



**House
Legislative
Analysis
Section**

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**MANDATORY HIV/HBV TESTING
OF PRISONERS**

House Bill 5881 as enrolled
Public Act 565 of 1996
Second Analysis (1-23-97)

Sponsor: Rep. David Galloway
House Committee: Health Policy
Senate Committee: Health Policy and
Senior Citizens

THE APPARENT PROBLEM:

Under Public Act 510 of 1988, all incoming state correctional prisoners are tested for HIV (unless they have been tested under court order within three months prior to incarceration), and the Department of Corrections (DOC) is required to report each positive test result to the Department of Community Health. If a DOC employee is exposed to the blood or body fluid of a prisoner in a manner that could transmit HIV, the prisoner is either tested for HIV or, if the prisoner refuses testing, is considered HIV positive by the department. Upon employee request, the DOC must provide or arrange for an HIV test for the employee free of charge.

Public Act 419 of 1994 amended the Public Health Code to allow emergency medical responders to request that certain emergency patients be tested for HIV infection under certain circumstances. Some people believe that the Department of Corrections should be authorized to require HIV and HBV (hepatitis B) testing of certain prisoners without their consent upon the request of DOC employees who were exposed in certain ways to the prisoner's body fluids.

THE CONTENT OF THE BILL:

The bill would amend 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.

Eligible exposures. DOC employees who sustained a percutaneous (through the skin), mucous membrane (such as through the mouth), or open wound exposure to the blood or body fluids of a prisoner could request that the prisoner be tested for HIV or HBV, or both. The request would have to be made to the DOC in writing on a request form developed and provided by the department within 72 hours after the exposure had occurred.

The bill refers to Public Health Code administrative rules on bloodborne infectious diseases. Rule 2 [R 325.70002], among other things, defines "exposure" to mean "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties". The rule further defines "parenteral" to mean "exposure occurring as a result of piercing mucous membrane or the skin barrier, such as exposure through subcutaneous, intramuscular, intravenous, or arterial routes resulting from needlesticks, human bites, cuts, and abrasions." "Other potentially infectious material" is defined to mean (a) any of the following human body fluids: semen, vaginal secretions, amniotic fluid, cerebrospinal fluid, peritoneal fluid, pleural fluid, pericardial fluid, synovial fluid, saliva in dental procedures, any body fluid visibly contaminated with blood, and all body fluids in situation where it is difficult or impossible to differentiate between body fluids; (b) any unfixed tissue or organ, other than intact skin, from a living or dead human; and (c) cell or tissue cultures that contain HIV, organ cultures, and culture media or other solutions that contain HIV or HBV; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

The request form. The request form would have to be dated and contain at least the name and address of the employee making the request, a description of his or her exposure to the blood or other bodily fluids of the prisoner, and a statement that the requester was subject to the confidentiality requirements of the Public Health Code. The request form would have to contain space for the DOC to state its reasons in cases it decided either that there was not reasonable cause to believe the requester's description of the exposure or that the exposure was not of the requisite kind. The form couldn't contain information that would identify the prisoner. (Note: Similar provisions regarding request forms by emergency medical care workers for having emergency patients

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tested for HIV specify that the form cannot contain information that identifies the patient by name.)

Prisoner testing. When the DOC received a request from an employee for the testing of a prisoner, it would have to determine (a) whether or not there was reasonable cause to believe that the exposure described in the request had occurred and (b) whether it was the relevant exposure, that is, whether it was a percutaneous, mucous membrane, or open wound exposure as defined under Public Health administrative rules which, among other things, define "exposure." (See "eligible exposure," above.) If the department did determine that the requisite exposure had occurred, it would be required to test the prisoner for HIV infection, HBV infection, or both, as indicated in the request. The department could test a prisoner under the bill whether or not the prisoner consented to the test and would not be required to give the prisoner either an opportunity for a hearing or to obtain a court order before administering the test.

Notification of test results. The department would have to notify the requesting employee of the test results, whether positive or negative, within two days after obtaining the results. The department also would be required to notify the Department of Community Health of each positive HIV test result. The notification of test results would have to be transmitted directly to the employee, unless he or she had requested that the results be sent to his or her primary care physician or to another designated health professional. The notice couldn't contain information that would identify the prisoner who'd been tested, and would have to include an explanation of the bill's confidentiality provisions: namely, that information contained in the notice was confidential and subject to the bill's provisions, to the confidentiality provisions of the health code regarding HIV infection, and to the code's administrative rules regarding confidentiality of HBV infection information (see BACKGROUND INFORMATION).

Disclosure penalties. Anyone who disclosed information in violation of the bill's provisions would be guilty of a misdemeanor, in addition to being subject to penalties prescribed elsewhere in the health code or its administrative rules (namely, civil damages up to \$1,000, costs and "reasonable" attorney fees, and criminal fines up to \$5,000 and/or imprisonment for up to one year). Anyone receiving confidential information under the bill could disclose it to others only to the extent consistent with the authorized purpose for which the information was obtained.

Denial of requests. The department would comply with the bill's provisions if it received a request and determined either that there wasn't reasonable cause to believe the requester's description of his or her exposure

or that the exposure was not of the requisite kind (percutaneous, mucous membrane, or open wound) and, as a result, wasn't required to test the prisoner. However, the department would be required to state in writing on the request form the reason for its determination, and would have to transmit a copy of the completed request form to the requesting employee within two days after the date it made its negative determination. Unless the department tested the employee for HIV, it would not have to provide him or her with HIV counseling.

MCL 791.67 and 791.67b

BACKGROUND INFORMATION:

The Public Health Code and the Department of Corrections act were amended in 1988 to add provisions regarding AIDS and/or HIV testing, and among other things require the testing of certain patients and certain prisoners for HIV. The health code provisions regarding AIDS and HIV infection, which have been amended several times since 1988, are found among a complex of provisions and administrative rules regarding "serious communicable diseases or infections" (which include, but are not limited to, HIV infection, AIDS, venereal disease, and tuberculosis), though the HIV infection and AIDS provisions generally are treated separately from those concerning other serious communicable diseases and infections. The health code requires the HIV testing both of certain patients in health care facilities under certain circumstances and of certain people in the judicial or state correctional system, while the 1988 amendments to the Department of Corrections act require that "immediately upon arrival at a [state correctional facilities] reception center," each incoming prisoner be tested for HIV ("or an antibody to HIV"). The health code requires that, under certain circumstances, certain health care workers and certain crime victims be notified of patients' or prisoners' HIV test results, while the Department of Corrections act requires that prisoners' positive HIV test results be reported to the Department of Community Health (formerly the Department of Public Health) and that all HIV test results be disclosed "only to persons who demonstrate to the department a need to know the test results." Reportedly, this latter disclosure provision means that prisoners' HIV test results generally are disclosed only to the health care workers at the correctional facility, and not to other correctional employees at those facilities.

Health care worker notification of patient HIV status. The Public Health Code has a number of provisions regarding HIV testing of patients and notification of health care workers, including certain mandatory health care worker notification provisions when a worker is potentially

exposed to infectious agents and provisions allowing patients to be tested for HIV (either automatically or at the request of a potentially exposed health care worker) without their consent when the worker is exposed to patients in certain ways.

If an emergency health care worker (including police officers and fire fighters) provides help to, and/or transports, an emergency patient to a health care facility and if the patient subsequently, as part of his or her treatment, is tested for an "infectious agent," the facility is required to notify the worker of his or her potential exposure if the patient test is positive. ("Infectious agent" is defined by administrative rule, and includes, among other things, any kind of viral hepatitis and AIDS or HIV.) In addition to notifying emergency health care workers, the health facility also is required to notify anyone who demonstrates in writing that he or she was exposed to the patient's blood, body fluids, or "airborne agents," or participated either in providing "assistance" (formerly, "provided treatment") to the patient or transportation of the patient to the facility. The mandatory notification must tell the potentially exposed person that he or she "may have been exposed to an [unspecified] infectious agent," the approximate date of the potential exposure, and "the appropriate infection control precautions to be taken." If the infectious agent is HIV, the health code prohibits the health facility from so notifying the potentially exposed worker unless the worker submits a written request for notification.

Normally, under the Public Health Code, if a physician or health facility wishes to test a patient for HIV, they first must get the patient's prior written consent. However, if a worker in a health care facility is exposed to a patient's blood or body fluids, and if the patient had been told, upon admission, that such tests might be done under such circumstances, then the facility can test the patient for HIV without his or her prior written consent. Further, 1994 amendments to the health code allow emergency medical workers who are exposed in certain ways (through the skin, mucous membranes, or open wounds) to the blood or body fluids of emergency patients outside of the health facility to request that the patient be tested for HIV or HBV infection (or both), and be notified of negative test results. Requests by emergency medical workers for HIV and/or HBV testing of emergency patients under these circumstances must be made on a form provided by the Department of Community Health before the patient is discharged from the facility. The test form must be dated and must contain the requester's name and address and a description of his or her exposure to the emergency patient's blood or other body fluids, but cannot contain information that identifies the patient by name. Notification under this section of the health code cannot contain information that would identify the emergency patient who tested positive for an infectious

agent or who tested positive or negative for HIV or HBV infection. Information contained in these notices is confidential and is subject to the confidentiality provisions -- including the penalty provisions -- of the health code (and of the administrative rules promulgated under the code) regarding HIV and HBV information.

Confidentiality of communicable diseases/infections information, penalties for violations. Article V of the Public Health Code addresses the prevention and control of diseases, infections, and disabilities. This article addresses "serious communicable diseases or infections," which, in part, are to be designated by the Department of Community Health, but which by law must at least include (but are not limited to) HIV infection, AIDS, venereal disease, and tuberculosis. The health code addresses HIV infection separately from other "serious communicable diseases or infections," though requiring similar confidentiality provisions and penalties for breaches of confidentiality.

The health code (MCL 333.5111) requires the department to promulgate rules specifying which "communicable diseases and serious communicable diseases or infections" -- other than "the serious communicable diseases or infections of HIV infection or acquired immunodeficiency syndrome" (AIDS) -- are to be covered under the rules. This section of the health code, however, specifically requires these rules to include (though they are not limited to) hepatitis B, venereal disease, and tuberculosis. The rules also are to provide for the confidentiality of information ("reports, records, and data pertaining to the testing, care, treatment, reporting, and research") associated with these specified, non-HIV communicable diseases and infections. The administrative rule (Rule 325.181) requiring the confidentiality of information about non-HIV infections 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."

In another section of the health code (MCL 333.5131), information regarding HIV infection and AIDS ("all reports, records, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to [legally required] partner notification") also is confidential, with HIV and AIDS test results also being specifically subject to the health code's physician-patient privilege provisions.

A person who violates the health code's HIV confidentiality provisions regarding HIV information under MCL 333.5131 is guilty of a misdemeanor, punishable by imprisonment for up to one year, a fine of up to \$5,000, or both; violators also are liable in civil suits for actual damages or \$1,000, whichever is greater, and costs and reasonable attorney fees (MCL 333.5131). The health code also makes it a misdemeanor to disclose information regarding infectious agents (MCL 333.20191), except as otherwise allowed by the code's HIV confidentiality provisions or by the confidentiality provisions of health code administrative rules (see MCL 333.5111, Rule 325.171 et seq.) for serious communicable diseases or infections other than HIV infection.

Section 333.5111(2) (MCL 333.5111) requires the state health department to promulgate rules to provide for the confidentiality of information "associated with communicable diseases and serious communicable diseases or infections" other than HIV infection or AIDS. Rule 11 (R 325.181), which was promulgated under MCL 333.5111, accordingly says that "[m]edical and epidemiological information which identifies an individual and which is gathered in connection with an investigation is confidential and it 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." The rules do not impose penalties for confidentiality violations.

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 reception center each prisoner is tested for HIV. Public Acts 471 of 1988 and 72 of 1994 also 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 care giver had no record of results of these tests for the patient.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bill would simply put into effect similar kinds of protections for corrections employees 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. Corrections employees come into contact with people who may expose these employees to HIV in the course of doing their jobs. Yet even when they are in daily contact in the course of their jobs with 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. 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 bill would let corrections employees, like hospital workers and medical first responders, 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.

Currently, prisoners are tested as they enter prison, and if an employee is exposed to the blood or body fluid of a prisoner in a manner that could transmit HIV, the prisoner is to be tested for HIV. However, if the prisoner refuses to undergo the test, he or she is simply considered by the department to be HIV positive and administratively segregated. A court order is needed to perform an HIV test against a prisoner's will, and there has been at least one case in which it took a year for the department to obtain such an order (whereupon the prisoner reportedly then decided to agree to be tested anyway). Rather than allowing prisoners to play such potentially deadly games, the bill would simply allow the department, under reasonable circumstances and at the request of an exposed employee, to proceed with testing and thereby to protect the health, safety, and welfare of its employees.

Against:

There may be some technical problems with the bill. The bill requires that corrections employees wishing to have a prisoner tested for HIV after having been exposed to the prisoner in certain ways use a request form developed by the DOC. Yet the bill says that "[t]he request form shall not contain information that would identify the prisoner." Similar language in the Public Health Code, which requires emergency medical care workers to submit their requests that emergency patients be tested for HIV on a form developed by the health department that does not identify the patient by name. It is difficult to see how a prisoner could be tested at employee request if there were no way of identifying the prisoner. In addition, when medical first responders were statutorily authorized to request that emergency medical patients be tested for HIV, companion legislation further amended the Public Health Code to add this new exception to the otherwise general requirement that all HIV testing be done only with written prior consent of the person being tested. Would the bill's exception also have to be added to this section of the health code? Finally, since legislation regarding HIV infection and AIDS have accreted over the years since the first major package of legislation in 1988, existing statutory provisions and administrative rules often are cross-referenced in complex and sometimes confusing ways and are written in language that sometimes contains minor discrepancies. For example,

whereas the medical first responder legislation only makes confidentiality violations misdemeanors, the bill would make it a misdemeanor to violate its confidentiality provisions, in addition to subjecting violators to the penalties prescribed in the rules promulgated under section 5111(2) of the Public Health Code and section 5131 of the Public Health Code. Section 5131 (MCL 333.5131) does prescribe misdemeanor fines and imprisonment, plus civil damages up to \$1,000, costs and reasonable attorney fees; but the Public Health Code rules on communicable and related diseases promulgated under section 5111, while imposing confidentiality requirements, do not appear to impose any penalties for violations of these confidentiality requirements. In addition, the language of the bill, which is similar to 1994 legislation allowing emergency medical care workers to request that emergency patients be tested for HIV under certain circumstances, nevertheless differs from the 1994 provisions in minor ways that seem unnecessary. Thus, for example, the 1994 health code legislation refers not only to emergency patients' blood and body fluids but also to their "airborne agents," while the bill refers only to prisoners' blood and body fluids. And while the bill would require the DOC to notify requesting employees of the HIV or HBV test results whether positive or negative, medical first responders are notified only if test results for HIV or HBV are negative. Further, health facilities receiving requests for patient HIV or HBV testing under the 1994 legislation are required to "accept as fact the requester's description of his or her exposure to the emergency patient's blood or body fluids, unless the health facility has reasonable cause to believe otherwise," while under the bill the DOC, upon receiving a similar employee request, would be required to "make a determination as to whether or not there is reasonable cause to believe that the exposure described in the request occurred." (Both the bill and the 1994 legislation then require the respective departments to determine if the exposure was a percutaneous, mucous membrane, or open wound exposure under the health code administrative rule's definition of "exposure.") And whereas a health facility is required to do the requested testing if it determines the exposure described in the request was a percutaneous, mucous membrane, or open wound exposure, the DOC is required to do the requested testing only after it determines both that there was "reasonable cause to believe that the exposure described in the request occurred" and "was a percutaneous, mucous membrane, or open wound exposure."

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■ 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.