

Legislative Analysis



AVAILABILITY OF BATHROOMS IN RETAIL STORES

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House Bill 5046 as enrolled
Public Act 469 of 2008
Sponsor: Rep. Andy Meisner
House Committee: Commerce
Senate Committee: Commerce and Tourism

Second Analysis (1-2-09)

BRIEF SUMMARY: The bill would require retail establishments to allow the use of employee-only restrooms by customers under certain conditions.

FISCAL IMPACT: The bill would have an indeterminate fiscal impact. A detailed fiscal statement follows later in the analysis.

THE APPARENT PROBLEM:

A significant number of people, young and old, suffer from medical conditions and diseases that may require unplanned, but urgent, access to bathroom facilities. Failure to reach a bathroom in time results in embarrassing and distressful "accidents." The fear of such incidents keeps many of these people virtual prisoners of their homes, making it difficult to engage in the normal functions of life such as shopping, banking, picking up the dry cleaning, and so on. Whether caused by pregnancy, cancer surgery, birth defects, or bowel diseases such as Crohn's and colitis, those who suffer with bladder or bowel incontinence report that trips away from home must be carefully planned and any business or place that does not have a readily accessible public bathroom must be avoided. They say this seriously affects their family and social relationships, making even shopping for school supplies with their children or meeting friends at the mall extremely stressful, if not impossible.

Virtually all retail businesses have bathroom facilities, but these are generally reserved for employees only. People with these disorders report being denied access by store employees to bathrooms, even after detailed explanations of their medical conditions, letters from their doctors, and pleas for help and understanding. They say they are directed to nearby businesses or, in the case of malls, to the nearest public facility in the mall. However, in a situation where seconds matter, there may not be sufficient time for the person to traverse the distance to the public facility.

One Crohn's sufferer tells of being struck with an urgent need to use a bathroom when standing in line to purchase shoes for her child. She was denied access to the nearby employee bathroom (although clerks had allowed her to use it on a previous shopping trip) and instead directed her to a public mall bathroom that was about 400 feet away (greater than a football field); though she had a three-year-old child in tow, she did make it that time – barely. But on another shopping occasion, where she was refused access to

a shop's bathroom and instead directed to the town's public facility that was "down an alley, across a wide parking lot, and over a grassy slope", she did not.

With over 50,000 in Michigan with Crohn's disease or ulcerative colitis, and hundreds of thousands more with bowel or bladder incontinence due to pregnancy; other diseases; injuries; and prostate, bladder, and bowel cancer surgeries, similar scenarios are reenacted daily across the state. Where some retail establishments are sympathetic and allow use of their employee's bathroom facilities in emergencies, most have policies prohibiting use of the facilities by nonemployees. Some feel therefore that legislation is needed to clarify the types of illnesses that may require a customer to have a sudden need for a bathroom, and to require, with some exceptions, that employee-only bathrooms be made available to those customers.

THE CONTENT OF THE BILL:

The bill would create a new act under which retail establishments would have to allow customers with certain medical conditions to use toilet facilities usually reserved for employees.

The bill would apply to customers who are pregnant and those with Crohn's disease, ulcerative colitis, any other inflammatory bowel disease, irritable bowel syndrome, or any other medical condition requiring immediate access to a toilet facility.

Under the bill, a customer seeking to use toilet facilities not normally available to the public would have to suffer from an eligible medical condition and provide the retailer with a copy of a statement on a prescription form and signed by a doctor indicating he or she suffers from such a condition or uses an ostomy device. A person would be guilty of a misdemeanor if he or she falsely made, published, passed, altered, or forged a prescription form as described in the bill; altered or forged a doctor's signature on a prescription form; or knowingly possessed a false, forged, or altered prescription form. (The punishment for a conviction is not specified in the bill; however, the Michigan Penal Code provides that when the punishment of a misdemeanor offense is not fixed by statute, the punishment is not more than 90 days imprisonment, a fine of not more than \$500, or both.)

The bill would not apply if a public restroom was immediately accessible to the customer or if the retailer's toilet facility was located in an area where public access would create an obvious health or safety risk to the customer or an obvious security risk to the retailer. The bill would only apply when the retailer had two or more employees working at the time of the customer's request. Further, the bill would not require a retail establishment to make any physical changes to an employee toilet facility.

A violation by a retail establishment would be a state civil infraction subject to a civil fine of up to \$100.

The bill would specify that a retailer or employee would not be civilly liable for any injury to or death of a customer allowed to use a toilet facility under the bill or to an individual other than an employee accompanying the customer unless all of the following applied: (1) the retailer or employee knew or should have known of the condition that caused the injury, should have realized the condition involved an unreasonable risk of harm, and should have expected the customer or accompanying individual would not discover or realize the danger; (2) the retailer or employee failed to exercise reasonable care to make the condition safe or warn the customer or other individual of the condition and risk; (3) the customer or other individual did not know or have reason to know of the condition and risk involved; and (4) the injury or death occurred in an area of the retail establishment not accessible to the public.

BACKGROUND INFORMATION:

A similar bill was introduced in each of the past two sessions. House Bill 5862 of the 2003-2004 legislative session received a hearing, but died in committee. House Bill 4550 of the 2005-2006 legislative session saw no action.

FISCAL INFORMATION:

House Bill 5046 would have an indeterminate fiscal impact. The bill could increase the funding for local libraries and increase revenues to the Justice System Fund (JSF). Under current law, each non-traffic-related civil infraction may be assessed the following: a \$10 JSF assessment, fines that go to county treasurers to benefit local libraries, and court costs. A violation under this bill would be assessed a fine of up to \$100. This revenue would be allocated to local libraries. Each infraction would also be assessed a \$10 Justice System Assessment which would be deposited into the state Justice System Fund (JSF). The JSF supports various justice-related endeavors in the judicial branch, the Department of State Police, and the Department of Corrections. In addition, the assessed court costs would generate additional revenue for the governmental unit that funds the local court.

To the extent that the bill increased the number of misdemeanor convictions, it could increase local correctional costs of misdemeanor probation supervision, jail incarceration, or both; costs vary by jurisdiction. To the extent that the bill increased penal fine collections, it could benefit local libraries, which are the constitutionally-designated recipients of those revenues.

ARGUMENTS:

For:

There are approximately 40 urinary, gastrointestinal, or neurological diseases that leave people with sudden uncontrollable urges or temporary or permanent incontinence. Many others suffer from bowel or bladder problems as a result of injuries or surgeries. These people often experience unplanned but urgent needs to get to a restroom – FAST. To them, "just hold it" is not an option. Though there are several types of products to assist

these people, the products still need to be changed, ostomy devices (pouch-like devices worn outside the body that are attached to the intestine, used by people who had sections of the bowel removed) still have to be emptied. Even hormones in early pregnancy and the size of the developing fetus in the last trimester can influence a woman's bowel and bladder functions. And, even with planning, unexpected needs can surface necessitating immediate access to bathroom facilities. Delays of even a few minutes can subject the afflicted to embarrassing and humiliating "accidents." As a result, many sufferers are hesitant to attempt going to public places that do not provide ready access to bathroom facilities.

House Bill 5046 would address this situation by requiring, in most situations, that retail establishments allow access to their employee-only bathrooms. A customer would have to offer proof of a legitimate need in the form of a doctor's prescription, and the bill would specify the illnesses and conditions for which a prescription could be written. The clarity the bill affords takes the responsibility off a retail employee who must currently decide whether to believe a customer is being truthful and grant his or her request or to violate the employer's policy of denying access in all situations and risk being fired.

However, the bill would not give a customer with a doctor's prescription a carte blanche to demand, and expect, access in all situations. The bill would provide several exceptions whereby a retailer could still deny access to the employee's bathroom. Also, despite misconceptions to the contrary, the bill would not require store owners to redesign their bathrooms or change store layouts in order to provide public access. If any of the allowable exceptions applied, a store could still deny access. In such a scenario, the bill would make it more likely that the customer could find another business close enough to avert an accident. Moreover, it would be a criminal offense to fake or forge a doctor's prescription.

In addition to improving the quality of life of many Michigan residents and visitors, passage of the bill should also give more people the confidence to leave their homes and shop at brick and mortar stores rather than online retailers, a win-win solution for Michigan retailers and those afflicted with bowel and bladder disorders.

Against:

Though the bill addresses some concerns of retailers, several other remain. For instance, the bill could require stores to increase staffing levels just to accommodate the possibility of a customer needing access to the bathroom facilities. For example, two employees may be sufficient to adequately handle the general number of customers seen in a typical shift. However, if one had to leave the floor for an extended amount of time because it was necessary to escort a customer to and from the facilities, service to other customers could suffer and business could be lost. But, increasing the staffing level just in case a customer or customers needed to use the bathroom could also result in a profit loss because the extra employee would not be needed for most of the time. And, if there are as many people with bowel and bladder conditions as stated by supporters of the legislation, it is conceivable that a business could see multiple requests by eligible

consumers in a day or even an hour that could hamper their ability to operate that business efficiently.

Though the bill would criminalize the use of a fake prescription, retail employees are not experienced in identifying a fake form from a real one. Verifying the authenticity of a prescription form would be difficult if a customer is stating that he or she cannot wait while a call is placed to the prescriber's office, creating an awkward and potentially contentious situation.

The greatest concern, however, is safety to employees. Some employee bathrooms are located off a lounge where employees store purses and personal items in unsecured lockers. Theft of personal items would be a concern unless an employee stayed near the bathroom while the customer used it, thus keeping that employee off the floor longer. Also, some are concerned that a fake prescription form could be used by criminals as a way to separate employees, thus making it easier to perpetrate a crime of theft or assault.

As an alternative to the micromanagement of the business practices of retail establishments, shop owners and their employees should be educated as to the medical conditions that could lead to a customer asking to use the employee-only bathroom, and the businesses should then establish a humane policy for their employees to follow.

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