

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 786

(Senator Hettleman)

Finance

Health and Government Operations

**Health - Reproductive Health Services - Protected Information and Insurance
Requirements**

This bill generally prohibits the disclosure of mifepristone data or the diagnosis, procedure, medication, or related codes for abortion care and other “sensitive health services” by a health information exchange (HIE), electronic health network (EHN), or health care provider beginning December 1, 2023. Beginning June 1, 2024, a person who knowingly violates this prohibition is guilty of a misdemeanor and subject to a fine of up to \$10,000 per day. The bill establishes a Protected Health Care Commission (PHCC), staffed by the Maryland Department of Health (MDH), to make specified recommendations to the Secretary of Health on what should be classified as “legally protected health care.” The Secretary must respond to PHCC reports within 60 days of receipt, use the reports in making specified determinations, and adopt emergency regulations within 90 days of the bill’s effective date to identify which specified codes should be restricted. The Maryland Health Care Commission (MHCC) must (1) adopt emergency regulations within nine months of the bill’s effective date to restrict data of patients related to legally protected health care and (2) submit quarterly reports on the bill’s implementation in fiscal 2024 and 2025. The bill also alters certain disclosures under the Maryland Public Information Act. **The bill takes effect June 1, 2023.**

Fiscal Summary

State Effect: MHCC special fund expenditures increase by \$100,000 in FY 2024 only for contractual services. The bill’s remaining provisions can likely be implemented within existing budgeted resources. Special fund revenues are not affected. General fund revenues are not materially affected, as discussed below.

Local Effect: The bill’s changes are primarily procedural in nature and do not materially affect local governmental finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: “Legally protected health care” means all reproductive health services, medications, and supplies related to the provision of abortion care and other sensitive health services as determined by the Secretary based on the recommendation of PHCC. “Sensitive health services” includes reproductive health services other than abortion care.

Maryland Public Information Act

A custodian must deny inspection of the part of a public record that (1) contains the name or other identifying information of an individual related to a licensed ambulatory surgical facility (except for the owner, primary contact, attorney, or consultant contained in an application to MHCC for a certificate of need (CON) or CON exception or determination request) or a licensed surgical abortion facility or (2) relates to an investigation of a licensee or certificate holder regarding the provision of legally protected health care. The bill also specifies that, for a health occupations board licensee, a custodian must allow inspection of the part of a public record that gives the business address of the licensee only (rather than the home address of the licensee if the business address is not available as under current law).

Health Information Exchange and Electronic Health Network Data Confidentiality

The purpose of MHCC is expanded to include the establishment of policies and standards to protect the confidentiality of patient and health care practitioner information related to legally protected health care. MHCC must adopt regulations for implementing connectivity to the HIE that restrict data of patients who have obtained legally protected health care.

Beginning December 1, 2023, an HIE or EHN is prohibited from disclosing mifepristone data or the diagnosis, procedure, medication, or related codes for abortion care and other sensitive health services (as determined by the Secretary) to a treating provider, a business entity, another HIE, or another EHN, unless the disclosure is (1) for the adjudication of claims or (2) to a specific treating provider at the written request of and with the consent of a patient, parent, or guardian, as specified.

Beginning June 1, 2024, a person who knowingly violates this prohibition is guilty of a misdemeanor and subject to a maximum fine of \$10,000 per day. The fine to be imposed must be based on consideration of (1) the extent of actual or potential public harm caused by the violation; (2) the cost of investigating the violation; and (3) whether the person previously violated this prohibition.

Subject to specified guidelines and recommendations, the Secretary must determine, for abortion care and sensitive health services, the procedure, diagnosis, medication, and other related codes that are subject to specified disclosure restrictions due to a substantial risk to patients or health care providers that would result from disclosure. The Secretary must adopt regulations to restrict the disclosure of abortion care and other sensitive health services information, as specified, and may adopt restrictions on the disclosure of abortion care or other sensitive health services that are applicable only to disclosures by HIEs or EHNs to out-of-state treating providers or business entities or other HIEs or EHNs provided that any restrictions on disclosing mifepristone data must apply to recipients located both in and outside the State.

Health Care Providers – Medical Record Disclosures

The disclosure of abortion care or other sensitive health services information, as specified, by a health care provider is subject to the related disclosure prohibitions established for HIEs and EHNs under the bill.

Protected Health Care Commission

PHCC is established to make recommendations to the Secretary regarding sensitive health services that should be determined by the Secretary to be legally protected health care. PHCC must identify sensitive health services information by diagnosis, procedural, medication, or related codes for which disclosure by an HIE or EHN to a treating provider, business entity, another HIE, or another EHN would create a substantial risk to patients or health care providers. PHCC may consult with organizations with expertise in (1) legal issues impacting providers of legally protected health care; (2) consumer health privacy; (3) health information technology; and (4) clinical, policy, or legal issues related to the work of PHCC.

PHCC must (1) select a chair each year; (2) meet at least four times per year; and (3) issue semiannual reports to the Secretary on its recommendation, as specified, including an assessment of the potential risk to patients and health care providers that would result from the disclosure of the sensitive health services that are addressed in the reports. Within 60 days of receiving a report, the Secretary must submit a written response to the report, including the findings and determinations of the Secretary, to PHCC and specified committees of the General Assembly.

Health Insurance – Coverage of Abortion Care Services

An insurer, nonprofit health service plan, or health maintenance organization that provides labor and delivery coverage must cover abortion care services, as specified, *notwithstanding* § 31-116 of the Insurance Article related to the essential health benefits

(EHBs) required pursuant to the federal Patient Protection and Affordable Care Act (ACA), which generally exempts a grandfathered health plan from covering EHBs.

Current Law:

Maryland's Public Information Act

The Public Information Act (PIA) establishes that all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. Generally, a custodian of a public record must permit inspection of any public record at any reasonable time. A custodian must designate types of public records that are to be made available to any applicant immediately on request and maintain a current list of the types of public records that have been so designated. Chapter 658 of 2021, effective July 1, 2022, requires each official custodian to adopt a policy of proactive disclosure of public records that are available for inspection under PIA, as specified.

A custodian must deny inspection of a public record or any part of a public record if (1) the public record is privileged or confidential by law or (2) the inspection would be contrary to a State statute, a federal statute or regulation, the Maryland Rules, or an order of a court of record. A custodian may deny inspection of part of a public record, if a custodian believes that inspection of a part of a public record by an applicant would be contrary to the public interest. PIA also requires denial of inspection for specified types of records and information.

Maryland Health Care Commission – Health Information Exchange Data Confidentiality

MHCC is an independent commission that functions within MDH and must coordinate the exercise of its functions with MDH and the Health Services Cost Review Commission to ensure an integrated, effective health care policy for the State. MHCC must adopt specified regulations for implementing a statewide HIE. MHCC designated the Chesapeake Regional Information System for Our Patients (CRISP) as the State-designated HIE in 2009, and the infrastructure became operational in 2010. An HIE allows clinical information to move electronically among disparate health information systems. CRISP offers tools aimed at improving the facilitation of care for the region's health care providers.

Health Care Providers – Medical Record Disclosures

A health care provider is a person who is licensed, certified, or otherwise authorized to practice under the Health Occupations Article or a facility where health care is provided to patients or recipients. In general, a health care provider must keep the medical record of a

patient or recipient confidential and disclose the information only as authorized and subject to specified requirements and limitations.

Health Insurance – Abortion Care Services

Chapter 56 of 2022 requires that a carrier that provides labor and delivery coverage must cover abortion care services without (1) a deductible, coinsurance, copayment, or any other cost-sharing requirement and (2) restrictions that are inconsistent with the protected rights under Title 20, Subtitle 2 of the Health-General Article. A carrier must provide information to consumers about abortion care coverage using the terminology “abortion care” to describe coverage. These requirements do not apply to (1) a multistate plan that does not provide coverage for abortions in accordance with federal law or (2) a high-deductible plan, unless the Insurance Commissioner determines that abortion care is not excluded from the safe harbor provisions for preventive care under federal law.

A religious organization that is eligible to obtain an exclusion from the requirement to cover prescription contraceptive drugs or devices may obtain an exclusion from abortion care coverage and notice requirements if the requirements conflict with the organization’s *bona fide* religious beliefs and practices. If the Commissioner determines that enforcement of these provisions may adversely affect the allocation of federal funds to the State, the Commissioner may grant an exemption for these requirements to the minimum extent necessary to ensure the continued receipt of federal funds.

The ACA requires nongrandfathered health plans to cover 10 EHBs, which include items and services in the following categories: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services, including behavioral health treatment; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including dental and vision care.

State Revenues: While the bill establishes a maximum fine of \$10,000 a day to be imposed for violations of a specified prohibition, the amount of the fine is subject to multiple considerations under the bill. Moreover, this analysis assumes general compliance with the bill’s provisions related to the disclosure of specified records. Thus, general fund fine revenues are not materially affected under the bill.

State Expenditures: MHCC advises that it will require a one-time expenditure of \$100,000 in fiscal 2024 only for contractual services to develop policies and standards protecting the confidentiality of patient and health care practitioner information related to legally protected health care information. MHCC further advises that the commission has sufficient funds available to cover this expenditure.

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

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 812 (Delegate Rosenberg, *et al.*) - Health and Government Operations.

Information Source(s): Maryland Department of Health; Maryland Insurance Administration; Department of Legislative Services

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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.

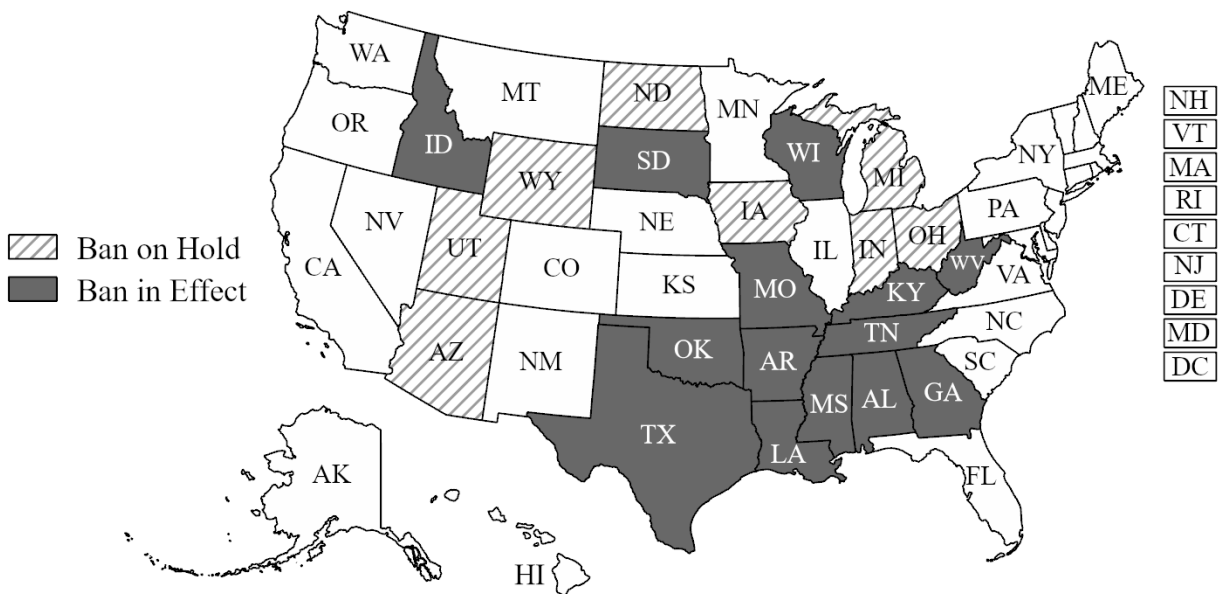
A qualified health care provider who performs an abortion is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the provider’s best clinical judgment using accepted standards of clinical practice. MDH may adopt regulations consistent 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.