

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

House Bill 4924

FISCAL
NOTE

BY DELEGATE KESSINGER

[Introduced February 11, 2020; Referred to the
Committee on Health and Human Resources then the
Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
 2 designated §16-2P-1, §16-2P-2, §16-2P-3, §16-2P-4, §16-2P-5, §16-2P-6, §16-2P-7,
 3 §16-2P-8, §16-2P-9, §16-2P-10, §16-2P-11, §16-2P-12, and §16-2P-13, all relating to
 4 enacting the Women’s Health Protection Act; making findings; defining terms; establishing
 5 criminal and civil penalties; establishing licensing requirements for abortion clinics;
 6 providing for severability; requiring rule-making; and establishing an effective date.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2P. WOMEN’S HEALTH PROTECTION ACT.

§16-2P-1. Title.

1 This article may be known and cited as the “Women’s Health Protection Act”.

§16-2P-2. Legislative findings and purposes.

1 (a) The Legislature finds that:

2 (1) The vast majority of all abortions in this state are performed in clinics devoted primarily
 3 to providing abortions and family planning services. Most women who seek abortions at these
 4 facilities do not have any physician-patient relationship with the physician who performs the
 5 abortion either before or after the procedure. They ordinarily do not return to the facility for post-
 6 surgical care. In most instances, the woman’s only actual contact with the abortion provider occurs
 7 simultaneously with the abortion procedure, with little opportunity to ask questions about the
 8 procedure, potential complications, and proper follow-up care.

9 (2) “The medical, emotional, and psychological consequences of an abortion are serious
 10 and can be lasting ...” H.L. v. Matheson, 450 U.S. 398, 411 (1981).

11 (3) Abortion can lead to both short-term and long-term medical complications. Potential
 12 complications from abortion include, among others, bleeding, hemorrhage, infection, uterine
 13 perforation, uterine scarring, blood clots, cervical tears, incomplete abortion (retained tissue),
 14 failure to actually terminate the pregnancy, free fluid in the abdomen, acute abdomen, organ
 15 damage, missed ectopic pregnancies, cardiac arrest, sepsis, respiratory arrest, reactions to

16 anesthesia and other drugs, and even death.

17 (4) The risks for second-trimester abortions are greater than for first-trimester abortions.
18 The risk of hemorrhage, in particular, is greater, and the resultant complications may require a
19 hysterectomy, other reparative surgery, or a blood transfusion.

20 (5) West Virginia has a legitimate concern for the public’s health and safety. *Williamson v.*
21 *Lee Optical*, 348 U.S. 483, 486 (1985).

22 (6) The state “has legitimate interests from the outset of pregnancy in protecting the health
23 of women.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847
24 (1992).

25 (7) More specifically, the state “has a legitimate concern with the health of women who
26 undergo abortions.” *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428-29
27 (1983).

28 (8) The U.S. Supreme Court has specifically acknowledged that a state has “a legitimate
29 interest in seeing to it that abortion, like any other medical procedure, is performed under
30 circumstances that ensure maximum safety for the patient. This interest obviously extends at least
31 to the performing physician and his staff, to the facilities involved, to the availability of after-care,
32 and to adequate provision for any complication or emergency that might arise.” *Roe v. Wade*, 410
33 U.S. 113, 150 (1973).

34 (b) Based on the findings in subsection (a) of this section, the purposes of this article are
35 to:

36 (1) Regulate abortion clinics consistent with and to the extent permitted by the decisions
37 of the U.S. Supreme Court and other courts; and

38 (2) Provide for the protection of public health through the development, establishment,
39 and enforcement of medically appropriate standards of care and safety in abortion clinics.

§16-2P-3. Definitions.

1 As used in this article:

2 “Abortion” means the act of using or prescribing any instrument, medicine, drug, or any
3 other substance, device, or means with the intent to terminate the clinically diagnosable
4 pregnancy of a woman with knowledge that the termination by those means will with reasonable
5 likelihood cause the death of the unborn child. Such use, prescription, or means is not an abortion
6 if done with the intent to:

7 (A) Save the life or preserve the health of the unborn child;

8 (B) Remove a dead unborn child caused by spontaneous abortion; or

9 (C) Remove an ectopic pregnancy.

10 “Abortion clinic” means a facility, other than an accredited hospital, in which five or more
11 first-trimester abortions in any month or any second- or third-trimester abortions are performed.

12 “Born alive,” with respect to a member of the species homo sapiens, means the complete
13 expulsion or extraction from his or her mother of that member, at any stage of development, who
14 after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord,
15 or definite movement of voluntary muscles, regardless of whether the umbilical cord has been
16 cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced
17 labor, cesarean section, or induced abortion.

18 “Conception” and “fertilization” each means the fusion of the human spermatozoon with a
19 human ovum.

20 “Department” means the West Virginia Department of Health and Human Resources.

21 “Gestation” means the time that has elapsed since the first day of the woman’s last
22 menstrual period.

23 “Licensee” means an individual, a partnership, an association, a limited liability company,
24 or a corporation authorized by this code to operate an abortion clinic.

25 “Physician” means a person licensed to practice medicine in West Virginia. This term
26 includes medical doctors and doctors of osteopathy.

27 “Secretary” means the Secretary of the West Virginia Department of Health and Human

28 Resources.

29 “Unborn child” means the offspring of human beings from conception until birth.

§16-2P-4. Licensure requirements.

1 (a) Beginning on the effective date of this article all abortion clinics shall be licensed by
2 the department. Any existing abortion clinic, as defined by this article, shall make application for
3 licensure within 90 days of the effective date of this article.

4 (b) An application for a license shall be made to the department on forms provided by it
5 and shall contain such information as the department reasonably requires, which shall include
6 affirmative evidence of ability to comply with such reasonable standards, and rules as are lawfully
7 prescribed hereunder. Additional information required by the department shall be supplied on
8 supplemental forms as needed.

9 (c) Following receipt of an application for license and if the applicant and the facility meet
10 the requirements established by this article and the minimum standards, administrative rules, and
11 regulations adopted in pursuance thereof, the department shall issue a license which is valid for
12 a period of one year.

13 (d) A temporary or provisional license may be issued to an abortion clinic for a period of
14 six months in cases where sufficient compliance with minimum standards, rules, and regulations
15 require an extension of time, if a disapproval has not been received from any other state or local
16 agency otherwise authorized to inspect such facilities. The failure to comply must not be
17 detrimental to the health and safety of the public.

18 (e) A license shall apply only to the location and licensee stated on the application and
19 such license, once issued, is not be transferable from one place to another or from one licensee
20 to another. If the location of the facility is changed, the license shall be automatically revoked. A
21 new application form shall be completed prior to all license renewals.

22 (f) An application for a license or license renewal to operate an abortion clinic shall be
23 accompanied by a fee determined by the secretary which is hereby levied as the license fee for

24 operation of an abortion clinic for a period of one year. The fees herein levied and collected shall
25 be paid into the General Revenue Fund.

26 (g) Each license issued hereunder shall be for a period of one year from the date of
27 issuance unless sooner revoked, shall be on a form prescribed by the department, and may be
28 renewed from year to year upon application and payment of the license fee as in the case of
29 procurement of the original license.

30 (h) The department may deny, suspend, revoke, or refuse to renew a license in any case
31 in which it finds that there has been a substantial failure of the applicant or licensee to comply
32 with the requirements of this article or the minimum standards, and administrative rules, and
33 adopted by the department pursuant to this article. In such case, the department shall furnish the
34 person, applicant, or licensee 30 days' notice specifying the reason(s) for the action.

35 (i) Any person, applicant, or licensee who feels aggrieved by the action of the department
36 in denying, suspending, revoking, or refusing to renew a license may appeal the department's
37 action in accordance with the delay, notice, and other procedures established by the department.

38 (j) Any person, applicant, or licensee who feels aggrieved by the action of the department
39 may, within 30 days after notification of such action, appeal to the circuit court. A record of all
40 proceedings before the department shall be made and kept on file. The department shall transmit
41 a certified copy of the record to the circuit court. The circuit court shall try the appeal de novo.

§16-2P-5. Inspections and Investigations.

1 (a) The department shall establish policies and procedures for conducting prelicensure
2 and relicensure inspections of abortion clinics. Prior to issuing or reissuing a license, the
3 department shall conduct an on-site inspection to ensure compliance with this article, with the
4 rules promulgated by the department under this article.

5 (b) The department shall also establish policies and procedures for conducting inspections
6 and investigations pursuant to complaints received by the department and made against any
7 abortion clinic. The department shall receive, record, and dispose of complaints in accordance

8 with established policies and procedures.

9 (c) If the secretary determines that there is reasonable cause to believe a licensee,
10 licensed abortion clinic, or abortion clinic that is required to be licensed pursuant to this article is
11 not adhering to the requirements of this article, and the rules promulgated by the department, the
12 secretary and any duly-designated employee or agent of the secretary, including county health
13 representatives and county or municipal fire inspectors, consistent with standard medical
14 practices, may enter on and into the premises of the licensee, licensed abortion clinic, or abortion
15 clinic that is required to be licensed, during regular business hours of the licensee or abortion
16 clinic to determine compliance with this article, with the rules promulgated by the department
17 under this article, local fire ordinances or rules.

18 (d) An application for a license pursuant to this article and rules promulgated by the
19 department under the authority of this article constitutes permission for, and complete
20 acquiescence in, an entry or inspection of the premises during the pendency of the application
21 and, if licensed, during the term of the license.

22 (e) If an inspection or investigation conducted pursuant to this subsections (a), (b), or (c)
23 of this section reveals that a licensee or licensed abortion clinic is not adhering to the requirements
24 of this article, with the rules promulgated by the department under this article, and local fire
25 ordinances or rules the secretary may take action to deny, suspend, revoke, or refuse to renew a
26 license to operate an abortion clinic.

§16-2P-6. Rulemaking.

1 (a) The secretary shall propose rules for legislative approval in accordance with §29A-3-
2 1 et seq. of this code to implement this article. At a minimum these rules shall prescribe standards
3 for:

4 (1) Adequate private space that is specifically designated for interviewing, counseling, and
5 performing medical evaluations.

6 (2) Dressing rooms for staff and patients

- 7 (3) Appropriate lavatory areas.
- 8 (4) Areas for preprocedure hand washing.
- 9 (5) Private procedure rooms.
- 10 (6) Adequate lighting and ventilation for abortion procedures.
- 11 (7) Surgical or gynecologic examination tables and other fixed equipment.
- 12 (8) Post-procedure recovery rooms that are supervised, staffed, and equipped to meet the
13 patients' needs.
- 14 (9) Emergency exits to accommodate a stretcher or gurney.
- 15 (10) Areas for cleaning and sterilizing instruments.
- 16 (11) Adequate areas for the secure storage of medical records and necessary equipment
17 and supplies.
- 18 (12) The display in the abortion clinic, in a place that is conspicuous to all patients, of the
19 clinic's current license issued by the department.
- 20 (13) Prescribe required equipment and supplies, including medications, required for the
21 performance, in an appropriate fashion, of any abortion procedure that the medical staff of the
22 abortion clinic anticipates performing and for monitoring the progress of each patient throughout
23 the procedure and recovery period.
- 24 (14) Require that the number or amount of equipment and supplies at the abortion clinic
25 is adequate at all times to assure sufficient quantities of clean and sterilized durable equipment
26 and supplies to meet the needs of each patient.
- 27 (15) Prescribe required equipment, supplies, and medications that shall be available and
28 ready for immediate use in an emergency and requirements for written protocols and procedures
29 to be followed by staff in an emergency, such as the loss of electrical power.
- 30 (16) Prescribe the mandated equipment and supplies for required laboratory tests and the
31 requirements for protocols to maintain laboratory equipment located in the abortion clinic or any
32 equipment operated by clinic staff.

33 (17) Require ultrasound equipment in all abortion clinics.

34 (18) Require that all equipment is safe for patients and the staff, meets applicable federal
35 standards, and is checked annually.

36 (19) The abortion clinic designate a medical director who is licensed to practice medicine
37 in West Virginia.

38 (20) Physicians performing abortions are licensed to practice medicine demonstrate
39 competence in the procedure(s) involved, and are acceptable to the medical director of the
40 abortion clinic.

41 (21) Surgical assistants, or other appropriate classification(s) of healthcare provider(s),
42 receive training in counseling, patient advocacy, and the specific responsibilities of the services
43 the surgical assistants, or other appropriate classification(s) of healthcare provider(s), provide at
44 an abortion clinic.

45 (22) Volunteers, if any, receive training in the specific responsibilities of the services that
46 volunteers provide at an abortion clinic, including, but not limited to, counseling and patient
47 advocacy, and as provided in the rules adopted by the secretary for different types of volunteers
48 based on their responsibilities.

49 (23) A medical history including the following:

50 (A) Reported allergies to medications, antiseptic solutions, or latex;

51 (B) Obstetric and gynecologic history;

52 (C) Past surgeries; and

53 (D) Medication that the patient is currently taking.

54 (24) A physical examination including a bimanual examination estimating uterine size and
55 palpation of the adnexa.

56 (25) The appropriate preprocedure testing including:

57 (A) Urine or blood tests for pregnancy, if ordered by a physician;

58 (B) A test for anemia;

59 (C) Rh typing, unless reliable written documentation of blood type is available; and

60 (D) Other tests as indicated from the physical examination.

61 (26) When medically appropriate, an ultrasound examination for abortion patients, require
62 that if a person who is not a physician performs an ultrasound examination, that person shall have
63 documented evidence that he or she completed a course or other acceptable training in the
64 operation of ultrasound equipment as prescribed. A physician or other licensed healthcare
65 professional shall review, at the request of the patient, the ultrasound evaluation results with the
66 patient before the abortion procedure is performed, including permitting the patient to view the
67 active ultrasound image and learn the probable gestational age of the unborn child.

68 (27) That a physician is responsible for estimating the gestational age of the unborn child
69 based on the ultrasound examination, if performed, and obstetric standards that are in accord
70 with established standards of care regarding the estimation of gestational age as defined in rule
71 and shall write the estimate in the patient's medical record. The physician shall keep original prints
72 of each ultrasound examination of a patient, if performed, in the patient's medical record.

73 (28) Medical personnel are available to all patients throughout their abortion procedures.

74 (29) Standards for the safe performance of abortion procedures that conform to obstetric
75 standards and are in accord with established standards of care, including those regarding the
76 estimation of gestational age as defined in rule.

77 (30) Appropriate use of local anesthesia, analgesia, and sedation if ordered by the
78 physician.

79 (31) The use of appropriate precautions such as the establishment of intravenous access
80 at least for patients undergoing second- or third-trimester abortions.

81 (32) The use of appropriate monitoring of the vital signs and other defined signs and
82 markers of the patient's status throughout the abortion procedure and during the recovery period
83 until the patient's condition is deemed to be stable in the recovery room.

84 (33) The provision of immediate post-procedure care including observation in a supervised

85 recovery room for as long as the patient's condition warrants.

86 (34) That the clinic arrange hospitalization if any complication beyond the management
87 capability of the staff occurs or is suspected.

88 (35) A licensed healthcare professional, trained in the management of the recovery area
89 and capable of providing basic cardiopulmonary resuscitation (CPR) and related emergency
90 procedures, actively monitor patients in the recovery room.

91 (36) A physician shall sign the discharge order and be readily accessible and available
92 until the last patient is discharged.

93 (37) That a physician discusses RhO(d) immune globulin with each patient for whom it is
94 indicated and assures that it is offered to the patient in the immediate post-operative period or
95 that it is be available to her within 72 hours after completion of the abortion procedure. If the
96 patient refuses, a refusal form approved by the department shall be signed by the patient and a
97 witness and included in the patient's medical record.

98 (38) Written instructions with regard to post-abortion coitus, signs of possible
99 complications and problems, and general aftercare are given to each patient. Each patient shall
100 have specific instructions regarding access to medical care for complications, including a
101 telephone number to call for medical emergencies.

102 (39) There is a specified minimum length of time that a patient remains in the recovery
103 room by type of abortion procedure and duration of gestation.

104 (40) The physician ensures that a licensed healthcare professional from the abortion clinic
105 makes a good faith effort to contact the patient by telephone, with the patient's consent, within 24
106 hours after surgery to assess the patient's recovery.

107 (41) Equipment and services are located in the recovery room to provide appropriate
108 emergency resuscitative and life support procedures pending the transfer of the patient or a child
109 born alive to the hospital.

110 (42) A post-abortion medical visit is offered and, if requested, scheduled for two to three

111 weeks after the abortion procedure. The post-abortion visit will include, at minimum, a medical
112 examination and a review of the results of all laboratory tests.

113 (43) A urine or blood test for pregnancy is obtained at the time of the follow-up visit to rule
114 out continuing pregnancy. If a continuing pregnancy is suspected, the patient shall be
115 appropriately evaluated, and a physician consulted.

116 (44) The abortion clinic records each incident resulting in a patient's or a born alive child's
117 injury occurring at an abortion clinic and shall report these incidents in writing to the department
118 within 10 days after the incident. For the purposes of this paragraph, "serious injury" means an
119 injury that occurs at an abortion clinic and that creates a serious risk of substantial impairment of
120 a major body organ or function.

121 (45) If a patient's death occurs, other than the death of an unborn child properly reported
122 pursuant to law, the abortion clinic reports it to the department not later than the next department
123 workday.

124 (46) Incident reports are filed with the department and appropriate professional regulatory
125 boards.

126 (b) The department may not release personally identifiable patient or physician
127 information.

128 (c) The rules adopted by the secretary pursuant to this article will not limit the ability of a
129 physician or other healthcare professional to advise a patient on any health issue.

130 (d) The provisions of this article and the rules adopted pursuant hereto shall be in addition
131 to any other laws, administrative or other rules, and regulations which are applicable to facilities
132 defined as "abortion clinics" under this article.

§16-2P-7. Criminal penalties.

1 (a) Whoever operates an abortion clinic as defined in this article without a valid license
2 issued by the department is guilty of a misdemeanor and, upon conviction, shall be confined in
3 jail for not more than one year, and fined up to \$5,000.

4 (b) Any person who intentionally or knowingly violates this article or any rules pursuant
5 hereto is guilty of a misdemeanor and, upon conviction, shall be fined up to \$1,000.

§16-2P-8. Civil penalties and fines.

1 (a) Any violation of this article or any rules adopted under this article may be subject to a
2 civil penalty or fine up to \$1,000 imposed by the department.

3 (b) Each day of violation constitutes a separate violation for purposes of assessing civil
4 penalties or fines.

5 (c) In deciding whether and to what extent to impose fines, the department shall consider
6 the following factors:

7 (1) Gravity of the violation including the probability that death or serious physical harm to
8 a patient or individual will result or has resulted;

9 (2) Size of the population at risk as a consequence of the violation;

10 (3) Severity and scope of the actual or potential harm;

11 (4) Extent to which the provisions of the applicable statute(s) and regulation(s) were
12 violated;

13 (5) Any indications of good faith exercised by the licensee;

14 (6) The duration, frequency, and relevance of any previous violations committed by the
15 licensee; and

16 (7) Financial benefit to the licensee of committing or continuing the violation(s).

17 (d) Both the Attorney General and the prosecuting attorney for the county in which the
18 violation occurred may institute a legal action to enforce collection of civil penalties or fines.

§16-2P-9. Injunctive Remedies.

1 In addition to any other penalty provided by law, whenever in the judgment of the
2 secretary, any person has engaged, or is about to engage, in any acts or practices which
3 constitute, or will constitute, a violation of this article, or any rule or regulation adopted under the
4 provision of this article, the secretary shall make application to any court of competent jurisdiction

5 for an order enjoining such acts and practices, and upon a showing by the secretary that such
 6 person has engaged, or is about to engage, in any such acts or practices, an injunction, restraining
 7 order, or such other order as may be appropriate shall be granted by such court without bond.

§16-2P-10. Construction.

1 (a) Nothing in this article shall be construed as creating or recognizing a right to abortion.

2 (b) It is not the intention of this article to make lawful an abortion that is currently unlawful.

§16-2P-11. Right of intervention.

1 The Legislature, by joint resolution, may appoint one or more of its members, who
 2 sponsored or cosponsored this article in his or her official capacity to intervene as a matter of right
 3 in any case in which the constitutionality of this article, any portion thereof or any rule adopted
 4 pursuant hereto is challenged.

§16-2P-12. Severability.

1 Any provision of this article held to be invalid or unenforceable by its terms, or as applied
 2 to any person or circumstance, shall be construed so as to give it the maximum effect permitted
 3 by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such
 4 provision shall be deemed severable and do not affect the remainder hereof or the application of
 5 such provision to other persons not similarly situated or to other, dissimilar circumstances.

§16-2P-13. Effective Date.

1 This article takes effect on the date of passage.

NOTE: The purpose of this bill is to enact the Women’s Health Protection Act. The bill makes findings. The bill defines terms. The bill establishes criminal and civil penalties. The bill establishes licensing requirements for abortion clinics. The bill provides for severability. The bill requires rulemaking. The bill establishes an effective date.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.