

**Department of Legislative Services**  
Maryland General Assembly  
2020 Session

**FISCAL AND POLICY NOTE**  
**First Reader**

Senate Bill 357

(Senator Serafini, *et al.*)

Finance

**Pain-Capable Unborn Child Protection 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 postfertilization age of 20 weeks or more, the physician is prohibited from performing or inducing an abortion except in specified circumstances. The bill also establishes reporting requirements for physicians and the Maryland Department of Health (MDH) and establishes civil actions, disciplinary actions, and penalties for physicians who violate the bill. MDH must adopt implementing regulations by January 1, 2021.

**Fiscal Summary**

**State Effect:** General fund expenditures increase by \$508,400 in FY 2021. Future year expenditures 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. Revenues are not affected.

(in dollars)	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	508,400	104,000	105,500	107,900	110,400
Net Effect	(\$508,400)	(\$104,000)	(\$105,500)	(\$107,900)	(\$110,400)

*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:**

#### *Findings of the General Assembly*

The bill lists a number of findings from the General Assembly regarding the experience of painful stimuli by an unborn child. Among other points, the bill states that (1) medical evidence indicates that unborn children are capable of experiencing pain by 20 weeks postfertilization; (2) it is the duty of the State to assert a compelling State interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain; (3) this compelling interest is intended to be separate from and independent of the State's compelling interest in protecting the lives of unborn children from the stage of viability; and (4) neither State interest is intended to replace the other.

#### *Limitations on Abortions*

Except in the case of a medical emergency (as defined by the bill), a physician may not perform, induce, or attempt an abortion unless the physician (1) determines the probable postfertilization age of the unborn child or (2) relies on such a determination made by another physician. In making such a determination, the physician is required to make inquiries of the pregnant woman and perform specified examinations and tests.

Further, unless – in the reasonable medical judgment of a physician – the pregnant woman has a medical emergency, a physician may not perform, induce, or attempt an abortion on a pregnant woman if the unborn child has a probable postfertilization age of 20 weeks or more, as determined by a physician. When an abortion is performed or induced in the case of a medical emergency, the physician must terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive – unless that method would pose a greater risk of the death of, or substantial and irreversible impairment (not including psychological or emotional conditions) of a major bodily function of, the pregnant woman, as specified by the bill.

The bill defines “postfertilization age” as the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

#### *Physician Reporting Requirements*

A physician who performs, induces, or attempts an abortion must submit a report to MDH, on a form and schedule required by the department, that includes specified information related to (1) the postfertilization age of the unborn child and how the physician determined

the age; (2) the method of abortion performed or induced; (3) the use, if any, of an intrafetal injection; (4) the pregnant woman's age and race; and (5) if the probable postfertilization age was determined to be 20 or more weeks, the physician's basis for specified determinations of medical emergency. MDH must adopt regulations by January 1, 2021, that require a physician to report on all abortions performed or induced on and after the first calendar month following the date the regulations are adopted.

Physician reports must include a unique medical record identifying number but may not include the pregnant woman's name, address, or any other personal identifying information. On request, these reports must be made available on a court order or to the Attorney General or a State's Attorney pursuant to a criminal or civil investigation. Otherwise, reports are confidential and unavailable for public inspection.

A physician who fails to submit a required report within 30 days after the reporting deadline is subject to a civil penalty of \$1,000 for each 30-day period (or portion thereof) that the report is overdue. Additionally, if a physician fails to file a report more than six months after June 30 of the reporting year, or knowingly files a false report, MDH may bring an action in the appropriate court of jurisdiction to direct the physician to either submit a complete report or be subject to civil contempt. A willful failure by any physician to submit a complete report – whether or not in accordance with a court order (or to conform to any reporting requirement, other than late filing) – must be deemed “unprofessional conduct” under the Health Occupations Article. Moreover, a physician may not willfully falsify a report required under the bill; a physician who violates this provision is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000.

#### *Maryland Department of Health Reporting Requirements*

By June 30 of each year, MDH must issue a public report providing statistics compiled from the reports submitted by physicians, as specified by the bill. The report may not include personal identifying information of any pregnant woman on whom an abortion was performed, induced, or attempted.

#### *Civil Actions Established*

A woman on whom an abortion is performed, induced, or attempted – or the father of the unborn child who was the subject of an abortion performed in violation of the bill – may bring a civil action against the person who performed or induced the abortion in intentional or reckless violation of the bill for compensatory and punitive damages.

Additionally, a woman on whom an abortion was performed, induced, or attempted in violation of the bill; the woman's parent or guardian; the woman's spouse or sibling; the woman's current or former licensed health care provider; MDH; the Attorney General; or

the appropriate State's Attorney may apply to the appropriate court for a temporary or permanent injunction to restrain the person that performed, induced, or attempted the abortion. This new cause of action is available (1) whether or not an adequate remedy at law exists; (2) in addition to other remedies provided by law; and (3) notwithstanding any other law. Reasonable attorney's fees may be awarded, as specified by the bill. No damages may be awarded to a plaintiff if the court finds that pregnancy resulted from the plaintiff's criminal conduct.

In a civil action or criminal proceeding brought under the bill, the court must determine whether the woman's anonymity must be preserved from public disclosure (if she does not consent to disclosure). The court must take specified actions to safeguard the woman's identity from public disclosure, if it finds that her anonymity must be preserved, including issuing a gag order to the parties, witnesses, and counsel. Each gag order issued under these provisions must be accompanied by a written finding, as specified by the bill. In addition, if the woman refuses to consent to disclosure of her name in a court proceeding, any person who brings an action under the bill is required to use a pseudonym. However, this provision may not be construed to authorize concealment of the identity of the plaintiff or a witness from the defendant or the defendant's attorney.

#### *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 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, 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.

### *State Abortion Laws*

The Guttmacher Institute reports that, as of March 1, 2020, 17 states ban abortions past 22 weeks gestation or the equivalent of 20 weeks after fertilization on the grounds that the fetus can feel pain: Alabama, Arkansas, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

State laws that institute a 22-week abortion ban have been contested in court. In 2013, the U.S. Court of Appeals for the Ninth Circuit struck down an Arizona law that is similar to the bill. The Arizona law banned abortions past 22 weeks gestation except in a medical emergency. The Ninth Circuit also struck down a similar Idaho law in 2015.

### *Federal Abortion Legislation*

In 2013, 2015, and 2017, the U.S. House of Representatives passed the Pain-Capable Unborn Child Protection Act, which had nearly identical legislative findings and declarations of constitutional authority for enactment as the bill. The federal legislation would have banned abortions at or beyond 22 weeks gestation, except in specific instances such as medical emergencies and pregnancies resulting from rape or incest.

According to the Guttmacher Institute, in 2017, approximately 862,320 abortions occurred in the United States, producing a rate of 13.5 abortions per 1,000 women of reproductive age. (This represents a 7% decrease since 2014.) In Maryland in 2017, 29,800 abortions were provided at a rate of 25.0 abortions per 1,000 women of reproductive age. (This represents a 6% increase since 2014.) However, 89% of U.S. counties had no abortion clinic in 2017, and 38% of American women of reproductive age lived in these counties. In 2017, 71% of Maryland counties had no clinics that provided abortions, and 29% of Maryland 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 2017, there were 44 abortion providers in Maryland of which 25 were clinics. (This number represents no change in clinics since 2014, when there were 41 overall providers, of which 25 were clinics.)

**State Fiscal Effect:** MDH advises that it must hire one full-time epidemiologist to review data submitted and produce the required statistical report and one full-time administrative officer to assist physicians in their submission of the required data. The Department of Legislative Services (DLS) concurs that permanent staff are needed to review data submitted and to produce the required report but advises that the extent to which physicians are likely to require assistance in submitting the required data is unknown. DLS further advises that the epidemiologist may be able to assist with the provision of any necessary assistance. Thus, this estimate reflects the minimum additional staff necessary to implement the bill; actual expenditures may vary to the extent that physicians require assistance in complying with the bill’s reporting requirements.

Accordingly, general fund expenditures increase by at least \$508,428 in fiscal 2021, which accounts for the bill’s October 1, 2020 effective date. This estimate reflects \$450,000 in one-time costs associated with the development and implementation of an electronic data system, as well as the cost of hiring one full-time epidemiologist to produce the required report. It includes a salary, fringe benefits, other one-time start-up costs, and ongoing operating expenses.

Position	1.0
One-time Costs for Electronic Data System	\$450,000
Salary and Fringe Benefits	51,187
Operating Expenses	<u>7,241</u>
<b>Total FY 2021 State Expenditures</b>	<b>\$508,428</b>

Future year expenditures reflect a full salary with annual increases and employee turnover and ongoing operating expenses (including contractual services associated with maintaining the electronic data system).

The bill’s disciplinary requirements can be handled with existing resources. The bill’s provisions related to civil actions and various penalties are not expected to materially affect caseloads and/or government finances.

**Small Business Effect:** Meaningful for physicians whose practices currently encompass abortions at 20 weeks or more postfertilization. Litigation costs may increase for physicians against whom civil actions are brought under the bill.

## **Additional Information**

**Prior Introductions:** SB 907 of 2019 was assigned to the Senate Rules Committee, but no further action was taken. Its cross file, HB 975, received a hearing in the House Health and Government Operations Committee, but no further action was taken. HB 1424 of 2018, a substantially similar bill, received a hearing in the House Health and Government Operations Committee, but no further action was taken. Similar legislation was also introduced in the 2013 through 2017 sessions.

**Designated Cross File:** None.

**Information Source(s):** Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland State’s Attorneys’ Association; Guttmacher Institute; Maryland Department of Health; Department of Legislative Services

**Fiscal Note History:** First Reader - March 6, 2020  
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Analysis by: Hillary J. Cleckler

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510