



MAG Fact Sheet

Georgia H.B. 481

How H.B. 481 affects physicians

H.B. 481, known as the “Heartbeat Bill,” passed during the 2019 Georgia legislative session. This bill will prohibit abortions after a fetal heartbeat is detected unless the pregnancy is the result of rape or incest (with an accompanying police report alleging the offense), the abortion is necessary to avert death or serious bodily harm to the mother, it is necessary to preserve the life of an unborn child, or the pregnancy is deemed medically futile (in reasonable medical judgment). One of the bill’s provisions states that a woman who seeks a prohibited abortion has a right to sue the physician who performs the illegal abortion. Therefore, this legislation could subject physicians to both criminal and civil liability for performing such a procedure.

Criminal liability

H.B. 481 changes the parameters for the crime of criminal abortion. Criminal abortion in Georgia carries a punishment of not less than one (1) year and not more than 10 years. Prior to H.B. 481, criminal abortion applied to abortions that were performed after 20 weeks unless the pregnancy was diagnosed as medically futile or that took place after the first trimester unless performed in a licensed hospital, in a licensed ambulatory surgical center, or in a health facility licensed as an abortion facility by the Georgia Department of Community Health. The law regarding where abortions that are performed after the first trimester must take place remains in effect with H.B. 481.

Under H.B. 481, criminal abortion will now apply to abortions that are performed after a human heartbeat is detected, which is defined as “embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac.” An abortion under H.B. 481 is defined as “using, prescribing, or administering any instrument, substance, device or other means with the purpose to terminate a pregnancy with knowledge that termination will, with reasonable likelihood, cause the death of an unborn child.” Conversely, the definition of abortion under H.B. 481 does not apply to the removal of a “dead unborn child caused by spontaneous abortion,” which refers to “the naturally occurring death of an unborn child, including a miscarriage or stillbirth” or the “removal of an ectopic pregnancy.”

H.B. 481 creates three (3) exceptions to the prohibition on abortions. The first is if a physician determines in their reasonable medical judgment that a medical emergency exists. Reasonable medical judgment has been defined in Georgia code as “medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case, and the treatment possibilities with respect to the medical conditions involved.” The bill defines a “medical emergency” as “a condition in which an abortion is necessary in order to prevent the death of the pregnant woman or the substantial and irreversible physical impairment of a major bodily function of the pregnant woman.” It is important to note that this definition of medical emergency further clarifies that “no such greater risk shall be deemed to exist if it is based on a diagnosis or claim of a mental or emotional condition of the pregnant woman or that the

pregnant woman will purposefully engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.”

The second exception will allow for an abortion to be performed at or before 20 weeks if the pregnancy is the result of rape or incest and an official police report is made that alleges that the rape or incest occurred. The probable gestational age with relation to the 20-week limit in this exception means “what will, in reasonable medical judgment and with reasonable probability, be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced, as dated from the time of fertilization of the human ovum.”

The third exception occurs when a physician determines, in their reasonable medical judgment, that the pregnancy is medically futile. Medically futile means that “in [their] reasonable medical judgment, an unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth.”

It is important to note that any abortion that is performed under H.B. 481, even when an exception is met, is still subject to investigation by law enforcement. This would necessitate access to patient records to determine if an exception was present and this bill provides that the local district attorney (of the judicial circuit where the abortion occurred or where the woman resides) will be granted access to the health records pertaining to the abortion.

There are essentially two (2) affirmative defenses in H.B. 481. The first is where a licensed physician, advanced practice registered nurse, registered professional nurse, licensed practical nurse, licensed pharmacist, or licensed physician assistant provides care to a pregnant woman that results in the accidental or unintentional injury to or death of an unborn child. The second occurs when “a woman sought an abortion because she reasonably believed that an abortion was the only way to prevent a medical emergency.”

Another consideration that could subject physicians to even greater liability is that H.B. 481 establishes that unborn children, defined as “a member of the species *Homo sapiens* at any stage of development who is carried in the womb,” are “natural persons.” This new distinction could put a physician in danger of criminal liability for any number of crimes against a person as defined by Georgia law.

Civil liability

With the aforementioned definitions in mind, H.B. 481 states that any woman upon whom an abortion is performed in violation of the law may file a suit against the person who performed the abortion and recover all damages available to her under Georgia law for any torts.

The bill also expands the damages that are allowed under a lawsuit for the homicide of a child, which would allow for the recovery for the full value of the life of the unborn child beginning at the point at which a detectable human heartbeat is present.

For physicians who are counseling women who are considering abortion, H.B. 481 also increases the amount of information that must be provided to the woman at least 24 hours prior to the abortion. The woman must be informed of the presence of a detectable human heartbeat. The following must also be

included in the information that is made available by the Georgia Department of Public Health: “As early as six weeks gestation, an unborn child may have a detectable human heartbeat.”

Requirements of a physician performing an abortion under H.B. 481

Under H.B. 481, a physician who performs an abortion must first make a determination of the presence of a detectable human heartbeat. The law does not provide for how this determination should be made, but it leaves the method of detection up to the medical judgment of the physician.

After determining that there is a detectable human heartbeat as defined by the law, the physician must then determine whether one of the aforementioned exceptions exists. If an exception exists, and an abortion will be performed, the physician needs to provide the requisite counseling at least 24 hours prior to the procedure, which include (1) the particular medical risks to the individual patient associated with the particular abortion procedure to be employed, when medically accurate and (2) the probable gestational age and the presence of a detectable human heartbeat of an unborn child at the time of the abortion would be performed and (3) the medical risks associated with carrying an unborn child to term. This information must be provided during a consultation in which the physician or the physician’s qualified agent can ask questions of the female patient and the female patient can ask questions of the physician or the physician’s qualified agent.

Only after these requirements have been met can the abortion can be performed. If the abortion is performed after the first trimester, it must take place at a licensed hospital, a licensed ambulatory surgical center, or a health facility that is licensed as an abortion facility by the Georgia Department of Community Health. If the fetus is capable of sustained life, medical aid must be rendered.

After the abortion is performed, reporting requirements must also be met. Any physician who performs or attempts to perform an abortion must submit a report to the Georgia Department of Community Health that includes: (1) if a detectable human heartbeat exists, the probable gestational age, and the method and basis of determination and (2) if a detectable human heartbeat exists, the basis of the determination that the pregnant woman had a medically futile pregnancy, that a medical emergency existed, or that the pregnancy was the result of rape or incest, and (3) the method used for the abortion.

Conclusions

With Gov. Brian Kemp’s signature, H.B. 481 will go into effect on January 1, 2020 and will dramatically change the law that governs abortions in Georgia, increases the state’s regulation of such procedures, and heightens both the potential criminal and civil liabilities for physicians and other health care professionals and the facilities where they perform such procedures.

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