

House Health and Government Operations Committee

SB 786 - Reproductive Health – Protected Information and Insurance Requirements

Favorable

March 29, 2023

Overview of the Bill

Electronic health records are an integral part of our health care system. They allow providers to share information about a patient’s health history through networks known as health information exchanges. These systems have allowed providers to significantly improve coordination of care and health outcomes.

In the wake of the *Dobbs* decision, however, these electronic health record systems have become one of the most significant sources of risk for patients and providers. Neither federal nor state rule offer adequate legal protections. States that are seeking to criminalize or otherwise intimidate abortion providers and patients have the legal tools at their disposal to obtain protected health information. Simply put, electronic health systems, originally designed to promote positive health outcomes, now pose a grave risk to abortion patients and providers.

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This year, the Maryland General Assembly is considering a package of bills to protect reproductive health patients and providers. *SB 786/HB 812 – Reproductive Health – Protected Information and Insurance Requirements* is a key component of this legislative package. **This legislation is essential for Maryland to protect our patients, our providers, and access to reproductive health care in our state.**

Three Components of the Bill

The bill has three components:

Part I: The bill prevents abortion and other sensitive health information from being shared across state lines through health information exchanges. This provision is essential to shielding patients and providers from threats of criminal and civil penalties. The Maryland General Assembly is currently considering another bill – *SB 859/HB 808 – Reproductive Health Protection Act* -to shield Maryland patient and providers from out-of-state investigations of abortion and other legally protected care.

If enacted, the *Reproductive Health Protect Act* will prohibit Maryland from assisting in out-of-state investigations of abortion and other legally protected care. But the bill's protections cannot go beyond Maryland borders. Maryland routinely share thousands of patient records, including abortion care records, across state lines through health information exchanges. With aggressive states seeking to penalize Maryland patient and providers, these states may simply obtain a Maryland record by issuing a subpoena to a patient's out-of-state provider. For example, an out-of-state provider will likely have a nearly complete health record, including abortion information, of a Maryland patient, even if it is just because they have visited the out-of-state provider once while on vacation or a business trip. Maryland cannot control subpoenas in other states, but Maryland can control whether we send records about abortion and related sensitive services to a patient's out of state provider. This bill creates strict guardrails around sharing abortion and other sensitive data across state lines. Patients will retain the ability to choose when and to whom their data is shared.

Part II: The bill prevents widespread dissemination of information about who prescribes Mifepristone and other abortion medications. This provision protects the safety of Maryland abortion providers. By doing so, it will also protect access to abortion care in Maryland. If abortion providers face the risk for being identified, many of them will be too afraid to provide abortion care.

Right now, vendors routinely collect pharmacy dispensing data, including the prescriber's name. Vendors then sell this information to be integrated into electronic health records. This arrangement is legal under the federal privacy law known as HIPAA.

In the past, the practice of disseminating prescription dispensing data did not pose a risk to abortion providers. Mifepristone, the primary medication used in medication abortion, could not be dispensed by pharmacies because of a federal rule. Providers had to dispense the medication in their offices. But the Food and Drug Administration changed this rule in December 2022, and prescribers may send Mifepristone prescriptions to pharmacies, just as with any other medication. This rule change has the potential to significantly improve access in underserved areas. However, it does mean that information about Mifepristone, including the

prescriber's name, will soon be widely integrated into electronic health records in Maryland and across the country. This practice means that abortion providers face an exponentially higher risk of being identified – risking their employment if their health facilities do not support abortion. And even worse, abortion providers, their staff, and their families face a heightened risk of violence.

This risk is not theoretical. It is real and long-standing, existing since Mifepristone was first developed. There are long-standing practices of protecting providers and people affiliated with Mifepristone. In *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006),ⁱ the U.S. Court of Appeals heard a case about the Food and Drug Administration's policy of redacting identifying information under a freedom of information request for the names of the individuals involved in the review of the application for approval for Mifepristone. The Court found that:

“(the FDA has) fairly asserted abortion-related violence as a privacy interest for both the names and addresses of persons and businesses associated with mifepristone.”

In making this determination, the Court cited that,

“As its privacy interest, the FDA cited the danger of abortion-related violence to those who developed mifepristone, worked on its FDA approval, and continue to manufacture the drug. The supporting affidavits detail evidence of abortion clinic bombings. They also describe websites that encourage readers to look for mifepristone's manufacturing locations and then kill or kidnap employees once found. Based on these declarations, the FDA fairly asserted abortion-related violence as a privacy interest for both the names and addresses of persons and businesses associated with mifepristone. “

Part III: The bill prevents the disclosure of personal information about abortion providers and their staff in three additional areas:

1) Identifying information about abortion providers and staff at surgical abortion facility and ambulatory surgery center licensing records under the Public Information Act, in accordance with the Court of Appeals decision in *Glenn v DHMH*;

There is strong legal precedent for protecting identifying information of health care providers and their staff, including abortion providers. In the 2013 case of *Glenn v DHMH*, the Court of Appeals found that the Maryland Department of Health (MDH) could redact identifying information about abortion providers in responding to PIA requests for facility licensure records. The court cited DHMH's reasoning that:

“(T)here would be substantial injury to the public interest if the identities of medical directors, administrators, and owners of surgical abortion facilities were disclosed as

part of the response to a request for public inspection of the Department’s licensure records. First, disclosing these names could result in harassment, threats or actual violent harm to these individuals, as well as unwarranted invasion of their personal privacy and that of their family members. Second, the Department’s action in releasing these names could deter others from operating surgical abortion facilities or from applying for licensure, restricting access to legal health services and risking injury to public health.”ⁱⁱ

2) Home addresses of health care providers under health occupation licensure records through PIA requests, with certain narrow exceptions;

There is also precedent in Maryland law for preventing the disclosure of home addresses of licensure records. Under General Provisions § 4-320, the Motor Vehicles Administration cannot release the home address of the holder of a driver’s license with limited exceptions. This provision was designed to protect the safety of licensee holders. A similar provisions related to health occupations licensure would protect the safety of abortion providers as well as health professionals in general.

3) Records related to abortion data and similar sensitive information through health information exchanges and similar data sources under the oversight of the Maryland Health Care Commission

This provision simply reiterates the Maryland Health Care Commission’s responsibility for implementing provisions that provide extra layers of protection to personal health information about abortion and similar sensitive services.

How will this bill protect patients?

This bill will protect patients by ensuring their most sensitive health information is not share over state lines, as other states may not have the same safeguards as Maryland. The threat to patients is real and growing.

About half the states are expected to ban abortion, and fourteen states have already implemented bans. There are numerous proposals to criminalize abortion care for both patients and providers. For example, Kentucky and South Carolina are considering bills that would treat abortion as homicide for both patient and provider. Texas and two other states – Oklahoma and Idaho – have enacted SB 8 style laws which expose any person, including out-of-state individuals, to penalties.

Other states, such as Missouri, are considering how to block their residents from going over state lines. A law firm, the Thomas More Society has even developed model legislation to support states seeking to shut down access to out-of-state abortion care. ⁱⁱⁱ

How will hostile state identify individuals who have obtained abortion care? The most likely source of information is their health record:

- In Indiana, a physician is suing the Attorney General in Indiana to block him from accessing a patient record. The patient is a 10-year-old from Ohio. She had been raped, but since she was just past the 6-week mark in pregnancy, and had to travel for abortion care. Since then, Indiana has banned abortion care. ^{iv}
- In Texas last year^v, a hospital reported a 26-year-old patient to law enforcement for a self-induced abortion. The patient was charged with murder. While the charges were dropped ultimately, the patient spent time in jail and the story went viral on the internet - so her identity and circumstances are known worldwide.
- In a report by If/When/How, researchers documented 61 cases of individuals being criminally charged because of pregnancy outcomes – and 45% of those cases were the result of the patient’s providers reporting them. ^{vi}

How will this bill protect abortion providers and access in Maryland?

This bill will keep information about the identity of abortion providers and their patients private. This privacy is essential. **Otherwise, some Maryland providers may stop providing abortion care because of fear.** The aggressive tactics of Texas, in collaboration with anti-abortion activists, are designed not just to stop abortion within the borders of states with abortion bans. They are designed to create an intimidating, almost untenable, environment for abortion providers in states where abortion is legal.

Abortion providers are reporting an increase in concerns about the safety of themselves, their families, and their staff. As states ban abortion, there is deep concern that the focus of the anti-abortion activists will move to states, like Maryland, where abortion is legally protected. Even before *Dobbs*, incidents were rising. The National Abortion Federation reported its 2021 statistics demonstrated significant increase in violence towards abortion providers: a 600% increase in stalking, 450% increase in blockades, a 129% increase in invasions, and 128% increase in assaults.^{vii}

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Since the *Dobbs* decision was leaked, providers have reported a significant increase in violence in states where abortion is legal:

- In May 2022 just after the leak of the *Dobbs* decision, an arsonist set fire to Wyoming's only abortion clinic. Since then, Wyoming is trying to enforce an abortion ban, which has been enjoined by the Court.
- In July 2022, an arsonist set fire to an abortion provider's site in Kalamazoo, Michigan^{viii}
- In January 2023, a Planned Parenthood affiliation in Illinois was firebombed^{ix}

How will this bill interact with federal law?

HIPAA is not sufficient to protect abortion patients and providers for two reasons: 1) providers must still generally provide health record data under a court order; and 2) providers using electronic health records must share, with a few exceptions, a patient's entire medical record. Providers may be allowed to block certain information under the federal Information Blocking Rule, but they must evaluate each patient record on a case-by-case basis. For providers, this would be administratively infeasible to implement.

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Under HIPAA, states are permitted to enact stricter privacy rules. A recent article in the Yale Law Review concluded that, “The most effective legislative approach for states may be to prohibit electronic-health-record vendors and health-information exchanges from facilitating the transfer of abortion-related data across state lines.”^{xi} *SB 786/HB 812 – Reproductive Health – Protected Information and Insurance Requirements* embodies this approach. Maryland would be the first state to enact such a measure, leading the way for other states that are carefully watching our progress so that they may replicate our efforts.

Conclusion

Planned Parenthood of Maryland requests a favorable report on *SB 786 - Reproductive Health – Protected Information and Insurance Requirements*. The bill's privacy protections are necessary to protect the safety of patients and providers. Without these protections, aggressive attempts to intimidate Maryland patients and providers will have a chilling effect of the provision of reproductive health care in Maryland.

We would be pleased to work with the sponsor and Committee on supporting this legislation moving forward. If we can provide any assistance, please contact Robyn Elliott at relliott@policypartners.net.

ⁱ *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006)

ⁱⁱ *Andrew Glenn v. Maryland Department of Health and Mental Hygiene*, No. 48, September Term, 2015. Opinion by Harrell, J.

ⁱⁱⁱ <https://www.culawreview.org/journal/the-post-dobbs-legality-of-out-of-state-abortion-travel-bans>

^{iv} <https://www.npr.org/2022/11/03/1133901526/indiana-doctor-sues-ag-to-block-him-from-obtaining-patient-abortion-records>

^v <https://www.nbcnews.com/think/opinion/lizelle-herrerass-texas-abortion-arrest-warning-rcna24639>

^{vi} https://www.documentcloud.org/documents/22129610-22_08_sma-criminalization-research-preliminary-release-findings-brief_final

^{vii} https://prochoice.org/wp-content/uploads/2021_NAF_VD_Stats_Final.pdf

^{viii} <https://www.wilx.com/2022/08/04/man-charged-with-arson-kalamazoo-planned-parenthood-fire/>

^{ix} <https://www.npr.org/2023/01/18/1149855905/officials-investigate-the-firebombing-on-an-illinois-planned-parenthood-facility>

^x https://www.yalelawjournal.org/pdf/F7.ZubrzyckiFinalDraftWEB_6jsh8oxp.pdf

^{xi} *Ibid.*