HB 958

Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 958 (Delegate Metzgar, *et al.*)
Health and Government Operations

Public Health - Abortion

This bill requires that an abortion be performed by a physician (rather than a qualified provider under current law) and prohibits a physician from performing, inducing, or attempting to perform or induce an abortion (1) before determining whether the unborn child has a detectable heartbeat and (2) if the physician determines that the unborn child has a detectable heartbeat. Accordingly, the bill repeals the current prohibition against State interference in a woman's decision to terminate a pregnancy before viability or at any time under specified circumstances. Any person (with specified exceptions) may bring a civil action to enforce this prohibition against (1) a physician who performs, induces, or intends to perform or induce a prohibited abortion or (2) any person who aides, abets, or intends to aide or abet the performance or induction of a prohibited abortion. If a person prevails under such an enforcement action, the court must award damages of at least $10,000 for each prohibited abortion the defendant performed or induced (and/or each abortion performed or induced as a result of the defendant's aiding or abetting). The Maryland Department of Health (MDH) must prepare and provide specified materials.

Fiscal Summary

State Effect: MDH general fund expenditures increase by $33,600 annually to produce, print, and provide specified materials, as discussed below. Medicaid general fund expenditures decrease by up to $5.7 million in FY 2024 and up to $7.6 million on an annualized basis thereafter. Department of Budget and Management (DBM) expenditures for the State Employee and Retiree Health and Welfare Benefits Program likely decrease by an indeterminate amount beginning in FY 2024. The overall net fiscal effect on Medicaid and DBM is indeterminate, as discussed below.

Local Effect: Local expenditures increase for circuit courts to the extent that additional civil actions are filed under the bill. Revenues are not materially affected.

Small Business Effect: Meaningful.

Analysis

Bill Summary: Under the bill, "physician" means an individual who is licensed to practice medicine in the State under Title 14 of the Health Occupations Article.

Abortion – Prohibition

With limited exception, a physician may not knowingly perform, induce, or attempt to perform or induce, an abortion on a pregnant woman (1) before determining whether the unborn child has a detectable heartbeat and (2) if the physician determines that the unborn child has a detectable heartbeat. In addition, a person may not perform or induce an abortion unless the abortion is voluntary and informed, as specified.

To determine whether a fetus has a detectable heartbeat, a physician must use a test that is (1) consistent with the physician's good faith and reasonable understanding of standard medical practice and (2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy. The physician must record the estimated gestational age, the method used to estimate the gestational age, and the test used for detecting a fetal heartbeat, as specified.

Informed and Voluntary Consent

The physician performing or inducing the abortion must inform the pregnant woman of the following:

- the physician's name;
- the particular medical risks associated with the particular abortion procedure to be employed, including (1) the risks of infection and hemorrhage; (2) the potential danger to a subsequent pregnancy and of infertility; and (3) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;
- the probable gestational age of the unborn child at the time the abortion is to be performed or induced; and
- the medical risks associated with carrying the child to term.

The physician performing or inducing the abortion (or an agent of the physician) must inform the pregnant woman that (1) Medicaid benefits may be available for prenatal care, childbirth, and neonatal care; (2) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and (3) public and private agencies provide pregnancy prevention counseling and medical referrals for

obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest.

The physician performing or inducing the abortion (or an agent of the physician) must provide the pregnant woman with specified printed materials provided by MDH that describe the unborn child and list agencies that offer alternatives to abortion or sonogram services at no cost.

Before any sedative or anesthesia is administered and at least 24 hours before an abortion is induced or performed (with limited exception), the physician (or a qualified agent) must perform, display, explain, and make audible a sonogram to the pregnant woman, as specified. Before receiving the sonogram, the pregnant woman must sign and the performing/inducing physician must receive a copy of an "abortion and sonogram election" form, as specified.

Prohibition – Exception

A physician is not in violation of the above prohibition if the physician tests for the presence of a fetal heartbeat and does not detect a heartbeat. The prohibition does not apply to a physician who performs or induces an abortion if the physician believes that a medical emergency exists, and the performing physician executes a specified written document that (1) certifies the abortion is necessary due to a medical emergency and (2) specifies the woman's medical condition requiring the abortion. The written document must be maintained in the pregnant woman's medical record and the physician's patient records.

Prohibition – Enforcement

Any person (other than an officer or employee of the State or a local governmental entity in the State) may bring a civil action in the appropriate venue as specified against any person who:

- performs or induces an abortion in violation of the specified prohibitions;
- knowingly engages in conduct that aids or abets the performance or inducement of an abortion (including paying for or reimbursing the costs of an abortion through insurance or otherwise) performed or induced in violation of the specified prohibitions; or
- intends to engage in either of the above.

An action must be filed within four years of the date when the cause of action arose. If a claimant prevails in the specified civil action, the court must award (1) injunctive relief sufficient to prevent the defendant from violating or engaging in acts that aid or abet violations of the specified prohibitions; (2) statutory damages of at least $10,000 for each

abortion the defendant performed or induced (and/or each abortion performed or induced as a result of the defendant's aiding or abetting) in violation of the specified prohibition; and (3) costs and attorney's fees.

A court may not award the above specified relief if the defendant demonstrates previous payment of the full amount of statutory damages for the particular abortion performed or induced (or the particular conduct that aided and abetted an abortion performed or induced) in violation of the specified prohibitions.

Defenses

It is an affirmative defense to an action filed to enforce violation of the specified prohibition that a defendant who performed or induced an abortion or a defendant who aided or abetted the performance or induction of an abortion reasonably believes, after conducting a reasonable investigation, that the physician complied or would comply with the bill's requirements, as specified. The defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

None of the following may be used as a defense: (1) ignorance or mistake of law; (2) a defendant's belief that the requirements of the bill are unconstitutional; (3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court (even if not overruled when the defendant engaged in a violation of the specified prohibition); (4) a defendant's reliance on any federal or State court decision that is not binding on the court in which the action is filed; (5) nonmutual issue preclusion or nonmutual claim preclusion; (6) the consent of the unborn child's mother to the abortion; or (7) any claim that the enforcement of the bill or the imposition of civil liability against the defendant will violate the constitutional rights of third parties.

Immunities

In any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this bill, (1) the State has sovereign immunity; (2) a political subdivision has governmental immunity; and (3) each officer and employee of the State or a political subdivision has official immunity.

Severability

Each statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance such that the unconstitutionality of one statute under one interpretation does not render other statutes or other interpretations unconstitutional. In addition, the bill's provisions are severable such that the invalidity of any provision does not affect other provisions.

Current Law: Generally, 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. 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.

Pursuant to Chapter 56 of 2022, if an abortion is provided, it must be performed by a "qualified provider," which includes a physician, nurse practitioner, nurse-midwife, licensed certified midwife, physician assistant, or any other individual who is licensed, certified, or otherwise authorized by law to practice in the State and for whom the performance of an abortion is within the scope of the individuals' license or certification. A qualified provider 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 qualified provider's best clinical judgment using accepted standards of clinical practice.

For a detailed discussion of both federal and State abortion laws, please see the **Appendix – Legal Developments Regarding Abortion**.

State Expenditures:

Administrative Costs

Under the bill, MDH must provide printed materials that describe the unborn child and list agencies that offer alternatives to abortion or sonogram services at no cost to the pregnant woman. These materials must also be accessible on a website sponsored by MDH. MDH advises that to implement this requirement a part-time (50%) health policy analyst is required at a cost of $23,972 in fiscal 2024, increasing to $34,474 in fiscal 2028, to develop, produce, and mail the materials and maintain the website. MDH further advises that it costs approximately $33,600 annually to produce and mail the materials. The Department of Legislative Services advises that developing the materials and providing access on an MDH-sponsored website is likely a once annual (as opposed to ongoing) activity that does not require additional staff to implement but agrees that costs are incurred annually to print and mail the materials. Thus, general fund expenditures for MDH increase by $33,600 in fiscal 2024 and annually thereafter.

Medicaid

MDH advises that Medicaid paid for 11,567 abortions in fiscal 2022 at an average cost of $659 per abortion for a total cost of $7.6 million. Thus, general fund expenditures decrease by up to $5.7 million in fiscal 2024, based on fiscal 2022 claims. This estimate reflects the

bill's October 1, 2023 effective date. Based on fiscal 2022 claims, general fund expenditures decrease by up to $7.6 million annually thereafter.

However, Medicaid has previously noted that any savings may be offset by an increase in costs for labor and delivery services provided to Medicaid eligible women to the extent that births increase under the bill. The approximate average cost for prenatal care, labor/delivery, and postpartum care for Medicaid beneficiaries is $36,000. Moreover, newborns born to Medicaid-eligible mothers are deemed automatically eligible for Medicaid benefits for their first year and typically retain eligibility for subsequent years. On average, Medicaid pays $9,700 for health care per eligible newborn annually (50% general funds and 50% federal funds). The extent of any increase in expenditures cannot be reliably estimated at this time. Federal fund revenues increase accordingly.

Department of Budget and Management

DBM oversees the State Employee and Retiree Health and Welfare Benefits Program. The bill likely results in a significant decrease in the number of abortions covered under the program. Thus, DBM expenditures for the program (general, federal, and special funds) decrease. Any potential reduction in expenditures cannot be reliably estimated as DBM has previously advised that it does not monitor claims data for abortion procedures.

To the extent that births increase among individuals covered by the program, there is likely an offsetting increase in expenditures (and potentially an overall increase in expenditures) for labor and delivery costs and to cover additional dependents. The extent of any increase cannot be reliably estimated at this time.

Small Business Effect: Small businesses that currently provide abortion services are prohibited from doing so if a fetal heartbeat is detected. Litigation costs and damage awards may also increase for physicians against whom civil actions are filed.

Additional Comments: According to the American Pregnancy Association, a fetal heartbeat can be detected by an ultrasound as early as six weeks gestation (or six weeks after a patient's last menstrual period).

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See HB 735 of 2022.

Designated Cross File: None.

Information Source(s): Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland Department of Health; American Pregnancy Association; Department of Legislative Services

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km/jc

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Appendix – Legal Developments Regarding Abortion

Status of Federal Abortion Law

In June 2022, the U.S. Supreme Court overturned precedent regarding abortion access in *Dobbs v. Jackson Women's Health Organization*. Before this decision, abortions prior to viability were constitutionally protected based on *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The petitioners in *Dobbs* sought to overturn the invalidation of Mississippi's Gestational Age Act, which prohibited abortions after 15 weeks gestation except for medical emergencies or severe fetal abnormalities. The U.S. Supreme Court upheld the Mississippi law by overturning *Roe* and *Casey*, holding that there is no constitutionally protected right to an abortion as it is not a right explicitly granted by the Constitution or a right "deeply rooted" in the country's history and tradition. The *Dobbs* decision leaves states to decide how to regulate abortion access, resulting in a patchwork of state laws with varying degrees of access to abortion care.

Maryland Abortion Law

The *Dobbs* decision does not impact Maryland law as § 20-209 of the Health-General Article codifies the protections of *Roe* and *Casey* by prohibiting the State from interfering with an abortion conducted (1) before viability or (2) at any point, if the procedure is necessary to protect the health or life of the woman in cases of fetal defect, deformity, or abnormality.

Chapter 56 of 2022 expanded beyond physicians the types of health care providers who may provide abortions to include nurse practitioners, nurse-midwives, licensed certified midwives, physician assistants, and other qualified licensed health care providers. The Act established the Abortion Care Clinical Training Program to (1) ensure there are a sufficient number of health care professionals to provide abortion services in the State and (2) require health insurers and Maryland Medicaid to cover abortion services without a deductible, coinsurance, copayment, or other cost-sharing requirement.

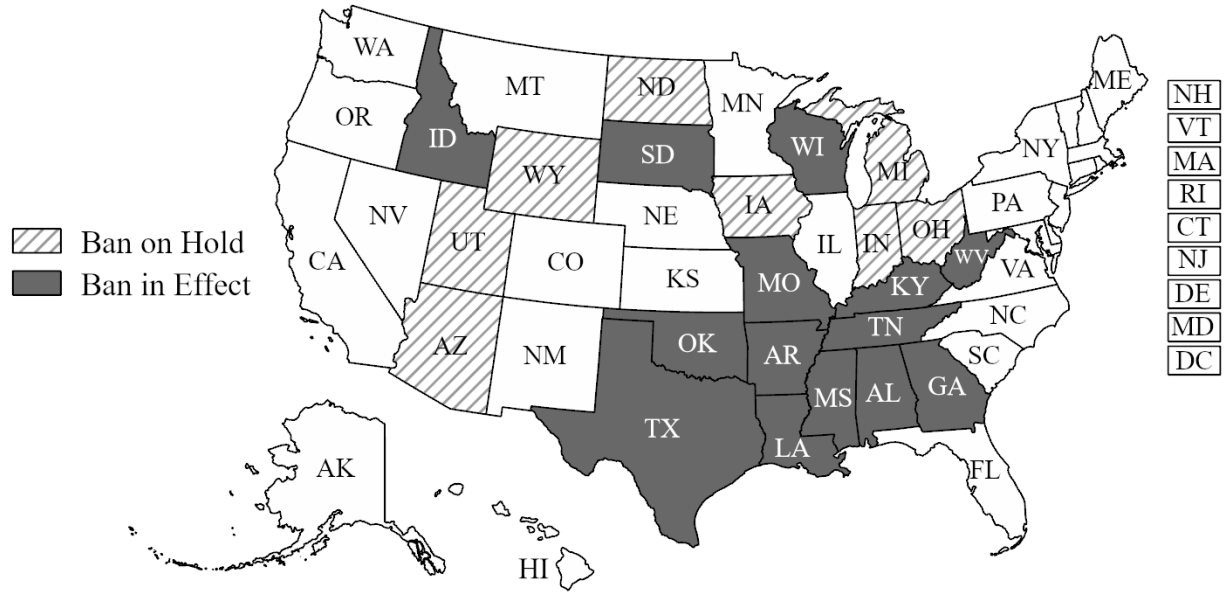
A qualified health care provider who performs an abortion is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the provider's best clinical judgment using accepted standards of clinical practice. The Maryland Department of Health may adopt regulations consistent with established clinical practice if they are necessary and the least intrusive method to protect the life and health of the woman.

After *Dobbs*, Maryland is authorized to enact additional laws protecting access to abortion or enact restrictions on abortion access that were unconstitutional under *Roe* and *Casey*.

State Actions Following the Dobbs Decision

Exhibit 1 indicates which states have banned abortion or have an abortion ban on hold. As of January 2023, 14 states have banned abortion and 9 states have bans on hold. In states such as Louisiana, Texas, and Utah, laws restricting abortion access took effect immediately following the *Dobbs* decision (the Utah ban is currently blocked by the courts). Seven states passed laws restricting abortion access prior to *Roe* but never repealed the laws following *Roe*. Those states may be able to enforce these laws post-*Dobbs,* but parties in several states have sought injunctions to prevent enforcement. Other states, such as Florida, Idaho, and Kentucky, passed laws restricting abortion, but specified that the laws would only take effect if existing precedent protecting the right to an abortion was overturned. These laws are also being challenged in state courts, with many challenges alleging that restrictions violate provisions of state constitutions.

Exhibit 1
States with Abortion Bans in Effect or on Hold
As of January 2023



Note: State laws with bans include near-total bans on abortion and bans after the detection of a fetal heartbeat or six weeks gestational age. Although Michigan is included as having a "Ban on Hold," Michigan voters approved an amendment to its state constitution including the right to an abortion. This will impact the court's decision on the validity of the pre-*Roe* law banning abortion as the law will now be considered unconstitutional.

Source: Guttmacher Institute; Center for Reproductive Rights; National Public Radio; Department of Legislative Services

Seventeen states and the District of Columbia currently have laws that protect the right to abortion, mostly before the point of fetal viability. Several states are seeking to establish the right to an abortion, either in statute or the state constitution. In November 2022, voters in California, Michigan, and Vermont approved ballot initiatives establishing the right to an abortion in their state constitutions. In some states where abortions are accessible, there have been efforts to limit liability and prevent enforcement of any judgment against an individual performing or obtaining an abortion in the state. This is in response to laws similar to Texas' law allowing civil actions against individuals who assist an individual in obtaining an abortion. Other states have taken additional measures to expand abortion access. For example, several states (including Maryland) require health insurance plans to cover abortions without imposing cost-sharing on beneficiaries, and several other states (also including Maryland) permit providers other than licensed physicians to perform abortions. Several states have introduced or passed laws to weaken or prohibit investigation of in-state providers by out-of-state officials to counteract laws in states that subject abortion providers to criminal penalties.