

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Enrolled

Senate Bill 824

(Senator Kramer)

Finance

Health and Government Operations

Health – Accessibility of Electronic Advance Care Planning Documents

This bill (1) repeals the exception to the requirement that an electronic advance directive be witnessed and the related requirement that the Maryland Health Care Commission (MHCC) only approve an electronic advance directives service that uses specified guidelines to authenticate identity; (2) alters the components of the advance directive information sheet prepared by the Maryland Department of Health (MDH) and requires the sheet to be provided by additional entities; (3) requires MHCC to coordinate the accessibility of electronic advance care planning documents in the State; (4) repeals the requirement that an electronic advance directives service be established in a certain manner to connect to the State-designated health information exchange (HIE); (5) requires specified health care facilities to take certain actions regarding advance care planning documents; (6) requires Medicaid managed care organizations (MCOs) and health insurance carriers to take specified actions and authorizes them to contract with an electronic advance directives service; and (7) requires the Motor Vehicle Administration (MVA) to submit a specified report by December 1, 2022. **The bill's provisions regarding MVA's report take effect June 1, 2022; other provisions take effect January 1, 2023, and those regarding carriers apply to all policies, contracts, and health benefit plans issued, delivered, or renewed in the State on or after that date.**

Fiscal Summary

State Effect: No effect in FY 2022. MDH (including MHCC) and MVA advise they can implement the bill with existing budgeted resources. To the extent that MHCC needs additional resources to develop the electronic platform, special fund expenditures increase.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Maryland Department of Health – Advance Directive Information Sheet

MDH, in consultation with the Office of the Attorney General (OAG), must update the advance directive information sheet to include written statements that an advance directive (1) can be updated or revoked by the individual at any time (rather than revoked or changed); (2) is a useful, legal, and well established way for an individual to communicate the preferences of the individual for medical care, including the designation of a health care agent; (3) if completed, should be copied for an individual's family members, physicians, and legal advisors and, at the discretion of the individual, be uploaded or saved to the electronic platform; (4) is most effective if it is uploaded or saved to the electronic platform; and (5) is not required to be completed by the individual. The bill also makes additional alterations to the content of the information sheet.

In addition to those specified under current law, the information sheet must be provided by the following entities, as specified:

- a licensed physician to a patient;
- an MCO;
- a health care facility;
- a nursing facility;
- an assisted living facility; and
- the State-designated HIE.

The information sheet must include links to (1) websites for electronic advance directives services that MHCC has recognized, as specified, and (2) a link to the website accessed through the tab on the State-designated HIE website (once developed). At a minimum, the information sheet must also emphasize the importance of uploading or saving an electronic advance directive to the electronic platform.

Maryland Health Care Commission – Coordination and Related Duties and Provisions

MHCC must coordinate the accessibility of electronic advance care planning documents in the State. The coordination must include:

- collaboration with the State-designated HIE to develop an electronic platform through which individuals can upload, save, and update advance care planning

- documents and health care providers can access electronic advance care planning documents as appropriate;
- identification of options that meet specified cybersecurity standards that may be taken by carriers, MCOs, and health care providers to encourage and make tools available for members, enrollees, and patients that allow them to create, upload, or save and update electronic advance care planning documents;
- development and implementation of quality measures endorsed or designated for testing by a national quality measurement organization to measure the effectiveness of the options specified above; and
- inclusion of a distinct tab on the State-designated HIE website that provides (1) access to the advance directive information sheet; (2) the electronic means to create, execute, and store an advance directive or health care designation; and (3) the capability to upload or save an advance care planning document to the electronic platform and to update existing electronic documents.

MHCC may adopt regulations to carry out its coordination responsibilities under the bill.

Authorized Connections to the Health Information Exchange: The bill repeals the requirement that an electronic advance directives service be established in accordance with a specified National Institute of Standards and Technology (NIST) Special Publication *Electronic Authentication Guideline* in order to be authorized to connect to the State-designated HIE.

MHCC may explore whether carriers, MCOs, and health care providers with secure member authentication websites can link between those websites and the State-designated HIE website.

Electronic Platform: “Electronic platform” means the platform developed by MHCC to make electronic advance care planning documents accessible. In developing the required electronic platform, MHCC and the State-designated HIE must consult with other State agencies and stakeholders, as appropriate, and may contract, as appropriate and subject to available funds, with a third-party vendor.

The electronic platform must be consistent with specified federal standards and provide an individual with disabilities with nonvisual access in a way that is fully and equally accessible to and independently usable by the individual with disabilities so that the individual is able to acquire the same information, engage in the same interactions, and enjoy the same services as users without disabilities, with substantially equivalent ease of use.

Health Care Facilities – Duties on Admission of an Individual

Upon admitting an individual to a health care facility, the facility must (1) use the electronic platform to identify if the individual has uploaded or saved any electronic advance care planning documents; (2) if any electronic advance care planning documents have been uploaded or saved, attempt to verify the contents and update as necessary; and (3) if no electronic advance care planning documents have been uploaded or saved, offer to scan any paper advance care planning documents the individual brought to the facility and upload or save them to the electronic platform or provide the individual with the advance directive information sheet. If a health care facility maintains a website, the facility must provide a link to the webpage that is accessed through the tab on the State-designated HIE website (once developed).

The above requirements do not apply to (1) a community provider; (2) a home health agency; (3) an assisted living facility; or (4) a hospice.

Managed Care Organizations and Carriers – Duty to Provide Information

Each MCO must provide the advance directive information sheet (1) to all enrollees at the time of initial enrollment and in any enrollee publications; (2) at the request of an enrollee; and (3) if the MCO maintains a website, on the website.

Each health insurance carrier must provide the advance directive information sheet to all enrollees or members in the initial enrollment materials and upon renewal (in addition to other specified times under current law).

If an MCO or carrier maintains a website, the MCO or carrier must provide a link to the webpage that is accessed through the tab on the State-designated HIE website (once developed).

An MCO or carrier is not required to assist an enrollee or member in drafting an electronic advance care planning document, store electronic advance care planning documents, or access advance care planning documents.

An MCO or carrier may contract with an electronic advance directive service if the service is approved by MHCC and meets the technology, security, and privacy standards set by MHCC.

Motor Vehicle Administration – Status Report

MVA must provide a status report to the Senate Finance Committee and the House Health and Government Operations Committee by December 1, 2022. That report must include

(1) a timeline for implementation of the requirement to add an advance directive notification on driver's licenses and identification cards (and make applicants aware of how to access the advance directive information sheet); (2) identification of any obstacles to implementation; and (3) measures being taken by MVA to resolve any identified obstacles and implement the requirements.

Current Law:

Maryland Department of Health

In general, an advance directive allows an adult who has decision making capacity to deal with future health care issues through written instructions, a written appointment of an agent, or an oral statement to a physician or nurse practitioner. The advance directive outlines the individual's instructions regarding the provision of health care or withholding or withdrawing health care. The individual may name an agent to make health care decisions under circumstances stated in the directive, and the authority of surrogate decision makers is specified based on their relationships with the individual. The directive becomes effective when two physicians have certified in writing that the patient is incapable of making an informed decision.

With the exception of an electronic advance directive that has been authenticated in a specified manner, a written or electronic advance directive generally must be dated, signed by or at the express direction of the individual making the advance directive, and subscribed by two witnesses.

A witness is not required for an electronic advance directive if the declarant's identity has been authenticated in accordance with NIST's *Electronic Authentication Guideline*. The State-designated HIE may accept as valid an unwitnessed electronic advance directive in the form of a video record or file if the video record or file is dated and stored in an electronic file by an electronic advance directives service recognized by MHCC. An electronic advance directives service must use the NIST guidelines to authenticate a declarant's identity for an electronic advance directive that is not witnessed. MHCC may only approve advance directives services that use these guidelines.

MDH is required to develop an information sheet, in consultation with OAG, which provides information relating to advance directives.

MHCC recognizes electronic advance directives services to be authorized for connection to the State-designated HIE subject to security provisions. An individual may register an advance directive with such a service recognized by MHCC. Currently, ADVault, Inc. (or MyDirectives.com) is the only web-based repository recognized by MHCC.

Health Care Facilities, Nursing Facilities, and Assisted Living Facilities

Each health care facility must provide each individual, on admittance to the facility, information concerning the rights of the individual to make decisions concerning health care, including the right to accept or refuse treatment, and the right to make an advance directive, including a living will. There are no similar requirements under current law for nursing facilities or assisted living facilities.

Managed Care Organizations and Carriers

A carrier must provide the advance directive information sheet developed by MDH (1) in the carrier's member publications; (2) on the carrier's website; and (3) at the request of a member. There are no similar requirements under current law for MCOs.

Small Business Effect: Small business health care facilities must take specified actions related to electronic advance care planning documents and provision of the advance directive information sheet on admission of an individual.

Additional Information

Prior Introductions: SB 837 of 2021, a related bill, passed in the Senate and received a hearing in the House Health and Government Operations Committee, but no further action was taken.

Designated Cross File: HB 1073 (Delegate Cullison, *et al.*) - Health and Government Operations.

Information Source(s): Department of Budget and Management; Maryland Department of Transportation; Maryland Insurance Administration; Department of Legislative Services

Fiscal Note History: First Reader - February 23, 2022

fnu2/jc Third Reader - March 30, 2022

Revised - Amendment(s) - March 30, 2022

Revised - Clarification - March 30, 2022

Enrolled - April 9, 2022

Analysis by: Amber R. Gundlach

Direct Inquiries to:

(410) 946-5510

(301) 970-5510