

Department of Legislative Services
 Maryland General Assembly
 2019 Session

FISCAL AND POLICY NOTE
 First Reader

House Bill 1075 (Delegate Rose, *et al.*)
 Health and Government Operations

Health - Informed Consent (Woman's Right to Know Act)

This bill prohibits a physician, with specified exceptions, from performing or attempting to perform an abortion unless the physician has (1) obtained voluntary informed consent at least 24 hours prior to an abortion being performed; and (2) performed a specified obstetric ultrasound or confirmed there is no embryonic fetal heartbeat. Beginning February 28, 2021, specified physicians must report specified information to the Maryland Department of Health (MDH) on an annual basis; failure to comply subjects the physician to late fees. By January 1, 2020, MDH must develop a website, create specified materials, and develop a reporting form for physicians. By June 30, 2021, and annually thereafter, MDH must issue a public annual report that includes specified statistics.

Fiscal Summary

State Effect: Potential increase in general fund revenues beginning in FY 2021 from late fees. General fund expenditures increase by \$199,800 in FY 2020 for staff. Future years reflect elimination of one-time costs and annualization. This analysis does not reflect any potential impact on Medicaid or the State Employee and Retiree Health and Welfare Benefits Program.

(in dollars)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024
GF Revenue	\$0	-	-	-	-
GF Expenditure	\$199,800	\$126,800	\$129,600	\$132,700	\$135,800
Net Effect	(\$199,800)	(\$126,800)	(\$129,600)	(\$132,700)	(\$135,800)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not expected to materially affect local government operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Definitions

“Abortion” means the use or prescription of any instrument, medicine, drug, or any other substance or device used to intentionally kill the unborn child of a woman known to be pregnant or to intentionally terminate the pregnancy of a woman known to be pregnant – except in cases where the intention is after viability to produce a live birth and preserve the life and health of the child born alive or to remove a dead unborn child.

“Attempt to perform an abortion” means an act that constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in the State.

Voluntary Informed Consent

A physician may not perform an abortion unless the woman on whom the abortion is being performed provides voluntary informed consent.

Disclosures by a Physician: The physician who is referring a woman for or performing an abortion must make specified disclosures, either in person or by telephone, to the woman at least 24 hours before an abortion is performed to ensure that her consent is both voluntary and informed: (1) the name of the physician performing the abortion; (2) the medical risks associated with the procedure that will be used to perform the abortion including, when appropriate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility; (3) the probable gestational age of the unborn child, in the physician’s judgement, at the time the abortion is to be performed; and (4) the medical risks associated with carrying the child to term.

This information must be provided such that the physician and the woman are both able to ask questions of each other. If the woman speaks a different language, the conversation may take place through a translator whom the woman understands. When this information is provided over the telephone without a physical examination of or tests on the patient, the information provided by the physician may be based on the facts supplied to the physician by the woman, as well as any other relevant information that is reasonably available to the physician. If at any time after this conversation the physician determines that the information provided needs to be revised, the revised information can be provided at any time before the abortion is performed.

Disclosures by a Physician, Physician’s Agent, or Recording: Additional specified disclosures must be made at least 24 hours before an abortion, but may be made by either

the physician who is referring or performing an abortion or an agent of the physician, in person or over the telephone, or through a tape recording if the recording has specified capabilities, including that:

- Medicaid benefits may be available for prenatal care, childbirth, and neonatal care;
- the father is liable to assist in the support of the woman's child, even if the father offered to pay for the abortion;
- there are materials available on a State-sponsored website that the woman has a right to review;
- the referenced materials describe the unborn child and list agencies that offer alternatives to abortion; and
- if the woman wishes to view a hard copy of the materials, they must be provided within a specified timeframe and through specified means, unless MDH has not yet made printed materials available.

Certification for Voluntary Informed Consent: Before performing an abortion, a physician must obtain written certification from the woman on whom the abortion is being performed that the specified required disclosures have been provided and that she has been made aware of the availability of specified materials.

Obstetric Ultrasounds

Requirements: Before a woman provides informed consent and before administering any anesthesia or medication in preparation for the abortion, the physician or a qualified technician must perform an obstetric ultrasound on the pregnant woman using a method that the physician and woman agree is best under the circumstance.

During the ultrasound, the person performing the ultrasound must:

- provide a verbal explanation of what the ultrasound is depicting, including the presence and location of the embryo or fetus within the uterus and the number of embryos or fetuses depicted;
- inform the woman if the fetus is not alive;
- display the ultrasound images so that the pregnant woman may view them; and
- provide a medical description of the ultrasound images, including the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.

The woman receiving an abortion may avert her eyes from any ultrasound images or choose not to listen to the sounds detected by a hand-held Doppler fetal monitor. The woman and the physician are not subject to any penalty for her doing so.

Exception: An obstetric ultrasound is not required if, the physician, certified technician, or agent has attempted to use a hand-held Doppler fetal monitor to make the embryonic or fetal heartbeat audible for the pregnant woman, the embryonic or fetal heartbeat is not audible, and the physician has offered to attempt to make the heartbeat audible at a subsequent date.

Certification: Before the abortion is performed, the physician must obtain written certification that the bill's provisions related to the performance of an obstetric ultrasound have been met. The physician must maintain the written certification for at least seven years or, if the woman is a minor, for at least seven years or for five years after the minor reaches age 18, whichever is greater.

Medical Emergency

“Medical emergency” means a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman and requires the immediate abortion of her pregnancy to prevent her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional damage. However, “medical emergency” does not include a condition based on a claim or diagnosis that the woman will engage in conduct that she intends to result in her death or substantial and irreversible physical impairment of a major bodily function.

A physician may perform an abortion without obtaining specified informed consent or performing an obstetric ultrasound if a medical emergency compels the abortion. If so, the physician must inform the woman before the abortion, if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a 24-hour delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional damage.

Website Requirements

Maryland Department of Health: MDH must develop and maintain a website that, to the extent reasonably practicable, is safeguarded from having the content of the website altered by anyone other than MDH. The website must be published by January 1, 2020, meet technical specifications, and contain specified content including but not limited to (1) geographically indexed information designed to inform a woman of the public and private agencies and services available to assist the woman through pregnancy, childbirth, and during the period in which the child is dependent, including lists of available agencies and their descriptions, and (2) materials designed to inform the woman of the probable anatomical and physiological characteristics of the embryo or fetus at two-week gestational

increments from the beginning of pregnancy to full-term pregnancy containing specified information (MDH must first create these materials).

Physicians: If a physician provides abortions and has a website, the website's homepage must include a link to MDH's website using at least two direct links, one of which must be posted prominently on the physician's website.

Reporting Requirements

Reporting Form: By January 1, 2020, MDH must prepare a reporting form that physicians must use to report specified information related to the bill's provisions to MDH. Copies of the reporting form must be provided to all licensed physicians by February 1, 2020. MDH must ensure that all licensed physicians have been provided with the reporting form by December 1, 2020, and annually thereafter. The reporting form must also be provided to each newly licensed physician at the time a license is issued.

Physician Reporting: By February 28, 2021, and annually thereafter, any physician who provided informed consent information regarding abortion to a woman under the bill's requirements in the immediately preceding calendar year must submit an accurately completed reporting form. A physician who fails to submit the required reporting form within 30 days after the deadline is subject to a late fee of \$500. The late fee may be imposed for each additional 30-day period or portion of a 30-day period that the reporting form remains overdue. If a physician fails to submit a complete reporting form for more than one year, MDH may file an action in court to compel the physician to submit a completed form.

Annual Report: By June 30, 2021, and annually thereafter, MDH must issue a public report that includes statistics pertaining to each item listed on the reporting form for the immediately preceding calendar year compiled from all of the reports submitted by physicians. If applicable, the annual report must also include statistics from all prior annual reports adjusted to reflect any additional information from late or corrected reporting forms. MDH must ensure that information in the annual report cannot reasonably lead to the identification of any individual.

If MDH fails to issue the annual report, any group of at least 10 residents of the State may seek an injunction in court against the Secretary of Health to compel the issuance of the report. Any failure to abide by this injunction will subject the Secretary of Health to sanctions for civil contempt.

Regulations: MDH may adopt regulations that alter any of the dates pertaining to when information or reports must be submitted or consolidate the forms or reports required under

the bill with other forms or reports, if MDH sends the reporting form to licensed physicians at least annually and issues its annual report at least annually.

Penalties

A woman on whom an abortion is performed or attempted to be performed in violation of the bill's provisions is not subject to any criminal or civil penalty.

Criminal Liability: A person who knowingly or recklessly performs or attempts to perform an abortion in violation of the bill's provisions is guilty of a felony. Any individual, other than a public official, who brings an action against a person for this violation must use a pseudonym for the woman on whom the abortion was performed or attempted unless that woman provides written consent for her name to be used.

Additionally, a physician who knowingly or recklessly submits a false reporting form is guilty of a misdemeanor.

Civil Liability: If a person knowingly or recklessly performs an abortion in violation of the bill's provisions, the woman on whom the abortion was performed, the father of the embryo or fetus who was subject to the abortion, or the grandparent of the embryo or fetus who was subject to abortion may recover actual and punitive damages against the person who performed the abortion.

Attorney's Fees: If the plaintiff prevails in an action authorized by the bill, the court must award reasonable attorney's fees to the plaintiff. However, if the court finds that the plaintiff's suit was frivolous and in bad faith, the court must award reasonable attorney's fees to the defendant.

Sealing Records for Anonymity: In an action or proceeding authorized by the bill, the court must, on its own motion or motion of a party, rule on whether the woman on whom an abortion was performed or attempted in violation of the bill must remain anonymous.

If the court determines that the woman must remain anonymous, the court must direct that the record be sealed, exclude individuals from courtrooms or hearing rooms to the extent necessary, take any other measure to safeguard the woman's identity from public disclosure, and document the specified findings that went into making its ruling.

Defendant's Right to Confront Witnesses: None of the bill's provisions related to civil or criminal actions allow the identity of the plaintiff or witnesses to be concealed from the defendant.

Severability

If any provision of the bill or its application to any person or circumstances is held invalid for any reason by a court, that invalidity does not affect other provisions or any other application of this bill that can remain in effect without the invalid provision or application.

Current Law: The State may not interfere with a woman's decision to end a pregnancy before the fetus is viable, or at any time during a woman's pregnancy, if the procedure is necessary to protect the life or health of the woman, or if the fetus is affected by a genetic defect or serious deformity or abnormality. This is consistent with the U.S. Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973). A viable fetus is one that has a reasonable likelihood of surviving outside of the womb. MDH may adopt regulations consistent with established medical practice if they are necessary and the least intrusive method to protect the life and health of the woman.

If an abortion is provided, it must be performed by a licensed physician. A physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the physician's best medical judgment using accepted standards of medical practice.

Background: According to the Guttmacher Institute, three states (Louisiana, Texas, and Wisconsin) mandate that an abortion provider perform an ultrasound on each woman seeking an abortion and requires the provider to show and describe the image. All three states also allow for a woman to look away from the image. Louisiana and Texas further allow a woman to decline to listen to the description provided, under certain circumstances.

Three other states have enacted similar legislation, however, enforcement is permanently enjoined by a court order in those states (Kentucky, North Carolina, and Oklahoma).

State Expenditures: MDH advises that it must hire two part-time (50%) permanent employees and one part-time (50%) contractual employee to implement the bill. MDH further advises that the contractual staff will need to start beginning July 1, 2019, prior to the bill's October 1, 2019 effective date, in order to meet the bill's requirement that the print materials and website be developed and available by January 1, 2020. The Department of Legislative Services concurs.

Accordingly, general fund expenditures increase by at least \$199,823 in fiscal 2020, which accounts for the bill's October 1, 2019 effective date, and the hiring of contractual staff beginning July 1, 2019. The estimate reflects the costs of hiring one part-time (50%) health policy analyst to support the continued monitoring and updating of the website and print materials, serve as a contact for providers, oversee distribution of reporting forms, and

prepare the annual report; one part-time (50%) epidemiologist to support the data collection and statistical analysis necessary to prepare the required annual report; and one part-time (50%) contractual physician clinical specialist to consult on the development of the mandated website and print materials. It includes salaries, fringe benefits, one-time start-up costs, ongoing operating expenses and one-time costs for translation services.

Contractual Positions	0.5
Permanent Positions	1.0
Salaries and Fringe Benefits	\$138,372
Other Operating Expenses	<u>61,451</u>
Total FY 2020 State Expenditures	\$199,823

This estimate does not include any health insurance costs that could be incurred for specified contractual employees under the State's implementation of the federal Patient Protection and Affordable Care Act.

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses (including annual printing and mailing costs).

Although the bill establishes criminal liability for a person who knowingly or recklessly performs or attempts to perform an abortion in violation of the bill (a felony) or a physician who knowingly or recklessly submits a specified false report (a misdemeanor), no associated penalties are established. Therefore, this analysis does not assume any effect on expenditures related to any potential incarceration or on revenues related to any potential fines.

The bill's provisions related to civil actions are not expected to materially affect caseloads and/or government finances.

Small Business Effect: Meaningful for physicians whose practices currently encompass performing abortions to comply with the bill. Litigation costs may increase for physicians against whom civil actions are brought under the bill.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Maryland

State's Attorneys' Association; Maryland Department of Health; Department of Legislative Services

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