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FISCAL IMPACT REPORT

ORIGINAL DATE 1/11/17

SPONSOR Montoya LAST UPDATED _____ HB 37

SHORT TITLE Born Alive Infant Protection SB _____

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		>\$150.0	>\$150.0	>\$300.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Identical to House Bill 275, 2016 Regular Session

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)

Children, Youth and Families Department (CYFD)

Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 37 if enacted would

- 1) Define “born alive,” as applied to an infant born or a fetus/infant removed or expelled from its mother’s uterus through abortion, as showing any sign of life, including breathing, heartbeat, pulsation of the umbilical cord, or definite movement of muscles.
- 2) Require that nutritional support be given to all “born alive” infants.
- 3) Require that life-saving measures be initiated in all cases where a fetus or infant is born alive, with the exception of measures that
 - a. Were unnecessary to save the life, OR
 - b. Had potential risks to the infant’s life or health that outweighed the potential benefits of that treatment, OR
 - c. Would do nothing more than temporarily prolong the act of dying.
- 4) Require that abortion providers take all steps to preserve the life and health of an infant born alive, transferring infants as necessary to preserve life and health.

- 5) Require that the physician must delegate someone else to care for the infant if occupied with caring for the mother.
- 6) Treat all infants born alive according to the above definitions as a full person, and have birth and death certificates prepared.
- 7) Prohibit research involving born alive infants.
- 8) Require that anyone knowing of a violation of this statute report it to a state and/or federal authority.
- 9) Define killing a “born alive infant” as a first degree felony, and attempting to do so, as a second degree felony.
- 10) Prescribe civil remedies for women whose infants “born alive” are not cared for as required in this statute.
- 11) Establish a task force to monitor “born alive infants” composed of two DOH and 3 CYFD members, creating a list of reporting requirements. The task force would send CYFD caseworkers to monitor each elective abortion provider on a monthly basis, reporting annually to the governor and the Legislature.

FISCAL IMPLICATIONS

CYFD and DOH would be asked to provide members to the “task force,” with CYFD also required to send employees to make monthly visits to providers of abortion services to ascertain compliance with this statute and report on their findings. No additional funds are allotted in this bill to cover those personnel costs. The agencies have not found it easy to estimate these costs due to uncertainty over the frequency with which the task force would meet, and uncertainty as to the requirement for monthly inspections of abortion providers.

CYFD commented: “Three CYFD employees would have to be part of a task force. It is not certain how long it would take for the task force to complete its duties so the fiscal impact related to the task force itself is currently unknown.

“CYFD caseworkers would have to do monthly inspections and staff interviews at every facility statewide that performs elective abortions to assess whether appropriate measures and care are being given to “born alive” infants and whether the reporting guidelines are being followed. Given that there is no restriction to indicate it is only children “born alive” pursuant to subsection D of section 2 of this bill, the bill obligates CYFD to assess every birth occurring at such facilities, which would take significant resources. Additionally, as CYFD caseworkers are trained to assess abuse and neglect, rather than medical malpractice, either additional FTEs with medical experience would be necessary or significant training for non-medical employees would be necessary.”

DOH commented that “Two DOH employees would be involved in creating reporting guidelines for born alive births. It is unclear how much time and involvement this will entail. Insufficient information is provided to accurately estimate resources needed and level of expertise required. It is also unclear how birth and death certificate registration would be monitored. If Vital Records has to develop and implement new administrative procedures and assign staff to this task, costs are estimated at \$75,000 per year based on comparable activities within Vital Records.”

CYFD stated that its personnel costs would be “moderate;” that would be in addition to at least \$75,000 per year for DOH, noting that CYFD personnel would both be required both on the task force set up by the bill and also to conduct monthly inspections and staff interviews at each abortion provider statewide, which, according to CYFD, “would take significant resources.”

LFC staff estimate the cost would probably be the same for each agency and the table reflects \$75.0 for each of them.

AODA indicates that “The fiscal impact for the district attorneys is expected to be minimal, as few prosecutions are likely. Those prosecutions, however, are likely to be litigated on appeal, resulting in costs to the attorney general’s office and the appellate court system.”

ADMINISTRATIVE IMPLICATIONS

CYFD would require additional FTEs to carry out its duties, especially given the medical nature of CYFD’s assessments under this bill. It is unknown how many FTE would be required. DOH has also commented on needing extra staff to implement this bill, if enacted: aside from assigning two members to the task force, the requirement that birth and death certificates be created for each born alive infant would require additional staff in that division of DOH.

CYFD states that it is responsible for assessing abuse and neglect of children. The duties of inspecting and interviewing staff at medical facilities may be more appropriately placed with the Department of Health, rather than CYFD.

CYFD is charged with assessing every child birth in every facility that offers elective abortions. It is unclear from the bill if that was its true intent or if it meant only to include those infants who are born alive after an attempted abortion.

PERFORMANCE IMPLICATIONS

Neither DOH nor CYFD noted performance issues related to this bill. AODA commented, however, that

“It is unlikely that the district attorneys will see many prosecutions under HB37, because late term abortions that could result in live births are not common. However, if the district attorneys prosecute an action under HB37 they are likely to face a constitutional challenge, and there will be significant issues of statutory interpretation to litigate, as described above.

Also as discussed above, for the medical professions, there are significant issues regarding how to care for infants when the statute creates conflicts between care standards, parental consent, and criminal and civil penalties.”

SIGNIFICANT ISSUES

Abortions are frequently performed due to the pregnancy’s having been initiated by rape or incest, or because the infant has been found to have severe, life-threatening abnormalities. In none of these cases is an exception made to the requirement for life-saving care. On some occasions, parents want to hold and comfort their severely malformed infants while dying is occurring; this bill, if enacted, would appear to prohibit the medical care staff from allowing that

to occur if any of the signs of life listed were present.

DOH comments that “HB37 proposes the creation of a Task Force to create reporting guidelines for each born alive infant incident that takes place in the state, assign CYFD caseworkers to perform monthly inspections and conduct staff interviews at each facility that offers elective abortions, and provide a yearly report to the governor and the legislature. NMDOH and CYFD would likely be required to promulgate rules to regulate these task force activities. There may also be conflict with existing authority to inspect medical facilities or assess medical care provided.”

AODA notes that HB 37 would result in confusion and a number of conflicts and duplications with existing state law. It notes, further, that the bill would it would violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. AODA’s analysis of the bill would seem to indicate that physicians would be placed in an untenable position with respect to infants defined in the legislation as being “born alive”: they would be subject to criminal penalties if they did nothing to save such an infant, but also would be liable to be prosecuted if their actions to save the infant were unsuccessful and the infant died. The AODA notes that HB37’s intent to legislate specific care, in particular transfer to a hospital and provision of nourishment, may create conflicts, and it further states that the legislation fails to define “born alive infant incident,” noting that it might apply to both induced abortions and usual births.

TECHNICAL ISSUES

CYFD comments that “The bill creates a strict liability criminal penalty for *any* overt act that kills a child, regardless of the actual intention of the act.”

Similarly, AODA comments that “HB37 defines ‘infant’ as a child who has been completely expelled or extracted from the child’s mother, regardless of the state of gestational development. ‘Child’ is not defined in HB37, and HB37 does not refer to a definition in another statute, so when a person ceases to be an ‘infant’ is unclear. The terms ‘infant’ and ‘born alive infant’ are used throughout HB37. This may create confusion. For example, the criminal provision in Section 4 states that whoever intentionally performs an overt act that kills a born alive infant is guilty of a first degree felony resulting in the death of a child. As discussed above, the person committing an ‘overt act’ that results in death may not intend to harm or kill. Does this provision apply only at the time of birth, or does it apply to any killing of a minor by ‘overt act?’ Does it apply to any killing of any person of any age by ‘overt act?’

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

There would be no mandated provision of medical care for all infants born alive according to the definition of the bill, and no penalties would be enacted for failing to do so. A Task Force to Monitor Born Alive Births would not be created.

However, according to AODA, “The intentional killing of a born alive infant may be prosecuted under existing murder statutes. The attempt to murder a born alive infant will be prosecuted under existing attempt statutes.”