

# **WEST VIRGINIA LEGISLATURE**

## **2022 REGULAR SESSION**

**Introduced**

### **House Bill 4049**

BY DELEGATE KEATON

[Introduced January 12, 2022; 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 §16-2Q-1, §16-2Q-2, §16-2Q-3, §16-2Q-4, §16-2Q-5, §16-2Q-6, §16-2Q-7,  
3 §16-2Q-8, §16-2Q-9, §16-2Q-10, §16-2Q-11, §16-2Q-12, and §16-2Q-13, all relating to  
4 enacting the Fetal Heartbeat Act; prohibiting abortions when a fetal heartbeat is detected;  
5 providing that the article applies only to intrauterine pregnancies; providing exceptions;  
6 making findings; providing for severability; establishing standards, requirements, and  
7 procedures; requiring documentation; requiring notice and acknowledgments; establishing  
8 criminal penalties; permitting civil actions; defining terms; and providing for rulemaking.

*Be it enacted by the Legislature of West Virginia:*

## **ARTICLE 2Q. THE HEARTBEAT PROTECTION ACT.**

### **§16-2Q-1. Definitions; legislative intent; severability.**

1 (a) As used in this article:

2 “Conception” means fertilization.

3 “Contraceptive” means a drug, device, or chemical that prevents conception.

4 “DNA” means deoxyribonucleic acid.

5 “Fetal heartbeat” means cardiac activity or the steady and repetitive rhythmic contraction  
6 of the fetal heart within the gestational sac.

7 “Fetus” means the human offspring developing during pregnancy from the moment of  
8 conception and includes the embryonic stage of development.

9 “Gestational age” means the age of an unborn human individual as calculated from the  
10 first day of the last menstrual period of a pregnant woman.

11 “Gestational sac” means the structure that comprises the extraembryonic membranes that  
12 envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

13 “Health care provider” means any licensed physician, dentist, nurse, physician’s assistant,  
14 paramedic, psychologist, or other person providing medical, dental, nursing, psychological or  
15 other health care services of any kind, as provided in §16-2Q-1, et seq of this code.

16 “Intrauterine pregnancy” means a pregnancy in which the fetus is attached to the placenta  
17 within the uterus of the pregnant woman.

18 “Medical emergency” means a condition that in a physician’s good-faith medical judgment,  
19 based upon the facts known to the physician at that time, so endangers the life of the pregnant  
20 woman or poses a serious risk of the substantial and irreversible impairment of a major bodily  
21 function of the pregnant woman as to necessitate the immediate performance or inducement of  
22 an abortion.

23 “Physician” means an individual authorized pursuant to §30-3-1 et seq. of this code to  
24 practice medicine and surgery, or an individual authorized pursuant to §30-14-1 et seq. of this  
25 code to practice osteopathic medicine and surgery.

26 “Pregnancy” means the human female reproductive condition that begins with fertilization,  
27 when the woman is carrying the developing human offspring, and that is calculated from the first  
28 day of the last menstrual period of the woman.

29 “Serious risk of the substantial and irreversible impairment of a major bodily function”  
30 means any medically diagnosed condition that so complicates the pregnancy of the woman as to  
31 directly or indirectly cause the substantial and irreversible impairment of a major bodily function.

32 “Spontaneous miscarriage” means the natural or accidental termination of a pregnancy  
33 and the expulsion of the fetus, typically caused by genetic defects in the fetus or physical  
34 abnormalities in the pregnant woman.

35 “Standard medical practice” means the degree of skill, care, and diligence that a physician  
36 of the same medical specialty would employ in like circumstances. As applied to the method used  
37 to determine the presence of a fetal heartbeat for purposes of this article, “standard medical  
38 practice” includes employing the appropriate means of detection depending on the estimated  
39 gestational age of the fetus and the condition of the woman and her pregnancy.

40 “Unborn human individual” means an individual organism of the species homo sapiens  
41 from fertilization until live birth.

42 (b)(1) It is the intent of the Legislature that a court judgment or order suspending  
43 enforcement of any provision of this act is not to be regarded as tantamount to repeal of that  
44 provision.

45 (2) After the issuance of a decision by the Supreme Court of the United States overruling  
46 Roe v. Wade, 410 U.S. 113 (1973), the issuance of any other court order or judgment restoring,  
47 expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or  
48 the effective date of an amendment to the Constitution of the United States restoring, expanding,  
49 or clarifying the authority of states to prohibit or regulate abortion entirely or in part, the Attorney  
50 General may apply to the pertinent state or federal court for either or both of the following:

51 (A) A declaration that any one or more sections specified in this article are constitutional.

52 (B) A judgment or order lifting an injunction against the enforcement of any one or more  
53 sections of this article.

54 (c) If the Attorney General fails to apply for the relief described in subdivision (2),  
55 subsection (b) of this section within the 30-day period after an event described in that section  
56 occurs, any county prosecutor may apply to the appropriate state or federal court for such relief.

57 (d) If any provision of this article is held invalid, or if the application of such provision to  
58 any person or circumstance is held invalid, the invalidity of that provision does not affect any other  
59 provision of this article and the other provisions of this article that can be given effect without the  
60 invalid provision or application, and to this end the provisions of those sections are severable. It  
61 is furthermore the intent of the Legislature that the provisions of this article are not to have the  
62 effect of repealing or limiting any other laws of this state, except as specified by this article.

**§16-2Q-2. Legislative findings; applicability.**

1 (a) The Legislature hereby finds, according to contemporary medical research, all of the  
2 following:

3 (1) As many as 30 percent of natural pregnancies end in spontaneous miscarriage.

4 (2) Less than five percent of all natural pregnancies end in spontaneous miscarriage after

5 detection of fetal cardiac activity.

6 (3) Over 90 percent of in vitro pregnancies survive the first trimester if cardiac activity is  
7 detected in the gestational sac.

8 (4) Nearly 90 percent of in vitro pregnancies do not survive the first trimester where cardiac  
9 activity is not detected in the gestational sac.

10 (5) Fetal heartbeat, therefore, has become a key medical predictor that an unborn human  
11 individual will reach live birth.

12 (6) Cardiac activity begins at a biologically identifiable moment in time, normally when the  
13 fetal heart is formed in the gestational sac.

14 (7) The State of West Virginia has legitimate interests from the outset of the pregnancy in  
15 protecting the health of the woman and the life of an unborn human individual who may be born.

16 (8) In order to make an informed choice about whether to continue her pregnancy, the  
17 pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to full-  
18 term birth based upon the presence of cardiac activity.

19 (b) This article applies only to intrauterine pregnancies.

**§16-2Q-3. Intrauterine pregnancies; persons intending to perform an abortion; detectable fetal heartbeat; rulemaking.**

1 (a) A person who intends to perform or induce an abortion on a pregnant woman shall  
2 determine whether there is a detectable fetal heartbeat of the unborn human individual the  
3 pregnant woman is carrying. The method of determining the presence of a fetal heartbeat shall  
4 be consistent with the person's good faith understanding of standard medical practice, provided  
5 that if rules have been adopted under subsection (b) of this section, the method chosen shall be  
6 one that is consistent with the rules. The person who determines the presence or absence of a  
7 fetal heartbeat shall record in the pregnant woman's medical record the estimated gestational age  
8 of the unborn human individual, the method used to test for a fetal heartbeat, the date and time  
9 of the test, and the results of the test.

10 (b) The State Director of Health shall propose rules for legislative approval in accordance  
11 with §29A-3-1 et seq. of this code to implement this section specifying the appropriate methods  
12 of performing an examination for the purpose of determining the presence of a fetal heartbeat of  
13 an unborn individual based on standard medical practice.

**§16-2Q-4. Detectable heartbeat; penalties; exceptions.**

1 (a) Except as provided in subsection (b) of this section, no person shall knowingly and  
2 purposefully perform or induce an abortion on a pregnant woman before determining in  
3 accordance with §16-2Q-3(a) of this code whether the unborn human individual the pregnant  
4 woman is carrying has a detectable heartbeat. Whoever violates this subsection of performing or  
5 inducing an abortion shall be liable for a civil penalty as defined in §16-2Q-11 of this code.

6 (b) Subsection (a) of this section does not apply to a physician who performs or induces  
7 the abortion if the physician believes that a medical emergency exists that prevents compliance  
8 with that subsection.

9 (c) A physician who performs or induces an abortion on a pregnant woman based on the  
10 exception in subsection (b) of this section shall make written notations in the pregnant woman's  
11 medical records of both of the following:

12 (1) The physician's belief that a medical emergency necessitating the abortion existed;  
13 and

14 (2) The medical condition of the pregnant woman that assertedly prevented compliance  
15 with subsection (a) of this section.

16 For at least seven years from the date the notations are made, the physician shall maintain  
17 in the physician's own records a copy of the notations.

18 (d) A person is not in violation of subsection (a) of this section if the person acts in  
19 accordance with §16-2Q-3(a) of this code and the method used to determine the presence of a  
20 fetal heartbeat does not reveal a fetal heartbeat.

**§16-2Q-5. Heartbeat; notification; acknowledgment.**

1           (a) If a person who intends to perform or induce an abortion on a pregnant woman has  
2 determined, under §16-2Q-3 of this code, that the unborn human individual the pregnant woman  
3 is carrying has a detectable heartbeat, the person shall not, except as provided in subsection (b)  
4 of this section, perform or induce the abortion until all of the following requirements have been  
5 met and at least 24 hours have elapsed after the last of these requirements is met:

6           (1) The person intending to perform or induce the abortion shall inform the pregnant  
7 woman in writing that the unborn human individual the pregnant woman is carrying has a fetal  
8 heartbeat.

9           (2) The person intending to perform or induce the abortion shall inform the pregnant  
10 woman, to the best of the person's knowledge, of the statistical probability of bringing the unborn  
11 human individual possessing a detectable fetal heartbeat to term based on the gestational age of  
12 the unborn human individual the pregnant woman is carrying or, if the State Director of Health  
13 has specified statistical probability information pursuant to rules adopted under subsection (c) of  
14 this section, shall provide to the pregnant woman that information.

15           (3) The pregnant woman shall sign a form acknowledging that she has received  
16 information from the person intending to perform or induce the abortion that the unborn human  
17 individual the pregnant woman is carrying has a fetal heartbeat and that the pregnant woman is  
18 aware of the statistical probability of bringing the unborn human individual the pregnant woman  
19 is carrying to term.

20           (b) Subsection (a) of this section does not apply if the person who intends to perform or  
21 induce the abortion believes that a medical emergency exists that prevents compliance with that  
22 subsection.

23           (c) The State Director of Health may propose rules for legislative approval in accordance  
24 with §29A-3-1 et seq. of this code that specify information regarding the statistical probability of  
25 bringing an unborn human individual possessing a detectable heartbeat to term based on the  
26 gestational age of the unborn human individual.

27 (d) This section does not have the effect of repealing or limiting any other provision of this  
28 code relating to informed consent for an abortion.

**§16-2Q-6. Abortion prohibition; documentation; penalties; exceptions.**

1 (a) Except as provided in subsection (b) of this section, no person shall knowingly and  
2 purposefully perform or induce an abortion on a pregnant woman with the specific intent of  
3 causing or abetting the termination of the life of the unborn human individual the pregnant woman  
4 is carrying and whose fetal heartbeat has been detected in accordance with §16-2Q-3(a) of this  
5 code. Whoever violates this subsection of performing or inducing an abortion before determining  
6 whether there is a detectable fetal heartbeat shall be liable for a civil penalty as defined in §16-  
7 2Q-11 of this code.

8 (b) Subsection (a) of this section does not apply to a physician who performs a medical  
9 procedure that, in the physician's reasonable medical judgment, is designed or intended to  
10 prevent the death of the pregnant woman or to prevent a serious risk of the substantial and  
11 irreversible impairment of a major bodily function of the pregnant woman.

12 A physician who performs a medical procedure as described in this subsection shall  
13 declare, in a written document, that the medical procedure is necessary, to the best of the  
14 physician's reasonable medical judgment, to prevent the death of the pregnant woman or to  
15 prevent a serious risk of the substantial and irreversible impairment of a major bodily function of  
16 the pregnant woman. In the document, the physician shall specify the pregnant woman's medical  
17 condition that the medical procedure is asserted to address and the medical rationale for the  
18 physician's conclusion that the medical procedure is necessary to prevent the death of the  
19 pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a  
20 major bodily function of the pregnant woman.

21 A physician who performs a medical procedure as described in this subsection shall place  
22 the written document required by this subsection in the pregnant woman's medical records. The  
23 physician shall maintain a copy of the document in the physician's own records for at least seven



24 years from the date the document is created.

25 (c) A person is not in violation of subsection (a) of this section if the person acts in  
26 accordance with §16-2Q-3(a) of this code and the method used to determine the presence of a  
27 fetal heartbeat does not reveal a fetal heartbeat.

28 (d) Subsection (a) of this section does not have the effect of repealing or limiting any other  
29 provision of this code that restricts or regulates the performance or inducement of an abortion by  
30 a particular method or during a particular stage of a pregnancy.

**§16-2Q-7. Abortion; requirements; documentation.**

1 (a) A person who performs or induces an abortion on a pregnant woman shall do  
2 whichever of the following is applicable:

3 (1) If the reason for the abortion purported is to preserve the health of the pregnant woman,  
4 the person shall specify in a written document the medical condition that the abortion is asserted  
5 to address and the medical rationale for the person's conclusion that the abortion is necessary to  
6 address that condition; or

7 (2) If the reason for the abortion is other than to preserve the health of the pregnant  
8 woman, the person shall specify in a written document that maternal health is not the purpose of  
9 the abortion.

10 (b) The person who specifies the information in the document described in subsection (a)  
11 of this section shall place the document in the pregnant woman's medical records. The person  
12 who specifies the information shall maintain a copy of the document in the person's own records  
13 for at least seven years from the date the document is created.

**§16-2Q-8. Exemptions.**

1 Nothing in this article prohibits the sale, use, prescription, or administration of a drug,  
2 device, or chemical that is designed for contraceptive purposes.

**§16-2Q-9. Construction of abortion statutes.**

1 (a) A statute that regulates or prohibits abortion may not be construed to repeal any other

2 statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute  
3 explicitly states that it is repealing the other statute.

4 (b) A statute may not be construed to restrict a political subdivision from regulating or  
5 prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the  
6 statute explicitly states that political subdivisions are prohibited from regulating or prohibiting  
7 abortion in the manner described by the statute.

8 (c) Every statute that regulates or prohibits abortion is severable in each of its applications  
9 to every person and circumstance. If any statute that regulates or prohibits abortion is found by  
10 any court to be unconstitutional, either on its face or as applied, then all applications of that statute  
11 that do not violate the United States Constitution and West Virginia Constitution shall be severed  
12 from the unconstitutional applications and shall remain enforceable, notwithstanding any other  
13 law, and the statute shall be interpreted as if containing language limiting the statute's application  
14 to the persons, group of persons, or circumstances for which the statute's application will not  
15 violate the United States Constitution and West Virginia Constitution.

**§16-2Q-10. Pregnant women exempt from civil penalties.**

1 A pregnant woman on whom an abortion is performed or induced in violation of this article  
2 is not subject to a civil penalty based on the abortion being performed or induced in violation of  
3 any of those sections.

**§16-2Q-11. Civil actions.**

1 (a) A woman who meets either or both of the following criteria may file a civil action for the  
2 wrongful death of her unborn child:

3 (1) A woman on whom an abortion was performed or induced in violation of §16-2Q-4 or  
4 §16-2Q-6 of this code.

5 (2) A woman on whom an abortion was performed or induced who was not given the  
6 information described in §16-2Q-5 of this code or who did not sign a form described in §16-2Q-5  
7 of this code.

8           (b) The father of the unborn child may file a civil action for the wrongful death of the unborn  
9 child except for those unborn children born in cases of rape and incest, so long as the  
10 requirements of subsection (a)(1) and subsection (a)(2) above are met.

11           (c) The parents of a mother under the age of 18 may file a civil action for the wrongful  
12 death of the unborn child, so long as the requirements of subsection (a)(1) and subsection (a)(2)  
13 above are met.

14           (d) Healthcare providers who have not had judgment brought against them under this  
15 statute may file a civil action for the wrongful death of an unborn child, so long as the requirements  
16 of subsection (a)(1) and subsection (a)(2) above are met.

17           (e) A party who prevails in an action filed under subsection (a) of this section shall receive  
18 both of the following from the person who committed the one or more acts described in that  
19 subsection:

20           (1) Damages in an amount equal to \$10,000 or an amount determined by the trier of fact  
21 after consideration of the evidence at the party's election at any time prior to final judgment subject  
22 to the same defenses and requirements of proof, except any requirement of live birth, as would  
23 apply to a suit for the wrongful death of a child who had been born alive; and

24           (2) Court costs and reasonable attorney's fees.

25           (f) If a defendant prevails in a suit brought under subsection (a) of this section, that  
26 defendant may recover their court costs and reasonable attorney's fees.

**§16-2Q-12. Severability.**

1           (a) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining  
2 the severability of a state statute regulating abortion the United States Supreme Court held that  
3 an explicit statement of legislative intent is controlling, it is the intent of the Legislature that every  
4 provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every  
5 application of the provisions in this chapter, are severable from each other.

6           (b) If any application of any provision in this chapter to any person, group of persons, or

7 circumstances is found by a court to be invalid or unconstitutional, the remaining applications of  
8 that provision to all other persons and circumstances shall be severed and may not be affected.  
9 All constitutionally valid applications of this chapter shall be severed from any applications that a  
10 court finds to be invalid, leaving the valid applications in force, because it is the Legislature's intent  
11 and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a  
12 provision of this chapter to impose an undue burden in a large or substantial fraction of relevant  
13 cases, the applications that do not present an undue burden shall be severed from the remaining  
14 applications and shall remain in force, and shall be treated as if the Legislature had enacted a  
15 statute limited to the persons, group of persons, or circumstances for which the statute's  
16 application does not present an undue burden.

17 (c) If any court declares or finds a provision of this chapter facially unconstitutional, when  
18 discrete applications of that provision can be enforced against a person, group of persons,  
19 or circumstances without violating the United States Constitution and West Virginia Constitution,  
20 those applications shall be severed from all remaining applications of the provision, and the  
21 provision shall be interpreted as if the Legislature had enacted a provision limited to the persons,  
22 group of persons, or circumstances for which the provision's application will not violate the United  
23 States Constitution and West Virginia Constitution.

24 (d) The Legislature further declares that it would have enacted this chapter, and each  
25 provision, section, subsection, sentence, clause, phrase, or word, and all constitutional  
26 applications of this chapter, irrespective of the fact that any provision, section, subsection,  
27 sentence, clause, phrase, or word, or applications of this chapter, were to be declared  
28 unconstitutional or to represent an undue burden.

29 (e) If any provision of this chapter is found by any court to be unconstitutionally vague,  
30 then the applications of that provision that do not present constitutional vagueness problems shall  
31 be severed and remain in force.

32 (f) No court may decline to enforce the severability requirements of subsections (a), (b),

33 (c), (d), and (e) on the ground that severance would rewrite the statute or involve the  
34 court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official  
35 from enforcing a statutory provision does not rewrite a statute, as the statute continues to  
36 contain the same words as before the court's decision. A judicial injunction or declaration of  
37 unconstitutionality:

38 (1) Is nothing more than an edict prohibiting enforcement that may subsequently be  
39 vacated by a later court if that court has a different understanding of the requirements of the West  
40 Virginia Constitution or United States Constitution;

41 (2) Is not a formal amendment of the language in a statute; and

42 (3) No more rewrites a statute than a decision by the executive not to enforce a duly  
43 enacted statute in a limited and defined set of circumstances.

**§16-2Q-13. Reporting of information.**

1 The information required to be recorded in §16-2Q-3, §16-2Q-4, §16-2Q-6, and §16-2Q-  
2 7 of this code shall be reported to the State Director of Health in accordance with the rules  
3 governing the reporting of other abortion information.

NOTE: The purpose of this bill is to enact the Heartbeat Protection Act. The bill prohibits abortions when a fetal heartbeat is detected. The bill provides exceptions. The bill applies only to intrauterine pregnancies. The bill makes findings. The bill establishes standards, requirements, and procedures. The bill requires documentation. The bill requires notice and acknowledgments. The bill provides for severability and establishes criminal penalties. The bill permits civil actions and defines terms. Finally, the bill provides for rulemaking.

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