

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

WORKS CITED

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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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