

Department of Legislative Services  
Maryland General Assembly  
2022 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 735 (Delegate Metzgar, *et al.*)  
Health and Government Operations

---

Public Health – Abortion

---

This bill prohibits a physician from performing or inducing an abortion before determining whether the unborn child has a detectable heartbeat and 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 if under specified circumstances. Any person (excepting State or local government officers or employees, as specified) 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. The bill’s provisions are severable such that the invalidity of any provision does not affect other provisions.

---

Fiscal Summary

**State Effect:** MDH general fund expenditures increase by \$32,100 annually to produce, print, and provide specified materials, as discussed below. Medicaid general fund expenditures decrease by up to \$5.1 million in FY 2023, and up to \$6.8 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 2023. 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.

## **Analysis**

### **Bill Summary:**

#### *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:** 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.

### **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. Thus, MDH general fund expenditures increase by \$32,100 beginning in fiscal 2023 to produce the materials, post the materials on the MDH website, and provide printed copies (presumably by mail) of the materials to abortion providers in the State.

#### *Medicaid*

MDH advises that Medicaid paid for 10,163 abortions in fiscal 2021 at an average cost of \$668 per abortion for a total cost of \$6.8 million. Thus, general fund expenditures decrease by up to \$5.1 million in fiscal 2023, based on fiscal 2021 claims. This estimate reflects the bill's October 1, 2022 effective date. Based on fiscal 2021 claims, general fund expenditures decrease by up to \$6.8 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:** None.

**Designated Cross File:** None.

**Information Source(s):** Maryland State Treasurer's Office; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Department of Legislative Services

**Fiscal Note History:** First Reader - March 9, 2022  
fnu2/jc

---

Analysis by: Amber R. Gundlach

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