

MANDATORY HIV/HBV/HCV TESTING OF PRISONERS

House Bill 4230 (Substitute H-1) First Analysis (4-17-97)

Sponsor: Rep. David Galloway
Committee: Health Policy

THE APPARENT PROBLEM:

Public Act 419 of 1994 allows emergency first responders (who include police officers, fire fighters, and emergency medical workers) who are exposed to the body fluids of emergency patients in certain ways to request that health facilities test the patients for HIV. Public Act 420 of 1994 further allowed health facilities to test patients for HIV without the patient's consent at the request of an emergency first responder who had been exposed to the patient's body fluids in certain ways if the facility notified patients upon admission that such testing could be done under these circumstances without prior consent or counseling. Similar legislation, Public Act 565 of 1996, amended the Department of Corrections act to allow employees who were exposed in certain ways to the blood or body fluid of a prisoner to request that the prisoner be tested for HIV infection or hepatitis B virus (HBV) infection, or both.

Some people believe that local law enforcement, court, and county employees, and persons making lawful arrests (for example, security guards at retail outlets) should be authorized to request HIV and hepatitis testing of arrestees and incarcerated people along lines similar to the 1994 legislation covering emergency first responders and emergency patients. Legislation has been introduced to address these concerns.

THE CONTENT OF THE BILL:

House Bill 4230 would amend the Public Health Code (MCL 333.5131 et al.) to authorize certain police officers, fire fighters, motor carrier officers, state property security officers, local correctional officers or other county employees, court employees, and individuals making a lawful arrest who were exposed in certain ways to the blood or body fluids of an arrestee, detainee (an individual who was suspected of committing a crime and who was detained by an officer or other individual in anticipation of or pending an arrest), correctional facility inmate, parolee, or probationer to request that the arrestee, etc. be tested for HIV, HBV (hepatitis B) infection, or HCV (hepatitis C) infection. The requesting party would have to have received training in the transmission of bloodborne

diseases (under rules governing exposure to bloodborne diseases in the workplace promulgated by the Occupational Health Standards Commission or incorporated by reference under the Michigan Occupational Safety and Health Act) and, while performing official duties or otherwise performing the duties of his or her employment, would have to have determined that he or she had sustained a percutaneous (that is, through the skin), mucous membrane, or open wound exposure to the blood or bodily fluid of the person in question.

Requests. Requests for testing would have to be in writing and on a form provided by the Department of Community Health (DCH) not later than 72 hours after the exposure occurred. The request would have to be dated and contain the following information: the name and address of the officer, employee, or person making a lawful arrest who was making the request, a description of his or her exposure to the blood or other bodily fluids of the proposed test subject, and a statement that the requester was subject to the Public Health Code's confidentiality requirements. The request form could not contain information that would identify the proposed test subject by name. An employer who received such a request would have to accept as fact the requester's description of his or her exposure.

Testing, payment. The testing would be done by the local health department or by a health care provider designated by the local health department. The officer, employee, or arresting individual requesting the test would be responsible for paying for the test if his or her employer or health care plan didn't cover the cost of the test. The local health department (or designee) would be authorized to charge the officer, employee, or arresting individual requesting the test the "reasonable and customary" charges of the test, and wouldn't have to provide HIV counseling to the requester unless he or she also were tested by that local health department (or designee). However, a detainee, an arrestee, correctional facility inmate, parolee, or probationer who refused to undergo a requested test and who subsequently was tested under court order would be

responsible for the cost of implementing that order (including the cost of the test).

Test results, confidentiality, penalties. Notification of test results, whether positive or negative, would have to be given on a form provided by the DCH to the requesting officer, employee, or arresting individual by the local health department (or designee) within two days after it had received the test results. (The local health department or designee also would have to notify the Department of Community Health of each positive HIV test.) Notification of test results would have to be transmitted directly to the requesting officer or employee, unless he or she had requested that the test results be sent to his or her primary care physician (or other health professional designated by the requester). The notification would have to contain a statement recommending that the requesting person undergo an HIV test, an HBV test, or an HCV test, or all three tests. Notification of test results couldn't contain information that identified the test subject, and information contained in the notice would be confidential and subject to the bill's provisions, the health code's HIV confidentiality provisions, and the confidentiality provisions for other communicable diseases and serious communicable diseases or infections other than HIV (i.e. hepatitis B) found in rules promulgated under the code (see BACKGROUND INFORMATION, below). Anyone who received confidential information under the bill's provisions would be authorized to disclose the information to others only to the extent consistent with the authorized purpose for which it had been obtained. (The notification would have to include an explanation of these confidentiality requirements.) In addition to existing penalties in the Public Health Code for breaching confidentiality (see BACKGROUND INFORMATION, below), someone who violated the confidentiality of the information would be guilty of a misdemeanor.

Test subjects. If the arrestee, detainee, correctional facility inmate, parolee, or probationer in question consented to the requested tests, either the requester's employer would transport the test subject to the local health department (or its designee) for testing or someone from the local health department (or its designee) would come to where the test subject was housed to take a blood or other body fluid sample for testing as soon as practicable after receiving the request for the test.

If the test subject refused to undergo a requested test, the requester's employer could petition the probate court under either the health code's health emergency commitment provisions (see BACKGROUND INFORMATION, below) or the bill's provisions, whichever were appropriate. Under the bill, the petition would have to contain substantially the same information

as was contained in the original request by the affected officer, employee, or arresting individual, except that, unlike the original request, it would have to contain the proposed test subject's name. The petition also would have to state (a) the reasons for the requester's determination that the exposure described in the request could have transmitted HIV, HBV, or HCV along with the date and place the officer, employee, or arresting individual had received the required training in the transmission of bloodborne diseases; (b) the fact that the proposed test subject had refused to undergo the requested test; (c) the type of relief sought; and (d) a request for a court hearing on the allegations in the petition.

As is currently the case in the health code for petitions regarding people who were alleged to be health threats to others, the court would have to hold a hearing within 14 days after receiving the petition regarding HIV, HBV, or HCV infection testing. Upon finding that the employer had proven the allegations set forth in the petition (including, but not limited to the requesting party's description of his or her exposure to the blood or body fluids of the proposed test subject), the probate court could order the proposed test subject to undergo testing for HIV, HBV, or HCV infection (or all three) after first considering the recommendation of a physician review panel. Before ordering testing, the probate court would have to appoint a review panel consisting of three physicians (from a list submitted by the Department of Community Health) to review the need for testing the proposed test subject for HIV, HBV, or HCV infection (or all three), one of whom could be selected by the proposed test subject. At least two of the physicians would have to have had training and experience in the diagnosis and treatment of serious communicable diseases and infections. The review panel would have to review the record of the proceeding, interview the proposed test subject (or document why he or she wasn't interviewed), and recommend either that the individual be tested for HIV infection, HBV infection, or HCV infection, or all three, or not be tested for any, and document the reasons for the recommendation.

Other provisions. An individual who refused to undergo a test for HIV infection, HBV infection, or HCV infection, or all three, would be guilty of contempt. In addition the Department of Community Health would be able to promulgate rules to administer the bill's provisions and would be required to develop and distribute the required request forms. Further, a person or governmental entity that made a good faith effort to comply with the bill's provisions would be immune from civil liability or criminal penalty based on compliance -- or failure to comply -- with the health code's HIV reporting requirements.

The bill would take effect on January 1, 1998.

BACKGROUND INFORMATION:

House Bill 4230 is nearly identical to legislation introduced in the 1995-96 legislative session (House Bill 5488). The bill passed both the House and the Senate, but was not ordered enrolled.

Health code confidentiality provisions, penalties for violations. Article V of the Public Health Code addresses the prevention and control of diseases, infections, and disabilities, and, among other things, defines "serious communicable disease or infection" to mean a communicable disease or infection that is designated by departmental rule to be serious, and includes, but isn't limited to, HIV infection, AIDS, venereal disease, and tuberculosis. This article of the code makes information about certain of these diseases or infections confidential. Information ("all reports, records, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to [legally required] partner notification") associated with HIV infection and AIDS is confidential under MCL 333.5131. (HIV and AIDS test results also are subject to the physician-patient privilege, except as otherwise provided by law.) Information about certain other diseases or infections designated by administrative rule also is confidential under rules promulgated by the Department of Community Health (formerly the Department of Public Health). By law (MCL 333.5111), these other diseases or infections must include, but are not limited to, hepatitis B, venereal disease, and tuberculosis, and are not to apply to the "serious communicable diseases or infections" of HIV infection or AIDS. More specifically, Rule 325.181 says, in part, "Medical and epidemiological information which identifies an individual and which is gathered in connection with an investigation is confidential and is not open to public inspection without the individual's consent or the consent of the individual's guardian, unless public inspection is necessary to protect the public health as determined by a local health officer or the director . . . Medical and epidemiological information that is released to a legislative body shall not contain information that identifies a specific individual."

Violations of the health code's HIV and AIDS confidentiality provisions are misdemeanors punishable by imprisonment for up to one year, a fine of up to \$5,000, or both. In addition, violators are liable in civil actions for actual damages of up to \$1,000 plus costs and reasonable attorney fees.

Involuntary commitment of health threats. Public Act 490 of 1988 amended the Public Health Code to give health officers the authority to restrain people with "serious communicable diseases or infections" such as

HIV infection, AIDS, venereal disease, or tuberculosis, including subjecting them to court-ordered commitment to an appropriate facility or emergency detention. More specifically, if the Department of Community Health or a local health department determines that someone is a carrier of a serious communicable disease or infection and a health threat to others, it can issue a warning to the carrier requiring his or her cooperation in efforts to prevent or control transmission of that serious communicable disease or infection. If the carrier fails or refuses to comply, the department can petition the probate court to order the carrier to do a number of things, including living part-time or full-time in a supervised setting or being committed to an appropriate facility for up to six months. To protect the public health in an emergency, the court can order the person to be temporarily detained.

Involuntary HIV testing. Currently, certain people in the judicial system or corrections facilities and certain patients can be tested for HIV infection without their prior written consent.

Under Public Act 510 of 1988, which amended the Department of Corrections act, immediately upon arrival at a state correctional facility each prisoner is tested for HIV (the act also requires that prisoners be tested for HIV if they expose a corrections employee to their blood or body fluids in a manner that could transmit HIV, but then goes on to say that if a prisoner refuses testing he or she will be considered by the department to be HIV positive). Public Acts 471 of 1988 and 72 of 1994 amended the Public Health Code to require the HIV and HBV testing of people arrested and charged with certain prostitution-related crimes or bound over to circuit court for certain sex crimes (gross indecency, prostitution, or criminal sexual assault, if the violation involved sexual penetration or the exposure of the victim to the defendant's body fluids) or convicted of certain sex crimes (gross indecency, solicitation, prostitution, criminal sexual assault) or for illegal IV drug use. In addition, Public Act 253 of 1995 requires the mandatory HIV testing of child molesters.

If a worker in a health facility is exposed in certain ways to the blood or body fluids of a patient in the facility, and the patient had been told when admitted that an HIV test might be done without his or her consent if a worker were so exposed, the patient may be tested for HIV without his or her prior written consent. Public Acts 419 and 420 of 1994 extended this involuntary HIV testing of patients to emergency patients when emergency first responders are exposed in certain ways to the emergency patient's blood or body fluids and requests that the patient be tested. Finally, Public Act 200 of 1994 amended the Public Health Code to require that pregnant women who went to a health care facility to give birth or for care immediately after having given birth outside of a health care facility be tested for VD,

HIV, and HBV if the caregiver had no record of results of these tests for the patient.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, cost increases to the state would be indeterminate, as under certain conditions, the state could incur the cost of testing an individual. Since the costs to local law enforcement agencies would be dependent upon the employment contracts of affected employees, local fiscal impact would also be indeterminate. (4-16-97)

ARGUMENTS:

For:

The bills would simply put into effect the same kinds of protections for police officers, local corrections employees, fire fighters, employees of county jails or courts, and individuals making lawful arrests (such as security guards at stores or banks) with respect to the people they deal with every day on their jobs that currently are enjoyed under law by emergency first responders with respect to exposure to the blood and bodily fluids of emergency patients that they care for and transport. Police officers, fire fighters, local corrections employees, employees of county jails and courts, and security guards come into contact with people who may expose these officers and employees to HIV in the course of doing their jobs. According to a representative from the Oakland County Prosecutor's Office, the office receives at least one case a week that involves county employees and other law enforcement officers being exposed to blood and other bodily fluids while performing their regular job duties. Yet even when they are in daily contact in the course of their jobs to people who may expose them to fatal or potentially fatal infections, such as HIV and hepatitis, they cannot ask that these people be tested for these infections. Reportedly, judges have refused to order such testing because there is no law on the books governing these employees. Instead, they have to endure the uncertainty of not knowing whether or not they have been exposed in situations involving blood or bodily fluids, and have to live with the dread of possibly exposing their families to these infections. The bills would let these officers and employees, like hospital workers, medical first responders, and state corrections officers, request that the people they come into contact with in the line of duty to be tested when a situation arises where HIV transmission may occur.

The bill would incorporate into its provisions due process protections for people who objected to proposed testing, and would even provide a physician review panel -- that

could have a member chosen by the potential test subject -- to provide objective oversight in these cases. There would be no Headlee implications because the officer, employee, or security guard would be responsible for paying for the test (unless his or her employer or health care plan covered it), and only officers, employees, and security guards who had had a specified level of training in the transmission of bloodborne diseases would be allowed to request such testing in the first place.

Against:

House Bill 4230 would require that the cost of implementing a court-ordered test for an arrestee, correctional facility inmate, parolee, or probationer be borne by the test subject. However, no provisions are made for someone who is unable to pay all or a part of the cost, unlike the current provisions in law regarding individuals posing health threats to others. What would happen in such cases? The bill also appears to automatically make a person who refuses to undergo a test for HIV infection, HBV infection, or HCV infection guilty of contempt, without limiting this to detainees, arrestees, correctional facility inmates, parolees, or probationers who in fact may have exposed an officer or employee to HIV, HBV, or HCV infection.

Against:

Though certain professions do carry a higher risk of exposure to HIV, HBV, and HCV infection than others, the bill's provisions are inadequate to substantially allay the concerns of people in these professions. For example, a detainee, arrestee, probationer, etc., could be in the first few months of being infected with HIV, in which case the person could test negative but still transmit the HIV virus. This could lead the exposed officer, employee, or arresting individual to believe that the exposure would have no ill effects. The reverse is also true. A person may test positive, but an exposure would not necessarily result in the transmission of HIV. Reportedly, hepatitis infections can be transmitted by such common activities as tattooing, ear piercing, and manicures and pedicures, if the equipment has not been adequately sterilized and the skin has been broken. The point is, that even if a detainee, arrestee, probationer, etc., tested positive for one or all of the infections in question, and the exposed officer, employee, or arresting individual tested positive, there would not necessarily be a connection between the two. Therefore, the bill represents a further invasion of privacy to people who may or may not be infected with HIV, HBV, or HCV. A better approach would be to encourage all people in high risk occupations to have a baseline test for each of these infectious viruses, and then to be tested on a regular basis, such as every six months or annually, along with taking necessary precautions both on and off the job.

POSITIONS:

The Michigan Police Legislative Coalition supports the bill. (4-16-97)

The Oakland County Prosecutor's Office supports the bill. (4-16-97)

The Michigan Association of Governmental Employees supports the bill. (4-16-97)

The Deputy Sheriff's Association of Michigan supports the bill. (4-16-97)

The Michigan Grocers Association supports the bill. (4-16-97)

The Detroit Fire Fighters Association supports the bill. (4-16-97)

The Fraternal Order of Police supports the bill. (4-16-97)

The Oakland County Sheriff's Department supports the bill. (4-16-97)

The Michigan Protection and Advocacy Service opposes the bill. (4-16-97)

Analyst: S. Stutzky

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.