

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

Senate Bill 511
Finance

(Senator Hough, *et al.*)

Women's Late-Term Pregnancy Health Act

This bill requires a qualified physician to determine the probable age of an unborn child before performing or inducing an abortion except in specified circumstances. If the unborn child has a probable gestational age of 20 weeks or more, the physician is prohibited from performing or inducing an abortion except in specified circumstances.

Fiscal Summary

State Effect: Potential minimal increase in general fund expenditures due to the bill's incarceration penalty provision. Maryland Medical Assistance Program (Medicaid) expenditures (50% general funds, 50% federal funds) decrease under the bill to the extent fewer abortions are performed; federal fund revenues decrease correspondingly. The State Board of Physicians can also likely handle the bill's requirements with existing resources, as discussed below.

Local Effect: Potential minimal increase in revenues and expenditures due to the bill's penalty provision.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Limitations on Abortions

Except in the case of a medical emergency (as defined in the bill), a physician may not perform, induce, or attempt an abortion unless the physician has made a determination of the probable gestational age of the unborn child. In making this determination, the physician must make inquiries of the pregnant woman and perform specified examinations and tests.

Additionally, except in the case of a medical emergency, an individual may not knowingly perform, induce, or attempt an abortion if the probable gestational age of the unborn child has been determined by the physician to be 20 weeks or more.

The bill defines “gestational age” as the time that has elapsed since the first day of a woman’s last menstrual period.

Medical Facility and Physician Reporting Requirements

A physician who performs, induces, or attempts an abortion due to a medical emergency must submit a written report to the medical facility in which the abortion was performed, induced, or attempted that indicates the reason for the determination that a medical emergency existed. The medical facility must submit the written report to the Department of Health and Mental Hygiene (DHMH).

If the physician performed, induced, or attempted the abortion due to a medical emergency in a location other than a medical facility, the physician must submit the report to DHMH.

A physician who fails to file the required report is not subject to the criminal and civil penalties established under the bill but is subject to sanctions, disciplinary action, or any other action deemed appropriate by the State Board of Physicians.

Penalties

An individual who intentionally or knowingly performs or induces an abortion in violation of the bill’s prohibitions, the action of which results in the death of the unborn child, is guilty of a felony and on conviction is subject to a fine of up to \$100,000 and/or imprisonment for up to 10 years.

A medical facility in which an abortion is performed or induced in violation of the bill's prohibitions is subject to immediate revocation of the facility's license by DHMH and revocation of State funding for five years.

A woman on whom an abortion is performed may not be prosecuted for a conspiracy to violate the bill.

A physician accused of violating the bill's prohibitions may seek a hearing before the State Board of Physicians to determine whether (1) the physician's conduct was necessary to save the life of the mother whose life was endangered by specified physical ailments or (2) the continuation of the pregnancy would have created a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman. Board findings are admissible at any trial related to violations of the bill in which the physician is a defendant.

Civil Actions Established

The following individuals may bring a civil action against an individual who performed or induced an abortion in violation of the bill's prohibitions: (1) the woman on whom the abortion was performed or induced; (2) the father of the unborn child if married to the mother at the time of the abortion; and (3) the maternal grandparents of the unborn child if the mother was a minor at the time of the abortion, unless the maternal grandparents consented to the abortion. However, a plaintiff may not bring a civil action if the pregnancy resulted from the plaintiff's criminal conduct. An award must include damages for psychological and physical injuries resulting from the violation as well as damages equal to three times the cost of the abortion.

Miscellaneous Provisions

If some or all of the bill's provisions are restrained or enjoined by judicial order, all other provisions of law regulating or restricting abortion must be enforced as though the restrained or enjoined provisions had not been adopted (except that, whenever the restraining order or injunction is stayed or dissolved or otherwise ceases to have effect, the affected provisions must have full force and effect).

The bill may not be construed to repeal specified other applicable provisions of State law regulating or restricting abortion.

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 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. DHMH 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, medical professionals customarily date a pregnancy from the first day of the woman's last menstrual period, because it is an easier date for a woman to pinpoint; fertilization usually takes place two weeks after the first day of a woman's last menstrual period. The normal gestational length of a pregnancy is 40 weeks from the beginning of a woman's last menstrual period, or about 38 weeks postfertilization. The Guttmacher Institute reports that, as of March 2015, 10 states ban abortions past 20 weeks postfertilization or the equivalent 22 weeks after the woman's last menstrual period on the grounds that the fetus can feel pain: Alabama, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, and Texas.

The U.S. Court of Appeals for the Ninth Circuit recently struck down an Arizona law that is similar to the bill. The Arizona law banned abortions past 20 weeks postfertilization except in a medical emergency. The U.S. Supreme Court declined to hear the appeal from Arizona officials on January 13, 2014. Additionally, *Politico* reports that, while 14 states have 20-week abortion ban laws "on the books," 3 of these state laws were blocked in court.

On June 18, 2013, the U.S. House of Representatives passed the Pain-Capable Unborn Child Protection Act, which would have banned abortions at or beyond 20 weeks after fertilization, except in specific instances such as medical emergencies and pregnancies resulting from rape or incest against a minor. The legislation was introduced again in January 2015 but did not move forward in the House due to concerns that the exceptions for rape and incest were not broad enough.

In 2011, 1.1 million American women obtained abortions, producing a rate of 16.9 abortions per 1,000 women of reproductive age. (This represents a decrease since 2008, when the abortion rate was 19.4 abortions per 1,000 women.) In Maryland in 2011, 34,260 women obtained abortions at a rate of 28.6 abortions per 1,000 women of reproductive age. (The rate remains unchanged since 2008, when the rate was 28.7 abortions per 1,000 women.) However, 89% of U.S. counties had no abortion clinic in 2011, and 38% of American women lived in these counties. Therefore, it is likely that some women who received abortions in Maryland were from other states, while some

Maryland residents received abortions in other states. For this reason, the Maryland rate may not accurately reflect the abortion rate of State residents.

In 2011, there were 34 abortion providers in Maryland. (The number remained the same since 2008.)

State Expenditures: The bill authorizes the State Board of Physicians to discipline physicians who fail to file the required reports. The bill also authorizes physicians who are accused of violating the bill's prohibitions to request a hearing before the board; however, the number of physicians requesting such hearings is expected to be minimal. Therefore, the board can likely absorb the workload within existing budgeted resources. However, should the board experience a higher volume of cases than anticipated, the board may require additional staff support; the board advises it may need the assistance of a compliance analyst and an assistant Attorney General to investigate the cases and conduct the disciplinary proceedings, as necessary.

Language attached to the Medicaid budget since the late 1970s authorizes the use of State funds to pay for an abortion if a physician or surgeon certifies that the procedure is necessary. In fiscal 2014, Medicaid paid for 6,609 abortions. The Department of Legislative Services advises that Medicaid expenditures (50% general funds, 50% federal funds) decrease under the bill to the extent that fewer abortions are performed and, therefore, funded by Medicaid. The exact amount of any decrease depends on the proportion of Medicaid-funded abortions that would be prohibited under the bill and cannot be reliably estimated at this time. Federal fund revenues decrease correspondingly to reflect the decrease in federal matching funds received.

Small Business Effect: Potential meaningful impact for physicians whose practices currently encompass abortions at or beyond a probable gestational age of 20 weeks. Litigation costs may increase for physicians against whom civil actions are brought under the bill. Physicians also face significant fines and prison sentences. Medical facilities that violate the bill's prohibitions may also have their licenses and State funding revoked.

Additional Information

Prior Introductions: None.

Cross File: HB 961 (Delegate Ciliberti, *et al.*) - Health and Government Operations.

Information Source(s): Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Maryland State Commission on Criminal Sentencing Policy, Guttmacher Institute, *New York Times*, *U.S. News & World Report*, *Politico*, Department of Legislative Services

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