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## **SENATE COMMITTEE ON INSURANCE**

**Senator Susan Rubio, Chair**

**2021 - 2022 Regular**

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**Bill No:** SB 283

**Hearing Date:** April 8, 2021

**Author:** Gonzalez

**Version:** March 10, 2021

**Urgency:** No

**Fiscal:** No

**Consultant:** Brian Flemmer

**SUBJECT:** Life and disability income insurance: HIV tests

**DIGEST:** On and after January 1, 2023, prohibits a life or disability insurance insurer from considering an applicant's occupation in determining whether to require an HIV test; from limiting benefits payable for a loss caused by or contributed to by HIV or AIDS; and clarifies the length of time that one may be imprisoned for a misdemeanor conviction for willful, negligent, or malicious disclosure of HIV test results to a third party.

**ANALYSIS:**

Existing law:

- 1) Until December 31, 2022, imposes a duty on life insurers and disability income insurers to avoid making or permitting unfair distinctions between individuals of the same class in the underwriting of life or disability income insurance for the risks of acquired immune deficiency syndrome (AIDS) and AIDS-related conditions (ARC). Life and disability income insurers may direct applicants to test for HIV of the insurer. (Ins. Code § 799)
- 2) Until December 31, 2022, establishes mandatory and uniform minimum standards for assessing AIDS and ARC risks for determining insurability which are deemed to be sufficiently reliable to be used for life and disability income insurance risk classification and underwriting purposes. (Ins. Code § 799)
- 3) Requires strict confidentiality in the maintenance of personal information obtained through testing, and requires informed consent before any insurer tests for HIV. (Ins. Code § 799)
- 4) Until December 31, 2022, permits a life or disability income insurer to deny an application or enrollment request on the basis of positive test results from the ELISA test (enzyme-linked immunosorbent assay) and the Western Blot Assay, which detect antibodies to HIV. (Ins. Code § 799.01 - .02)
- 5) Forbids an insurer from testing for HIV for the purpose of determining insurability other than in accordance with the informed consent, counseling, and privacy protection provisions, and unless the insurer pays for the test. (Ins. Code § 799.03 - .04)
- 6) Imposes a civil penalty of \$5,000 to \$10,000 for willful, malicious, or negligent disclosure of HIV antibody test results to any third party, except pursuant to written authorization or informed consent. If the negligent or willful disclosure results in

economic, bodily, or psychological harm to the subject of the test, disclosure is punishable by misdemeanor imprisonment in a county jail for up to one year, by a fine not to exceed \$25,000, or by both. (Ins. Code § 799.10)

- 7) On and after January 1, 2023, prohibits a life or disability income insurer from declining a life or disability income insurance application or enrollment solely based on a positive HIV test.
- 8) On and after January 1, 2023, prohibits a life or disability income insurer from considering the marital status, actual or perceived sexual orientation, gender, gender identity, gender expression, race, color, religion, national origin, ancestry, living arrangements, beneficiary designation, or ZIP Codes in determining whether to require an HIV test of an applicant.

This bill:

- 2) On and after January 1, 2023, prohibits a life or disability insurance insurer from considering an applicant's occupation in determining whether to require an HIV test.
- 3) On and after January 1, 2023, prohibits a life or disability income insurer from limiting benefits payable for a loss caused by or contributed to by HIV or AIDS, unless the limit is the result of underwriting the risk at the time the insured submitted their application or enrollment request.
- 4) Clarifies that the misdemeanor for willful, negligent, or malicious disclosure of HIV test results to a third party is punishable by imprisonment for a period not to exceed 364 days, conforming the Equal Insurance HIV Act to the requirements of Penal Code Section 18.5.
- 5) Makes other technical changes to the Equal Insurance HIV Act.

## **Background**

According to the Author:

"In 2020, Governor Newsom signed the Equal Insurance HIV Act, which deletes an outdated law that allowed for discrimination of insurance applicants based solely on their HIV status. Insurance application denials have been based on outdated survival statistic bias that allows discrimination against individuals who are HIV-positive based on test results only, not considering other health and wellness factors. When HIV underwriting laws were enacted, treatment and services for someone who tested HIV-positive was severely limited, which significantly reduced their life expectancy. Today, with access to quality health care, advancements in HIV testing and treatment, a person who learns they are HIV-positive can live a longer, healthier life than ever before, and their need for life and disability income insurance is imperative in order for them to protect themselves and their loved ones. To strengthen protections and to ensure that the Equal Insurance HIV Act is implemented as it was intended, SB 283 makes important clarifying changes. Specifically, SB 283 would prohibit an

insurer from considering an applicant's occupation in determining whether to require an HIV test. This measure also makes clarifying changes by specifically limiting benefits payable for a loss caused or contributed by HIV if it was part of the original underwriting risk; and conforms the Equal Insurance HIV Act's civil penalty of imprisonment to not exceed 364 calendar days as established under Penal Code section 18.5."

California law prohibits unfair discrimination between individuals in the same insurance rate class with equal expectation of life for the rates charged, benefits payable, or terms and conditions for life insurance and annuities. (Ins. Code § 790.03 (f)(1)).

Last year, the legislature passed The Equal Insurance HIV Act (SB 1255, Insurance, Ch. 184, Stats. 2020). An act that adds substantial protections for HIV positive individuals and that aims to rapidly increase the availability of life and disability income insurance for this population. SB 283 adds clarification and technical changes to the Act.

*Change to Criminal Penalty.* Effective on and after January 1, 2023, the Equal Insurance HIV Act would impose criminal penalties, including imprisonment in a county jail for a period "not to exceed one year." However, under Penal Code Section 18.5, every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. SB 283 would make a small change to the Equal Insurance HIV Act to be consistent with the provisions under Penal Code 18.5.

Since 1989, California law has statutorily allowed an exception that permits insurers to deny coverage for life or disability income insurance to HIV positive individuals when the denial is based on positive results of an enzyme-linked immunoassay (ELISA) test followed by a positive Western Blot Assay performed by or at the direction of the insurer. (AB 3305, Johnston, Chapter 1279, Statutes of 1988). Additionally, insurers were not prohibited from declining an application or enrollment request for life or disability income insurance because a medical professional has diagnosed the applicant as having AIDS.

In the late 1980's, when existing HIV underwriting laws were enacted, treatment for someone who tested HIV positive was limited, ineffective, expensive, inaccessible and came with severe side effects causing many individuals who were HIV positive to bypass treatment altogether. Since then groundbreaking advancements in HIV treatment mean the disease is no longer the death sentence it once was. Now, a person living with HIV who has access to quality health care can live a long and healthy life.

*Looking Forward.* In addition to the technical and conforming change, this bill would add occupation to the list of reasons an insurance company may not require an HIV test. This list of protected factors is encompassing, and should serve to open the door wider for applicants with HIV to enter the mainstream life and disability insurance markets in the near future. Ending a specific discrimination in the insurance industry necessarily begins a new race for information on how to price the risk, simply by the very inclusion of a new population into a risk pool. Insurance is and has always been discriminatory in some ways, because adherence to the law of large numbers means an insurer can't sell as much when it can't measure as finely. Insurers must draw a statistical line on who is

and who isn't a good risk in order to develop products that are affordable and marketable to a critical mass of individuals. Life insurance is a bit like a betting game, and, to most insurers, people with HIV have been seen as bad bet for a long time. But good public policy requires striving to increase access for all individuals.

That people with HIV are living longer, and that the industry has not opposed the efforts to make mainstream inclusion easier, means that over time, access will likely increase. Like with other high-risk populations this committee has been following (eg. homeowners in high wildfire risk areas) policies may be more expensive for HIV positive individuals based on actuarial experience as it is further developed. Some factors for consideration:

- According to research from the North American AIDS Cohort Collaboration on Research and Design (NA-ACCORD), a 20-year-old, HIV-positive person on antiretroviral therapy can now expect to live into his or her early 70s.<sup>1</sup>
- A 2014 study by the Multicenter AIDS Cohort supported this claim, concluding that people who start therapy early (when their CD4 count, a measure of the robustness of the immune system, is above 350) should be able to have a life expectancy equal to the general population.<sup>2</sup>
- Despite gains in life expectancy, people with HIV are more likely to get non-HIV-related illnesses years before their non-infected counterparts.<sup>3</sup>
- Heart attacks, for example, are typically seen 16 years earlier than in the general population, while non-HIV-associated cancers are diagnosed anywhere from 10 to 15 years earlier.<sup>4</sup>

These studies of survival statistics suggest evidence that life insurance for this population will be more expensive. For comparison, tobacco smoking is estimated to lead to the premature death of approximately 6 million people worldwide. 'Premature death from smoking' is defined as a death from a smoking-related disease in an individual who would otherwise have died later from another cause. There is evidence these premature deaths average to 10 years of life years lost (US Department of Health and Human Services, 2004).

This is measured in the deaths of people who have stopped smoking but whose health has already been harmed by smoking. But, like a young person who starts antiretroviral therapy, a smoker who stops before their mid-30s have approximately the same life expectancy as never smokers. Life insurance is available for smokers, though many companies do not offer it. While not California specific, data out of Ohio reviewing ten big names suggests premiums can be two to three times higher than for non smokers.<sup>5</sup>

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<sup>1</sup> <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0081355>

<sup>2</sup> [https://journals.lww.com/aidsonline/Fulltext/2014/01140/Cause\\_specific\\_mortality\\_among\\_HIV\\_infected.13.aspx](https://journals.lww.com/aidsonline/Fulltext/2014/01140/Cause_specific_mortality_among_HIV_infected.13.aspx)

<sup>3</sup> <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0223224>

<sup>4</sup> <https://ajph.aphapublications.org/doi/10.2105/AJPH.2012.300844>

<sup>5</sup> <https://www.policygenius.com/life-insurance/best-life-insurance-companies-for-smokers/>

After the Equal Insurance HIV Act becomes operative, the Committee may want to monitor and revisit the topic of affordability for the HIV+ population as necessary.

## Questions

Section 3 of this bill, a conforming change to Section 799.08, would prohibit a life or disability insurance policy from limiting benefits unless that limit is the result of underwriting the risk at application or enrollment, pursuant to Section 799.02. This code section as it stands under existing law provides for an exception that would allow a life or disability income insurer to limit benefits if it could have denied the application for insurance originally, also pursuant to Section 799.02.

Section 799.02 is one section that was repealed and replaced (operative January 1, 2023) by the Author's previous legislation on this topic, SB 961 (Gonzalez, 2020) which, due to concerns over lengthy bill hearings during the pandemic, was eventually subsumed into the Committee's omnibus bill (SB 1255, 2020). Until December 31, 2022, section 799.02 allows insurers to decline a life or disability income insurance application on the basis of a positive ELISA test and positive Western Blot Assay test, indicating HIV infection.

Section 799.08 provided additional leeway to insurers to limit benefits in the instance that the insurer later learns the applicant was HIV+. Essentially, if the applicant lies about their status, the insurer has an out. Beginning January 1, 2023, however, Section 799.02 will prohibit a life or disability income insurer from declining an application based solely on the results of a positive HIV test, but specifies that limiting the amount of coverage offered is permissible if based on sound actuarial principles and experience.

Only allowing limitations based on actuarial principles and experience raises a technical question as to whether the proposed change would still allow for an insurer to limit benefits in the event that it learns of fraud or misrepresentation in the application, even if unrelated to HIV status. The author may wish to clarify that fraud and misrepresentation are still valid reasons to limit benefits, before the Equal Insurance HIV Act becomes operative January 1, 2023. This type of clarification would have precedent, as Insurance Code Section 10384.17 allows health insurers to rescind or limit a policy if the "insurer can demonstrate that the insured has performed an act or practice constituting fraud or made an intentional misrepresentation of material fact as prohibited by the terms of the policy."

## Related/Prior Legislation

*SB 1255 (Insurance, Chapter 184, Statutes of 2020)* in relevant part, this Committee omnibus bill included the Equal Insurance HIV Act which prohibits discrimination in life and disability income insurance against HIV positive applicants.

*SB 961 (Gonzalez, 2020)* the Equal Insurance HIV Act, which prohibits discrimination in life and disability income insurance against HIV positive applicants, was originally included in SB 961. The bill was held in Committee and contents moved to SB 1255.

*AB 3305 (Johnston, Chapter 1279, Statutes of 1988)* put into place significant portions of existing law on this subject, including allowing a life or disability income insurer to deny

an application or enrollment request on the basis of positive test results from the ELISA test and the Western Blot Assay.

**ARGUMENTS IN SUPPORT:**

None on file

**SUPPORT:**

California Department of Insurance  
Equality California

**OPPOSITION:**

None on file.

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