or income loss.¹⁵

Like the Bill's impacts on residents, OLO is unable to anticipate the magnitude of its impacts on businesses. As discussed above, it is unknown the extent to which businesses rely on the health information the Bill would prohibit nor their ability to circumvent the policy by using non-protected information as proxies. Moreover, certain businesses likely use health information that the Bill would prohibit in an inefficient manner, namely *inaccurately* predicting productivity and medical claims or screening out *more* productive workers due to bias or prejudiced beliefs.¹⁶ Thus, the Bill may prevent certain businesses from making poor workforce decisions.

Beyond these potential impacts, OLO is unable to anticipate the Bill's impacts on businesses in terms of the Council's other priority indicators.

Net Impact

OLO anticipates that Bill 44-23 would have an indeterminate impact on overall economic conditions in the County in terms of the Council's priority economic indicators. On the one hand, prohibiting businesses from requesting and considering health care information from applicants may prevent certain businesses from using this information to screen for certain characteristics they believe may impact medical claims or job performance. If this occurs, the policy may prevent income losses that can occur through job rejections, lower compensation, promotion denial, or job termination. On the other hand, preventing certain businesses from using this information for screening may increase operating expenses or reduce business income.

OLO is unable to determine the direction of the net effect on overall economic conditions in the County. As discussed above, various uncertainties prevent anticipating the magnitude of the resident and business impacts. This conclusion is echoed in reviews of the theoretical and empirical literature of the economics of privacy. As Acquisti, Taylor, and Wagman write, "both economic theory and empirical analysis of privacy expose varying scenarios. In some, privacy protection can decrease individual and societal welfare; in others, privacy protection enhances them. Thus, it is not possible to conclude

¹⁴ U.S. Census Bureau. "QuickFacts: Montgomery County, Maryland."

¹⁵ Increased labor productivity does not always increase profitability. See Huang and Rust, "Should Your Business Be Less Productive?"

¹⁶ Miller, "Privacy of Digital Health Information."

unambiguously whether privacy protection entails a net ‘positive’ or ‘negative’ change in purely economic terms: its impact is context specific.”¹⁷

DISCUSSION ITEMS

Not applicable

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¹⁷ Acquisti, Taylor, and Wagman. “The Economics of Privacy.” Miller reaches a similar conclusion when she writes, “In principle, the potential harms from improper disclosure can be weighed against the benefits from of allowing unrestricted use of digital health data, discussed in Section 3, to determine the socially optimal level of privacy protection. In practice, uncertainty about, and heterogeneity in, both costs and benefits of health privacy make it impossible to find a single universally optimal level of protection.”

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. 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.

AUTHOR

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