

Department of Legislative Services  
Maryland General Assembly  
2019 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 1195 (Delegate Cox, *et al.*)  
Health and Government Operations

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Health - Maryland Fetal Heartbeat Protection Act

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This bill prohibits a physician from performing or inducing an abortion (1) unless the physician has first determined whether the fetus has a detectable heartbeat; and (2) if there is a detectable fetal heartbeat. A violator of either prohibition is guilty of a felony and subject to imprisonment for up to two years and/or a fine of \$10,000. A pregnant woman who receives an abortion in violation of these prohibitions is not criminally or civilly liable and may file a civil cause of action against a physician for any violation of the bill's provisions. **The bill takes effect July 1, 2019.**

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Fiscal Summary

**State Effect:** Potential minimal increase in general fund revenues and expenditures due to the bill's penalty provisions. The bill's provisions related to civil actions are not expected to materially affect caseloads and/or government finances. This analysis does not reflect any potential impact on Medicaid or the State Employee and Retiree Health and Welfare Benefits Program.

**Local Effect:** Potential minimal increase in revenues and expenditures due to the bill's penalty provisions. The bill's provisions related to civil actions are not expected to materially affect local government operations or finances.

**Small Business Effect:** Meaningful.

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Analysis

**Bill Summary:** The bill also repeals current law provisions that (1) prohibit the State from interfering with a woman's decision to terminate 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; (2) authorize the Maryland Department of Health (MDH) to 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; and (3) exempt a physician from liability for civil damages or 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.

The bill's provisions only apply to pregnancies in which the fetus is attached to the placenta within the uterus of the pregnant woman. Additionally, the bill does not prohibit the sale, use, prescription, or administration of a drug, device, or chemical this is designed to prevent fertilization.

### *Definitions*

"Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac, which is the structure that comprises the extraembryonic membranes that envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

"Gestational age" means the age of an embryo or a fetus as calculated from the first day of the last menstrual period of a pregnant woman.

"Medical emergency" means a condition that, in reasonable medical judgement, complicates the medical condition of a pregnant woman and (1) requires the immediate abortion of her pregnancy to prevent her death without first determining whether there is a detectable fetal heartbeat; or (2) the delay caused by determining whether there is detectable fetal heartbeat will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. "Medical emergency" does not include a claim or diagnosis that the woman will act to cause herself death or substantial and irreversible physical impairment of a major bodily function.

"Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

### *Determining the Existence of a Fetal Heartbeat*

To determine whether a fetus has a detectable heartbeat, a physician must perform an obstetric ultrasound on the pregnant woman, using a method the physician and patient

agree is best under the circumstance. The physician must inform a woman before an ultrasound procedure of her right to view the ultrasound image during or after the ultrasound procedure. The physician must display the ultrasound images so that the pregnant woman may view the images and record in the woman's medical record a written description of the ultrasound images of the fetus's cardiac activity, if present and viewable.

If at least eight weeks have occurred after fertilization, the physician must (1) inform the woman that it may be possible to make the fetal heartbeat audible; (2) ask the woman if she would like to hear the heartbeat; and (3) if so, make the heartbeat audible using a method the physician and patient agree is best under the circumstance.

If a physician determines during an ultrasound procedure that a fetus has a detectable heartbeat, the physician must inform the woman, in writing, that the fetus has a detectable heartbeat and the statistical probability of bringing the fetus to term based on the gestational age of the fetus.

MDH may adopt regulations based on available medical evidence to determine the statistical probability of bringing a fetus with a detectable heartbeat to term based on the gestational age of the fetus.

#### *Required Disclosures and Waiting Period*

Before performing an abortion, a physician must inform a woman of the probable gestational age of the embryo or fetus at the time an abortion is to be performed. If an ultrasound is performed, the physician may not perform an abortion until 60 minutes after the ultrasound.

#### *Performing an Abortion – Prohibitions and Exceptions*

A physician is prohibited from performing, inducing, or attempting to perform or induce an abortion before a physician has performed an obstetric ultrasound to determine if there is a fetal heartbeat. A physician who performs an abortion without first performing an obstetric ultrasound is guilty of a felony and subject to imprisonment for up to two years and/or a fine of \$10,000.

However, if a medical emergency exists, a physician may perform an abortion without first determining if there is a fetal heartbeat. If an abortion is performed under this exception, the physician must include specified written notations in the pregnant woman's medical record and maintain a copy of the records for at least seven years.

A physician is prohibited from performing, inducing, or attempting to perform or induce an abortion if, during the obstetric ultrasound, a fetal heartbeat is detected. A physician

who performs an abortion after detecting a fetal heartbeat is guilty of a felony and subject to imprisonment for up to two years and/or a fine of \$10,000.

However, an abortion may be performed after a fetal heartbeat has been detected if, in the physician's reasonable medical judgment, the abortion is necessary to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. If an abortion is performed under this exception, the physician must include specified written notations in the pregnant woman's medical record and maintain a copy of the records for at least seven years.

A physician may perform an abortion if no fetal heartbeat is detected.

### *Pregnant Woman Receiving Abortion*

*Civil and Criminal Immunity:* A pregnant woman who receives an abortion under the bill is not subject to civil penalty or criminal prosecution or penalty based on an abortion being performed or induced in violation of the bill's provisions.

*Civil Actions:* If an abortion was performed or induced in violation of the bill's provisions, the woman on whom the abortion was performed or induced may file a civil action in court against the person who committed the violation. If the woman prevails, the court must award and require the defendant to pay damages of \$10,000 (or an amount determined by the court after considering the evidence), court costs, and reasonable attorney's fees.

The court must only award court costs and reasonable attorney's fees to a defendant if the court finds that commencement of the action constitutes frivolous conduct and the defendant was adversely affected by the frivolous conduct. Frivolous conduct does not include a finding of frivolousness based on the unconstitutionality of the provision that was allegedly violated.

### *Miscellaneous Provisions*

In the event that the authority of the states to prohibit or regulate abortion is restored, expanded or clarified, the Attorney General or any county prosecutor (if the Attorney General fails to do so within 30 days of the event) may apply to the appropriate court for (1) a declaration that any of the bill's provisions are constitutional; and/or (2) a judgment or an order lifting an injunction against the enforcement of the bill's provisions.

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, a fetal heartbeat can be detected by an ultrasound as early as six weeks after a patient’s last menstrual period, a time during which most women are unaware they are pregnant.

Two other states have enacted legislation that would ban abortion at six weeks after a patient’s last menstrual period based on the presence of a fetal heartbeat: North Dakota in 2013 and Iowa in 2018. Neither of these laws are in effect. The North Dakota law was ruled unconstitutional by the U.S. Eighth Circuit Court of Appeals in July 2015, and the U.S. Supreme Court declined to review. The Iowa law was immediately enjoined from enforcement pending litigation on the law’s constitutionality.

Ohio’s legislature passed bills prohibiting an abortion after a fetal heartbeat has been detected on two separate occasions (2016 and 2018); however, Governor John Kasich vetoed both bills.

Additionally, Arkansas enacted similar legislation in 2013 that was slightly less restrictive and prohibited an abortion if a pregnancy has progressed to 12 weeks and a fetal heartbeat was detected. The U.S. Eighth Circuit Court of Appeals ruled the law was unconstitutional in January 2016, and the U.S. Supreme Court declined to review.

**Small Business Effect:** Meaningful for physicians whose practices currently encompass performing abortion procedures. Litigation costs may increase for physicians against whom civil actions are brought under the bill. Physicians also face significant fines and prison sentences for violations of the bill’s provisions.

## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Office of the Attorney General; 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 Public Safety and Correctional Services; *The New York Times*; Guttmacher Institute; Department of Legislative Services

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