

**AMENDING HIV REPORTING
AND TESTING REQUIREMENTS /
FELONY DISCLOSURE LAW**

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**House Bills 6016 and 6017 as enacted
Public Acts 534 and 567 of 2018
Sponsor: Rep. Edward J. Canfield, D.O.**

**House Bills 6020 and 6021 as enacted
Public Acts 537 and 587 of 2018
Sponsor: Rep. Jon Hoadley**

**House Bill 6018 as enacted
Public Act 535 of 2018
Sponsor: Rep. Hank Vaupel**

**House Bill 6022 as enacted
Public Act 538 of 2018
Sponsor: Rep. John Bizon, M.D.**

**House Bill 6019 as enacted
Public Act 536 of 2018
Sponsor: Rep. Abdullah Hammoud**

**House Bill 6023 as enacted
Public Act 539 of 2018
Sponsor: Rep. Kevin Hertel**

**House Committee: Health Policy
Senate Committee: Health Policy
Complete to 2-12-19**

BRIEF SUMMARY: House Bills 6016 to 6020, 6022, and 6023 would amend various sections of the Public Health Code to update the terminology and applicable testing and reporting for those infected with HIV. House Bill 6021 would make a complementary change to the sentencing guidelines chapter of the Code of Criminal Procedure. The bill package was requested by the Division of HIV and STD Programs within the Michigan Department of Health and Human Services (DHHS). The bills take effect March 28, 2019.

FISCAL IMPACT: The bills may provide minor savings for DHHS and local public health departments resulting from the reduction of statutory directives regarding pretest information, data retention, and reporting requirements. (See *Fiscal Information*, below, for further discussion.)

THE APPARENT PROBLEM:

According to committee testimony, several of the laws amended were passed when there was no effective treatment for HIV and when fear of and discrimination against HIV-infected individuals were widespread. With the passage of time, increased knowledge of sexually transmitted infections, and treatments that make HIV a chronic condition, some feel that Michigan's laws should be updated accordingly. This bill package represents a step in that direction.

THE CONTENT OF THE BILLS:

House Bill 6016 would amend the definition of *HIV infection* or *HIV infected* in the Public Health Code to mean the status of an individual who is infected with HIV, as evidenced by any of the following:

- An HIV test, or a combination of tests, that is considered a confirmatory diagnostic test according to prevailing medical technology and algorithms or guidance from the federal Centers for Disease Control and Prevention (CDC).
- An HIV test that is approved by DHHS.

MCL 333.5101

House Bill 6017 would revise the time frame for document retention and remove the requirement for biennial reports to the House and Senate Health Policy standing committees. The requirement that documents be retained for only 90 days predated later initiatives that linked regular reporting and maintenance of information to federal funding from the CDC. Under the bill, a local health department's reports, records, and data related to HIV testing, in paper or electronic form, would have to be destroyed within 365 days unless otherwise required by federal law. Likewise, DHHS currently produces statewide and local annual reports on HIV,¹ so the requirement of biennial reporting on the same data may be less necessary.

MCL 333.5114a

House Bill 6018 would remove specific requirements for HIV pre- and post-test counseling mandated of providers.

Additionally, it would rewrite the requirement for informed consent before an HIV test. Currently, the Code prohibits a physician (or individual to whom the physician has delegated authority) from ordering an HIV test for the purpose of diagnosing HIV infection without first providing the test subject with pretest information and receiving the informed consent of the test subject. Instead, the bill would consider a general informed consent for medical care as consent to an HIV test without a separate consent form. However, it still would require the provider to inform the subject that an HIV test would be performed unless declined and to offer the subject the opportunity to ask questions and decline the test.

Finally, in addition to the current requirement that a person determined to be HIV-infected be provided appropriate counseling on HIV and AIDS, the bill would require that the health facility provide referrals to expedite HIV treatment and services.

MCL 333.5133

¹ July 2018 DHHS HIV statistics and data reports: https://www.michigan.gov/mdhhs/0,5885,7-339-71550_2955_2982_46000_46003-35962--,00.html#current

House Bill 6019 would remove the term “serious communicable disease” and state that a physician or local health officer disclosing information as provided in the Code may only disclose the minimum information necessary to accomplish the intended purpose of the disclosure. [According to DHHS, the term “serious communicable disease” currently prevents medical providers from sharing behavioral, substance abuse, and comorbidity data in a health information technology environment.]

MCL 333.5131

House Bill 6020 would amend the “Felony Disclosure Law,” which currently makes it a felony for a person who knows that he or she has been diagnosed with AIDS or AIDS-related complex (ARC) [a term no longer in use] or who knows that he or she is HIV-infected to engage in sexual penetration with another person without first informing that person of his or her AIDS, ARC, or HIV status.

The bill would remove reference to AIDS and ARC and instead separate the offense into three potential offenses, depending on the intent of the person with HIV and the result of the sexual contact. All three offenses would occur when a person knows that he or she has HIV and engages in anal or vaginal intercourse without informing the other person that he or she has HIV.

If the infected person did so with the specific intent that the uninfected person contract HIV, the infected person would be guilty of a felony.

If the infected person did so and transmitted HIV to an uninfected person that caused the person to become HIV-positive, the infected person would be considered to have acted with reckless disregard and would be guilty of a felony.

If the infected person did so with reckless disregard, but did not transmit HIV, the infected person would be guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$1,000, or both.

The bill would state that a person who knows that he or she has HIV who is adherent with the treatment plan of an attending physician and has been medically suppressed per accepted medical standards is not acting with reckless disregard.

MCL 333.5210

House Bill 6021 would divide the felony described as “AIDS – sexual penetration with uninformed partner,” which is punishable by a statutory maximum of four years, into two offenses in the sentencing guidelines in the Code of Criminal Procedure. The offenses would mirror the two felony offenses described in HB 6020—one in which the person acted with specific intent to infect, and one in which the person acted with reckless disregard and the uninfected person became HIV-positive.

MCL 777.13k

House Bill 6022 would amend the requirement that pregnant women be tested for certain sexually transmitted diseases. Currently, a physician or otherwise authorized person must submit a pregnant woman's test specimens taken at the time of her initial examination for testing for sexually transmitted infection (STI), HIV or an antibody to HIV, and hepatitis B. The bill would retain that requirement, but instead provide that the testing be for HIV, syphilis, and hepatitis B. It would also add a requirement that HIV, hepatitis B, and syphilis testing be completed during the woman's third trimester of pregnancy, in accordance with guidelines established by the CDC.

Currently, a woman who appears at a health care facility to deliver or receive immediate postpartum care is also subject to testing if no record of previous testing is readily available. The bill would retain this requirement for syphilis, HIV, and hepatitis B testing.

Under current law, this testing is not required if it is medically inadvisable in the professional opinion of the physician or other person or if the woman does not consent to be tested. The bill would remove the phrase "or other person."

[According to DHHS, third-trimester testing would bring testing requirements into compliance with current DHHS and CDC guidelines.]

MCL 333.5123

House Bill 6023 would remove the requirement that a person or governmental agency who obtains a test result confirming or monitoring an HIV infection must report that finding to the local health department (or DHHS, if requested by the local health department) within seven days after receiving a diagnostic test result. Instead, under the bill, test results would need to be reported to the local health department (or DHHS) within a time frame determined by DHHS. [According to DHHS, the seven-day requirement is no longer necessary, as electronic laboratory reporting results in much faster reporting.]

MCL 333.5114

FISCAL INFORMATION:

The bills may provide minor savings for DHHS and local public health departments resulting from the reduction of statutory directives regarding pretest information, data retention, and reporting requirements. DHHS estimates about \$25,000 of savings related to pretest information materials. There will be a modest increase in Medicaid costs for adding third-trimester tests for HIV and syphilis, but these tests will likely result in reduced cases of mother-to-child transmission of HIV and congenital syphilis and consequently less health care costs over the long term.

House Bill 6020 would have an indeterminate fiscal impact on the state and on local units of government, which would depend on the number of persons convicted under provisions of the bill. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year 2017, the average cost of prison incarceration in a state facility was roughly \$37,000 per prisoner, a figure that includes various fixed

administrative and operational costs. State costs for parole and felony probation supervision averaged about \$3,600 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. Any fiscal impact on the judiciary and local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

House Bill 6021 amends sentencing guidelines and would not have a direct fiscal impact on the state or on local units of government.

ARGUMENTS:

For:

Proponents argued that the bills would stem unintended consequences of the current law by doing all of the following:

- Removing reference to outdated tests that are no longer recommended.
- Aligning state and local health department reporting time frames with current practice.
- Removing requirements that are burdensome to the health care industry, which discourages routine HIV testing.
- Breaking down barriers that currently prevent medical providers from sharing critical health information.
- Aligning state statutes around testing with national guidelines to protect vulnerable populations.

Additionally, they argued that HB 6022 would require third-trimester testing for HIV in addition to the test administered during the initial examination of a pregnant woman, which could greatly reduce the likelihood of transmission of HIV to an infant. With the required antiretroviral and obstetric interventions, a woman who knows of her HIV infection early in pregnancy can reduce the chance of delivering an HIV-infected child from 25% to 1%. Supporters stated that, given our ability to prevent it, an instance of mother-to-child transmission today would be a failure of public health. It is hoped that the addition of third-trimester testing would reduce its incidence.

For:

Proponents argued that the bills would do a better job of incentivizing rather than punishing responsible behavior than current law. Currently, the so-called “felony disclosure law” makes it a felony for a person who knows that he or she is HIV-positive to engage in sexual penetration with another person without first informing that person of the HIV status. Supporters say that this incentivizes willful ignorance—or refusing to be tested (and treated), because only knowledge of HIV status triggers the penalty. In other words, as one of the bill sponsors stated, “the only way to ensure that you are never charged under this law is to make sure you are never tested.”

Response:

Others replied that the possible outcomes caused by violation—a chronic condition, even assuming that HIV medications continue to work—demands the more severe penalty. After all, does a misdemeanor conviction and a \$1,000 fine truly balance with a lifetime incurable condition?

Rebuttal:

House Bill 6020 would retain the felony designation and penalty when a person does not warn his or her partner and actually transmits HIV or intends to transmit HIV. It would lower the offense to a misdemeanor when a person does not warn the partner but does not transmit HIV. Moreover, the bill states that a person who is medically suppressed and compliant with a physician's care would not be considered to be acting with reckless disregard. Proponents argued that this would penalize bad results and intent, but lower probable punishment, as there has been no evidence of transmission of HIV by a person with a suppressed viral load.²

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

² <https://www.who.int/hiv/mediacentre/news/viral-supression-hiv-transmission/en/>