

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 808

(Delegate Williams, *et al.*)

Judiciary and Health and Government
Operations

Judicial Proceedings and Finance

Reproductive Health Protection Act

This bill generally (1) establishes additional protections for information related to “legally protected health care” when that information is sought by another state; (2) prohibits a health occupations board from taking specified disciplinary actions related to the provision of legally protected health care; (3) prohibits a medical professional liability insurer from taking “adverse actions” against a practitioner related to the practice of legally protected health care; and (4) prohibits specified State entities, agents, and employees from participating in any interstate investigation seeking to impose specified liabilities or sanctions against a person for activity related to legally protected health care (with limited exception). The bill also clarifies a provision of law relating to the exemption of high-deductible health plans from existing requirements to provide specified coverage of abortion care services. **The bill takes effect June 1, 2023.**

Fiscal Summary

State Effect: None. The change is procedural in nature and is not anticipated to materially affect governmental finances.

Local Effect: The bill is not anticipated to materially affect local government operations or finances.

Small Business Effect: None.

Analysis

Bill Summary/Current Law: Under the bill, “legally protected health care” means all reproductive health services, medications, and supplies related to the direct provision or

support of the provision of care related to pregnancy, contraception, assisted reproduction, and abortion that is lawful in the State.

Maryland Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings

Under current law, if a judge of a court of record in any state that has laws for commanding persons within that state to attend and testify in the state certifies under the seal of the court specified assertions, a judge of a court of record in the county in which the person is located must establish a time and place for a hearing upon presentation of the certificate and must make an order directing the witness to appear at a specified time and place for the hearing. At the hearing, if the judge makes the determinations listed below, the judge must issue a summons attached to a copy of the certificate directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has begun or is about to begin at the time and place specified in the summons:

- the witness is material and necessary;
- that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state; and
- that the laws of the state in which the prosecution is pending, or grand jury investigation has begun or is about to begin, and of any other state through which the witness may be required to pass by ordinary course of travel, will protect the witness from arrest and the service of civil and criminal process.

In the hearing, the certificate is *prima facie* evidence of all the facts stated above.

Under the bill, a judge is prohibited from issuing a summons under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings if the criminal proceedings or grand jury investigation for which the witness is being summoned relates to a violation of another state's criminal law involving the provision of, receipt of, or assistance with legally protected health care in Maryland. However, if the acts forming the basis of the prosecution or investigation would constitute a crime in Maryland, then a judge may issue a summons pursuant to the Uniform Act.

Maryland Uniform Interstate Depositions and Discovery Act

Under current law, a party requesting issuance of a subpoena must submit a foreign subpoena (one that is issued under the authority of a court or record of another state) to a circuit court clerk for the county in which discovery is sought to be conducted in Maryland. A subpoena is defined as a document issued under authority of a court of record that requires a person to (1) attend and give testimony at a deposition; (2) produce and permit inspection and copying of designated materials in the possession, custody, or control of the

person; or (3) permit inspection of premises under the control of the person. When a foreign subpoena is submitted to a clerk, the clerk must promptly issue a subpoena for service on the individual named in the foreign subpoena. The subpoena must incorporate the terms used in the foreign subpoena and include or be accompanied by the names and contact information of all counsel and unrepresented parties. The subpoena must be served in compliance with the Maryland Rules.

Under the bill, a request made pursuant to the Maryland Uniform Interstate Depositions and Discovery Act must include a sworn, written statement signed under penalty of perjury by the party (or party's counsel) seeking enforcement, that no portion of the subpoena is intended or anticipated to further any investigation or proceeding related to legally protected health care. The specified written statement is not required if the out-of-state proceeding is based in tort, contract, or statute for which a similar or equivalent claim would exist in Maryland *and* (1) is brought by the patient (or patient's legal representative) who received legally protected health care *or* (2) is based on conduct that would be prohibited under the laws of Maryland.

The Wiretap and Electronic Surveillance Act

Under current law, the Attorney General, State Prosecutor, or any State's Attorney may apply to a judge for (and the judge may grant) an *ex parte* order authorizing interception of a wire, oral, or electronic communication if the judge determines that normal investigative procedures have failed, are unlikely to succeed, or are too dangerous. The judge must also determine that specified probable cause exists including probable cause to believe an individual is committing, has committed, or is about to commit offenses enumerated under § 10-406 of the Courts and Judicial Proceedings Article, (*e.g.*, murder, rape, and child abuse).

Under the bill, a judge may not issue an *ex parte* order for the purpose of investigating or recovering evidence of actions related to legally protected health care, unless the acts forming the basis for the investigation or recovery of evidence would constitute a crime in Maryland.

Uniform Enforcement of Foreign Judgments Act

Under current law, a copy of an authenticated foreign judgment may be filed in the office of the clerk of a circuit court, in the District Court for judgements of \$2,500 or less, or in either court if the judgement is more than \$2,500. The court must treat the foreign judgment in the same manner as a judgment of the court in which the foreign judgment is filed.

Under the bill, a judgment creditor may not file a copy of any foreign judgment if the judgment was issued in connection with any litigation concerning legally protected health

care, unless the underlying cause of action is (1) based in tort, contract, or statute for which a similar or equivalent claim would exist in Maryland *and* is brought by the patient (or patient's legal representative) who received legally protected health care, *or* (2) is based on conduct that would be prohibited under the laws of Maryland.

Uniform Criminal Extradition Act

Under current law, extradition is a process where one state (the asylum state) surrenders to another state (the demanding state) an individual accused or convicted of an offense outside the territory of the asylum state and within the territorial jurisdiction of the demanding state. The Governor of Maryland may surrender, on demand of the executive authority of any another state, any person in Maryland charged in the other state with committing an act that intentionally results in a crime in the demanding state. This provision applies even if the accused was not in the state at the time of the commission of the crime and has not fled therefrom.

Under the bill, the Governor of Maryland is prohibited from surrendering a person on the demand of the executive authority of any another state if the alleged act for which surrender is being demanded relates to providing, procuring, or aiding another in providing or procuring legally protected health care services *and* that act would not be a crime in Maryland. This prohibition does not apply to a writ of mandamus issued by a federal court.

Health Occupations Boards

Under current law, an individual must be licensed, certified, or otherwise authorized to practice by the respective health occupations board before the individual may practice in the State (with limited exceptions). Authorizations to practice vary by profession but typically require, among other things, specified education and experience, passage of a national and/or State examination, and a criminal history records check. Generally, a health occupations board has the authority, for individuals who do not comply with enumerated practice requirements, to deny an authorization to practice for an applicant or for an individual already authorized to practice, place on probation, impose a fine, suspend an authorization, or revoke an authorization. Many health occupations professions also participate in interstate compacts that offer expedited authorizations to practice for individuals already authorized to practice in other compact states. When licensed under the compact, disciplinary actions taken by one compact state must be deemed unprofessional conduct by other compact states that could subject the practitioner to further disciplinary measures in those other compact states.

Under the bill, a health occupations board may not revoke, suspend, discipline, take an adverse action against, or refuse to issue or renew a license, certification, or other authorization to practice for any "health care practitioner" (an individual licensed, certified,

or otherwise authorized by law to provide health care services under the Health Occupations Article) (1) because of the provision of legally protected health care provided in accordance with the standard of care as determined by the relevant Maryland health occupations board or (2) if the health care practitioner is disciplined by a licensure board in another state because of the provision of legally protected health care provided in accordance with the standard of care determined by the relevant Maryland health occupations board. If the legally protected health care was not provided in accordance with Maryland law, a health occupations board may take any action authorized by statute.

Medical Professional Liability Insurance

Under current law, medical professional liability insurance (also known as medical malpractice insurance), covers doctors and other professionals in the medical field for liability claims relating to patient treatment.

Under the bill, an insurer that issues to, delivers to, or renews medical professional liability insurance for a health care practitioner who is authorized to practice in the State may not take an “adverse action” against a practitioner based on that practitioner’s provision of or making of a referral for legally protected health care. This prohibition does not apply to a medical professional liability insurer taking an adverse action against a health care practitioner for conduct that would otherwise constitute professional misconduct.

“Adverse action” includes (1) refusing to renew or execute a contract or agreement with a health care practitioner; (2) making a report or commenting to an appropriate private or governmental entity regarding practices of legally protected health care; and (3) increasing a premium for or making another type of unfavorable change regarding terms of coverage under a medical malpractice insurance contract with a health care practitioner. Adverse action does not include making a rate filing in accordance with § 11-206 of the Insurance Article.

State Employment Policies

The State Personnel and Pensions Article establishes policies pertaining to State employment, including rights of State employees and actions prohibited to State employees.

Under the bill, an agency of the State or a political subdivision of the State (including agents, employees, or private parties providing services on behalf of the State or a political subdivision), are prohibited from participating in any interstate investigation or proceeding that seeks to impose a civil liability, criminal liability, or administrative sanction against a person for an activity relating to legally protected health care. This prohibition includes providing information; expending time or money; or using State facilities, property,

equipment, personnel, or other resources in such an investigation. This prohibition does not apply if (1) the interstate investigation or proceeding concerns conduct that would be subject to civil liability, criminal liability, or administrative sanction in Maryland or (2) the subject of the interstate investigation or proceeding submits a written request to provide information or assistance to the investigation or proceeding.

High-deductible Health Plan Exemption from Coverage of Abortion Care Services

Under current law, insurers, nonprofit health service plans, and health maintenance organizations that provide labor and delivery coverage must cover abortion care services without (1) a deductible, coinsurance, copayment, or any other cost-sharing requirements and (2) restrictions that are inconsistent with protected rights under Title 20, Subtitle 2 of the Health-General Article. Information to consumers about abortion care coverage must be provided using the terminology “abortion care” to describe coverage. These provisions do not apply to a high-deductible plan, unless the Insurance Commissioner determines that abortion care is not excluded from the safe harbor provisions for preventive care under specified provisions of the Internal Revenue Code (IRC).

The bill clarifies that a high-deductible plan is exempt from these requirements if the Commissioner determines that abortion care services are excluded from the safe harbor provisions for preventive care under specified provisions of the IRC.

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: SB 859 (Senator Smith) - Judicial Proceedings and Finance.

Information Source(s): Maryland Association of Counties; Maryland Municipal League; Office of the Attorney General; Maryland State Treasurer’s Office; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Maryland Department of Health; 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.

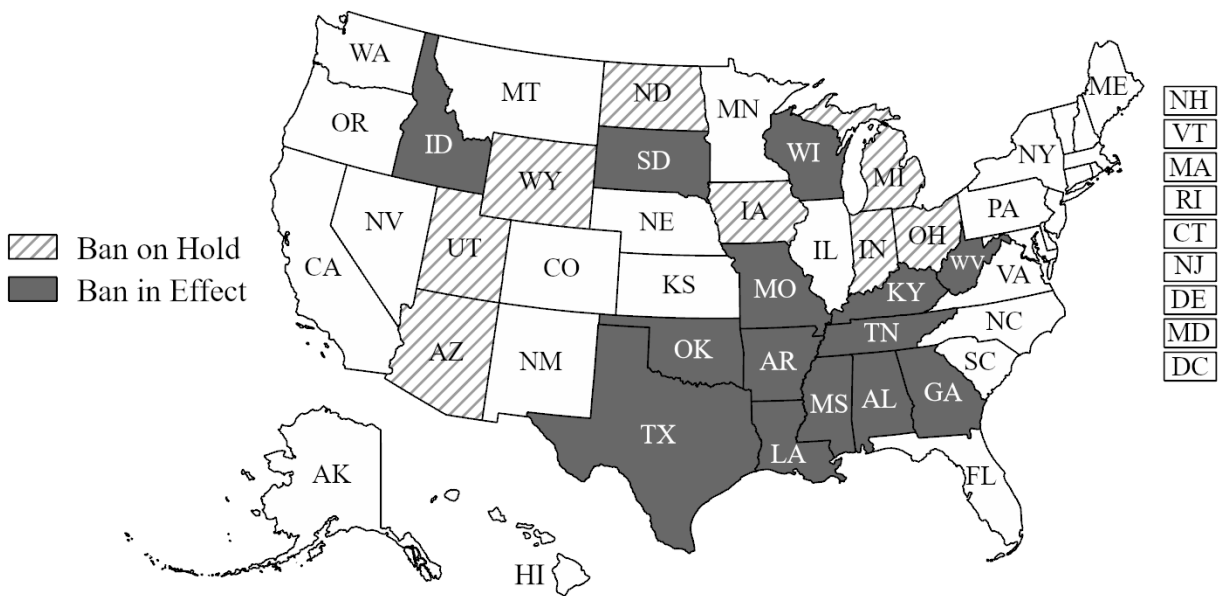
A qualified health care provider who performs an abortion is not liable for civil damages or subject to a criminal penalty for a decision to perform an abortion made in good faith and in the provider’s best clinical judgment using accepted standards of clinical practice. The Maryland Department of Health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