

# 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.

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### 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.

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### 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> [RESJIS 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.