

Legislative Analysis



ABORTION-RELATED AMENDMENTS

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House Bill 4949 as introduced
Sponsor: Rep. Laurie Pohutsky

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4950 as introduced
Sponsor: Rep. Penelope Tsernoglou

House Bill 4951 as introduced
Sponsor: Rep. Kara Hope

House Bill 4952 as introduced
Sponsor: Rep. Carrie Rheingans

House Bill 4956 as introduced
Sponsor: Rep. Julie M. Rogers

House Bill 4953 as introduced
Sponsor: Rep. Christine Morse

House Bill 4957 as introduced
Sponsor: Rep. Samantha Steckloff

House Bill 4954 as introduced
Sponsor: Rep. Felicia Brabec

House Bill 4958 as introduced
Sponsor: Rep. Regina Weiss

House Bill 4955 as introduced
Sponsor: Rep. Natalie Price

House Bill 4959 as introduced
Sponsor: Rep. Kristian Grant

Committee: Health Policy
Complete to 9-14-23

SUMMARY:

House Bills 4949 to 4959 would create a new act and amend several existing acts to revise and repeal provisions of law related to abortion services. In November 2022, Michigan voters approved Ballot Proposal 3, which added section 28 of Article I to the state constitution.¹ Among other things, that section provides that “[e]very individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.” (The full text of section 28 of Article I is included in **Background**, below.) The bills, briefly described, would prohibit a governmental entity from violation section 28 of Article I and reenact most of its provisions as statute (HB 4949), repeal sections of law that define and prohibit specified abortion procedures (HB 4949), repeal requirements regarding health insurance coverage of abortion services (HB 4949), repeal or amend sections of law that prescribe procedures or other requirements for health facilities and professionals that perform abortions (HB 4950), repeal or amend sections of law that now prohibit or direct the use of public funds related to abortion (HBs 4949, 4957, 4958, and 4959), and make complementary changes to other sections of law. The bills are described in greater detail below.

¹ See https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf

House Bill 4949 would create a new act to prohibit a *governmental entity* from violating section 28 of Article I of the state constitution.

Governmental entity would mean any of the following:

- The state and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces.
- A county, city, village, township, school district, or other political subdivision of the state.
- An agency, department, court, board, commission, or council of a county, city, village, township, school district, or other political subdivision of the state.
- An official of any of the entities described above.

The bill also includes the full text of section 28 of Article I of the state constitution (see **Background**, below) and says that those provisions apply in Michigan, *except that* it does not include the constitutional clause that says “The state shall not discriminate in the protection or enforcement of this fundamental right [to reproductive freedom].”

One of the provisions from the constitution included in the bill allows the state to regulate the provision of abortion care after fetal viability.² Under the constitution and as included the bill, this applies notwithstanding other provisions that prohibit an individual’s fundamental right to reproductive freedom from being denied, burdened, or infringed upon unless justified by a compelling state interest³ achieved by the least restrictive means. However, under the constitution and as included in the bill, the state cannot under any circumstances prohibit an abortion that, in the professional judgment of an attending health care professional, is *medically indicated to protect the life or physical or mental health of the pregnant individual*.

The bill would add that, in determining whether an abortion is *medically indicated to protect the life or physical or mental health of a pregnant individual* under the provision described above, the attending health care professional may consider any factor that they consider relevant to the well-being of the pregnant individual, including the pregnant individual’s age and physical, emotional, psychological, and familial considerations.

Remedies

The bill would authorize the attorney general to enforce the provisions described above under the heading “Other provisions” through a civil action for injunctive relief, damages, or any other appropriate remedy.

In addition, an individual or entity or their legal representative could bring a civil action for injunctive relief, damages, or any other appropriate remedy in the appropriate state or federal court for an alleged violation by a governmental entity (as defined above) of the individual’s or entity’s rights under either of the following:

- The provisions described above under “Other provisions.”
- Section 28 of Article I of the state constitution.

² *Fetal viability* is defined as the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’s sustained survival outside the uterus without the application of extraordinary medical measures.

³ A state interest is defined as being *compelling* only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.

Repealers

Finally, the bill would repeal all of the following:

- Section 90h of the Michigan Penal Code,⁴ the Partial-Birth Abortion Ban Act, which defines and prohibits partial-birth abortion procedures, makes violation a felony, and provides grounds for civil action. (MCL 750.90h)
- Section 323 of the Michigan Penal Code,⁵ which defines as manslaughter an abortion or attempted abortion of a “quick child” (unless necessary to protect the pregnant individual’s life) that results in the death of the pregnant individual or the quick child. (MCL 750.323)
- The Legal Birth Definition Act,⁶ which provided that perinates as defined in the act are legally born persons under Michigan law. The act was found to be unconstitutional in 2007. (MCL 333.1081 to 333.1085)
- 2002 PA 360,⁷ known as the Allocation of Funds to Family Planning Services Act, which requires priority in the allocation of funds for reproductive health programs and services administered by the Department of Health and Human Services (DHHS) to be given to entities that do not perform or allow abortions, make referrals for abortion services, or present abortion as being in a range of family planning or reproductive health services. (MCL 333.1091)
- The Abortion Insurance Opt-Out Act,⁸ which requires coverage in a health care plan for most abortion services to be provided only through an optional rider with an additional premium, prescribes notice that an employer must provide to employees if the employer purchases optional abortion coverage, and prescribes a civil fine for certain violations by health professionals or facilities. (MCL 550.541 to 550.549)

The bill would take effect January 1, 2025. It cannot take effect unless HBs 4950 and 4958 are both also enacted.

House Bill 4950 would repeal the following sections of the Public Health Code:

- Section 2835,⁹ which requires a physician who performs an abortion to report the procedure to DHHS, prescribes requirements for the reports and their processing, and makes violation of confidentiality requirements a felony. (MCL 333.2835)
- Section 2836, which prescribes requirements for the disposal of fetal remains from an abortion. (Violation is a state civil infraction.)¹⁰ (MCL 333.2836)
- Section 2837, which requires a physician to file a written report regarding patients who suffer a physical complication or death that is a primary, secondary, or tertiary result of an abortion and prescribes how those reports and that information are to be processed and used.¹¹ (MCL 333.2837)
- Sections 17014 and 17015, which together require that a patient be provided with specified visual materials and information at least 24 hours before a scheduled abortion

⁴ <http://legislature.mi.gov/doc.aspx?mcl-750-90h>

⁵ <http://legislature.mi.gov/doc.aspx?mcl-750-323> At the time this law was first enacted, a “quick child” was understood to be a fetus that could be felt moving.

⁶ <http://legislature.mi.gov/doc.aspx?mcl-Act-135-of-2004>

⁷ <http://legislature.mi.gov/doc.aspx?mcl-Act-360-of-2002>

⁸ <http://legislature.mi.gov/doc.aspx?mcl-Act-182-of-2013>

⁹ <http://legislature.mi.gov/doc.aspx?mcl-333-2835>

¹⁰ <http://legislature.mi.gov/doc.aspx?mcl-333-2836>

¹¹ <http://legislature.mi.gov/doc.aspx?mcl-333-2837>

(such as, among other things, a description of the procedure, a medically accurate depiction of a fetus at the same probable gestational age, and a prenatal and parenting information pamphlet). The patient must sign an acknowledgment and consent form to confirm receipt of the information and authorize the procedure. Section 17014 contains legislative findings, and section 17015 has the substantive provisions that are described in brief above. Section 17015 also contains a definition of “abortion” that is cited in several other provisions of law.¹² (MCL 333.17014 and 333.17015)

- Section 17015a, which requires that a patient seeking an abortion be screened to determine whether they have been coerced to do so and prescribes protocols for the screening process.¹³ (MCL 333.17015a)
- Sections 17016 and 17516, which define, and generally prohibit physicians from performing, partial-birth abortion.¹⁴ (MCL 333.17016 and 333.17516)
- Sections 17017 and 17517, which required a personal physical examination by a physician before an abortion procedure involving prescription drugs and not surgery. These sections expired December 31, 2018.¹⁵ (MCL 333.17017 and 333.17517)
- Section 17515, which requires osteopathic physicians to comply with sections 17015 and 17015a (described above).¹⁶ (MCL 333.17515)
- Section 22224, which exempts health facilities that are required to be licensed as freestanding surgical outpatient facilities due to their provision of abortion services from certificate of need requirements.¹⁷ (MCL 333.22224)

The bill would also amend several sections of the code to remove references to the sections described above, notably in provisions that provide penalties or sanctions for a violation of those sections. (For example, removing section 2836, which the bill would repeal, from section 2854, which now prescribes sanctions for a violation, and removing sections 17015, 17015a, 17016, 17017, 17515, 17516, and 17517 from sections 16221 and 16226, which prescribe licensure sanctions for their violation by a licensed health professional.)

Definition of “abortion”

As noted above, section 17015 of the code, which the bill would repeal, contains a definition of the term *abortion* that is incorporated by reference into several other sections of law:

Abortion means the intentional use of an instrument, drug, or other substance or device to terminate a woman’s pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a fetus that has died as a result of natural causes, accidental trauma, or a criminal assault on the pregnant woman. Abortion does not include the use or prescription of a drug or device intended as a contraceptive.

¹² <http://legislature.mi.gov/doc.aspx?mcl-333-17014> and <http://legislature.mi.gov/doc.aspx?mcl-333-17015>

¹³ <http://legislature.mi.gov/doc.aspx?mcl-333-17015a>

¹⁴ <http://legislature.mi.gov/doc.aspx?mcl-333-17016> and <http://legislature.mi.gov/doc.aspx?mcl-333-17516>

¹⁵ <http://legislature.mi.gov/doc.aspx?mcl-333-17017> and <http://legislature.mi.gov/doc.aspx?mcl-333-17517>

¹⁶ <http://legislature.mi.gov/doc.aspx?mcl-333-17515>

¹⁷ <http://legislature.mi.gov/doc.aspx?mcl-333-22224>

The bill would amend sections 2803 and 10102,¹⁸ which reference the definition in section 17015, to remove those references and instead provide the following definition of *abortion* for purposes of those sections:

Abortion means a medical treatment that is intended to terminate a diagnosable intrauterine pregnancy for a purpose other than to produce a live birth. Abortion does not include the use or prescription of a drug or device that prevents pregnancy or a medical treatment used to remove a dead fetus or embryo whose death was the result of a spontaneous abortion.

The above definition would also apply to section 2690. The bill would use the term “abortion” in that section where now the term “elective abortion” is defined and used.¹⁹

Other provisions

The bill would amend section 9141 of the code to remove a provision that now requires that an entity that receives a grant for the purchase of ultrasound equipment must agree not to use that equipment to assist in the performance of an elective abortion as defined in that section.

The bill would amend section 20115 to remove provisions that now require a facility, including a private practice office, that performs 120 or more surgical abortions per year to be licensed as a freestanding surgical outpatient facility under the code and include related requirements.

The bill cannot take effect unless HB 4949 is also enacted.

MCL 333.2690 et seq.

House Bill 4951 would amend the Code of Criminal Procedure to change citation references to comport with changes proposed by HB 4949. The bill also would amend the sentencing guidelines to remove felonies that HBs 4949 and 4950 would repeal (sections 90h and 323 of the Michigan Penal Code and section 2835 of the Public Health Code).

The bill cannot take effect unless HB 4950 is also enacted.

MCL 762.10d et seq.

House Bill 4952 would amend the Born Alive Infant Protection Act to change the definition of the term *abortion* for purposes of the act. Currently, *abortion* means that term as defined in section 17015 of the Public Health Code, which HB 4950 would repeal. The bill would accordingly remove the reference section 17015 and add the definition, described above, that would also be added to the Public Health Code by HB 4950.

The Born Alive Infant Protection Act requires certain procedures to be followed if an abortion results in a live birth (as defined in the act). For example, in a hospital setting, the attending physician must provide immediate medical care to the newborn, inform the mother of the live birth, and request transfer of the newborn to another physician for medical care. In addition, if

¹⁸ Section 2803 defines the term for purposes of Part 28 (Vital Records) of the code, and section 10102 defines it for purposes of Part 101 (Revised Anatomical Gift Law).

¹⁹ See <http://legislature.mi.gov/doc.aspx?mcl-333-2690>

an abortion results in a live birth and the mother expresses a desire not to assume custody and responsibility for the newborn, the newborn is considered a newborn who has been surrendered to an emergency service provider under the Safe Delivery of Newborns Law (Chapter XII of the Probate Code).²⁰

The bill cannot take effect unless HB 4950 is also enacted.

MCL 333.1071

House Bills 4953 through 4956 would amend the following acts to change citation references to comport with changes proposed by HB 4949:

- HB 4953: Revised Judicature Act (MCL 600.5711).
- HB 4954: State School Aid Act (MCL 388.1606).
- HB 4955: Occupational Code (MCL 339.1810).
- HB 4956: 1965 PA 213, concerning expungement (MCL 780.621).

House Bills 4953, 4954, and 4956 cannot take effect unless HB 4949 is also enacted. House Bill 4955 cannot take effect unless HB 4950 is also enacted.

House Bill 4957 would amend the Pregnant and Parenting Student Services Act to remove a provision that now prohibits a pregnant and parenting student services office established by an *institution of higher education* from providing referrals for abortion services.

Institution of higher education means a degree- or certificate-granting public or private college or university, junior college, or community college in Michigan.

The act allows institutions of higher education to establish grant-eligible pregnant and parenting student services offices that address the needs of students on campus who are pregnant or the custodial parent of legal guardian of a minor, such as comprehensive student health care, family housing, child care, flexible or alternative academic scheduling, and education concerning responsible parenting for mothers and fathers.

Among other things, an office must assess the performance of the institution and the office in meeting those needs, identify providers and programs qualified to meet those needs, and assist students in locating and getting services that meet those needs.

In addition, if appropriate, an office must provide referrals on prenatal care and delivery, infant or foster care, or adoption, and on family planning, to individual students who request that information.

Currently, the act prohibits an office from providing referrals for abortion services. The bill would remove that prohibition.

The bill cannot take effect unless HB 4949 is also enacted.

MCL 390.1595

²⁰ <http://legislature.mi.gov/doc.aspx?mcl-288-1939-XII>

House Bill 4958 would repeal the following three sections of the Social Welfare Act:

- Section 109a, which prohibits an abortion from being provided with public funds to a recipient of welfare benefits unless necessary to save the life of the mother. The prohibition applies whether the funds are provided through a program of medical assistance, general assistance, or categorical assistance or through any other type of public aid or assistance program.
- Sections 109d and 109e, which together prohibit a health care professional or health facility or agency from seeking or accepting reimbursement for the performance of an abortion knowing that public funds will be or have been used in whole or in part for the reimbursement in violation of section 109a (above). A person who violates this prohibition is liable for a civil fine of up to \$10,000 per violation. Section 109e contains the prohibition and sanction, and section 109d contains related legislative findings.

The bill cannot take effect unless HBs 4949 and 4959 are also enacted.

MCL 400.109a, 400.109d, and 400.109e (repealed)

House Bill 4959 would amend the Social Welfare Act to provide that a medically indigent individual²¹ is entitled to receive abortion services from any provider the individual chooses (that is, the bill would require Medicaid to cover abortion services for Medicaid recipients). DHHS would have to set and pay to providers reasonable rates that take account of the prevailing charges and reimbursement rates in the region. Plans offered under Medicaid could not impose any cost-sharing or case-by-case utilization management or utilization review requirement or limitation.

The bill would take effect January 1, 2025. It cannot take effect unless HB 4958 is also enacted.

MCL 400.108 and 400.109

BACKGROUND:

Section 28 of Article I of the state constitution reads in full as follows:

Sec. 28 (1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.

Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that,

²¹ As defined in section 106(1) of the act: <http://legislature.mi.gov/doc.aspx?mcl-400-106>

in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

(2) The state shall not discriminate in the protection or enforcement of this fundamental right.

(3) The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall the state penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.

(4) For the purposes of this section:

A state interest is “compelling” only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.

“Fetal viability” means: the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’s sustained survival outside the uterus without the application of extraordinary medical measures.

(5) This section shall be self-executing. Any provision of this section held invalid shall be severable from the remaining portions of this section.

FISCAL IMPACT:

House Bill 4949 would have an indeterminate fiscal impact on the state and on local units of government. The Department of the Attorney General may experience an increase of casework related to the bill should the attorney general choose to take civil action for enforcement. The department will likely be able to absorb any increase in casework resulting from the bill with ongoing staff and funding.

Repealing the Allocation of Funds to Family Planning Services Act would not increase costs for the Department of Health and Human Services but may reduce state allocations for local units of government. Current law has generally provided priority to local health departments in awarding of grant funding and has made it harder for grant funding to be awarded to non-state entities that provide abortion services. Under the provisions of the bill, this priority structure for funding would no longer be given to local health departments and could potentially result in loss of revenue for some local health departments. If a local health department is not awarded grant funding, it is not required to carry out those certain services. However, non-state entities that are awarded funding may then offer those services so accessibility to services would not be impacted within a county.

Eliminating civil fines would decrease revenue to libraries and to the state. Revenue collected from the payment of civil fines is used to support public and county law libraries. Also, under section 8827(4) of the Revised Judicature Act, \$10 of the civil fine is to be deposited into the state's Justice System Fund. Justice System Fund revenue supports various justice-related endeavors in the judicial branch, the Departments of State Police, Corrections, Health and Human Services, and Treasury, and the Legislative Retirement System. Because there is no practical way to determine the number of fines that would no longer be ordered under provisions of the bill, an estimate of the amount of lost revenue to libraries or to the state cannot be made.

Eliminating felony offenses would result in a decrease in costs for the state and for local units of government. Reduced felony charges would result in reduced costs related to the state correctional system. In fiscal year 2022, the average cost of prison incarceration in a state facility was roughly \$47,900 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$5,000 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how court caseloads and related administrative costs are affected. There could also be a decrease in penal fine revenues which would decrease funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 4950 would have an indeterminate, but likely minimal, fiscal impact on the Department of Licensing and Regulatory Affairs (LARA). The bill would reduce conditions under which LARA would need to conduct disciplinary investigations into actions undertaken by health professionals with respect to abortion-related activities. Thus, the bill could also lead to reductions in disciplinary action against licensees. The fiscal impact from these reductions would likely be minimal.

The bill could increase state revenues for the Department of Health and Human Services by a minimal amount. The bill repeals the certificate of need exception for freestanding surgical outpatient facilities that provide abortions in the Public Health Code. Under the provisions of the bill, freestanding surgical outpatient facilities that do provide abortions are now eligible to apply for the certificate of need program, which may result in an increase in applications for the program. DHHS receives restricted revenue from application fees for the certificate of need program, and an increase in applications would mean an increase in revenue to the state.

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Additional fiscal impacts of House Bill 4950 would be dependent on the administrative cost related to any change in reporting and information sharing measures related to abortion required of DHHS under the provisions of the bill.

House Bill 4951 is a companion bill that amends citations and the sentencing guidelines. Amendments to citations include eliminating references to MCL 750.90g. Amendments to sentencing guidelines include eliminating guidelines for performing or assisting in performance of partial-birth abortion and disclosing confidential information about abortion. The bill would not have a direct fiscal impact on the state or on local units of government.

House Bill 4952 would not have a significant fiscal impact on state expenditures to the Department of Health and Human Services or local units of government.

House Bills 4953 to 4956 would have no fiscal impact on the state or local units of government.

House Bill 4957 would have no fiscal impact on public universities or community colleges.

House Bill 4958 would have an indeterminate fiscal impact on the state and on local units of government. Revenue collected from the payment of civil fines is used to support public and county law libraries. Also, under section 8827(4) of the Revised Judicature Act, \$10 of the civil fine is to be deposited into the state's Justice System Fund. Justice System Fund revenue supports various justice-related endeavors in the judicial branch, the Departments of State Police, Corrections, Health and Human Services, and Treasury, and the Legislative Retirement System. Repealing the civil fine would decrease revenue to libraries and to the state. Because there is no practical way to determine the number of fines that would no longer be ordered under provisions of the bill, an estimate of the amount of lost revenue to libraries or to the state cannot be made.

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House Bill 4959 would increase state Medicaid costs by \$2.0 million to \$6.0 million, as a greater percentage of abortions in this state would be paid for with state funds, rather than non-state resources, for recipients of Medicaid, and would have no fiscal impact on local units of

government Presently, the state’s Medicaid program follows the federal Medicaid standard of paying for abortion services in instances of rape, incest, or life of the mother.²² Any payments for abortion services outside of those three factors are not currently eligible for federal Medicaid reimbursement and would therefore have to be paid for with 100% state funding.²³

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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.

²² See Section 7.2 of the Billing & Reimbursement for Institutional Providers, 3.1 of Hospital 1.3 of Medicaid Health Plans, 12.1 of Practitioners, MSA-1550, and MSA-4240, from the Medicaid Provider Manual Dated July 1, 2023 <https://www.michigan.gov/mdhhs/doing-business/providers/providers/medicaid/policyforms/medicaid-provider-manual>.

²³ See <https://reproductiverights.gov/> and <https://www.kff.org/medicaid/state-indicator/abortion-under-medicaid/>.