

LFC Requester:

Kelly Klundt

AGENCY BILL ANALYSIS  
2024 REGULAR SESSION

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original   X   Amendment         
Correction        Substitute       

Date Prepared:   1/20/2024  

Bill No:   HB167  

Sponsor:   Reps. Jenifer Jones,  
Cathrynn N. Brown, and  
John Block  

Short Title:   Healthcare for Babies Born  
Alive  

Agency Name and Code Number:   305 – New Mexico  
Department of Justice  

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurr ing</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

*This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.*

**BILL SUMMARY**

House Bill (“HB”) 167 seeks to enact new legislation to require the protection of the life of an infant that has been “expulsed or extracted” from the mother, regardless of the stage of gestational development and regardless of whether such expulsion or extraction has been the result of labor, a c-section, or abortion, so long as the infant meets one of the following criteria of evidence of life: breathing; a heartbeat; umbilical cord pulsation; definite movement of voluntary muscles.

Section 1 defines the terms “born alive” or “live birth” and “infant,” which sets forth the intended boundaries of what the bill covers, as identified above.

Section 2 prohibits the denial or deprivation of nourishment “with the intent to cause or allow the death” of an infant, as defined above and the deprivation of medically appropriate and reasonable medical care and treatment or surgery to such an infant.

The proposed legislation does not prevent a parent or guardian from refusing to give consent or medical treatment or medical care “that is not medically necessary or reasonable,” including care that is not necessary to save a life; has a potential risk to the infant’s life or health *that outweighs the potential benefit* of treatment or care; or will do nothing more than temporarily prolong the act of dying when death is imminent.

This section requires a health care provider attempting to perform an abortion to “take all medically appropriate and reasonable steps” to save the infant’s life and health, inform the mother of the live birth, and ensure further medical treatment. If the abortion is attempted outside of a hospital, the same essential steps are required, with the additional requirement that 911 must be called. If the health care provider must attend to the mother instead, the proposed legislation requires another health care provider to assume the required duties to the infant.

The proposed legislation expressly states that any born alive infant as defined above and “including one born in the course of an abortion procedure” shall be treated as a legal person with the same rights to medical care, as well as birth and death certificates.

The proposed legislation prohibits the use of any born alive infant for scientific research or experimentation, unless it is necessary to protect or preserve the life/health of the infant.

Section 3 requires any health care practitioner or employee of a health care facility to immediately report any failure to comply with Section 2 to law enforcement.

Section 4 makes any intentional act that kills a born alive infant a first-degree felony resulting in the death of a child, and any intentional *attempt* to kill a born alive infant a second-degree felony, and imposes sentences for such felonies in accordance with Section 31-18-15 (sentencing statute).

Section 5 provides civil remedies to the woman upon whom the abortion was performed if a child is born alive and Section 2 is violated, including money damages for psychological and physical damages; statutory damages triple the cost of the abortion/attempted abortion; and punitive damages and attorney fees.

Section 6 creates a task force to monitor born alive births; create reporting guidelines that include when an infant was given medical care or when 911 was called as required in Section 2, and provide an annual report of findings to the governor and Legislature. The task force is to be comprised of 2 members from the Department of Health and 3 members from CYFD.

Section 7 also requires the Department of Health to perform monthly inspections and conduct staff interviews to determine whether the proposed legislation has been complied with.

\*\*Note that a nearly identical bill and another related nearly identical bill were proposed in the 2023 Session as HB441 Medical Care for Infants Born Alive and HB468 Born Alive Act. The bills were sent to HHHC and then postponed indefinitely.

This bill does not contain an effective date and, as a result, would go into effect May 13, 2024, (90 days after the Legislature adjourns) if signed into law.

## **FISCAL IMPLICATIONS**

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

While the criminal liability portions of the bill may not impact the State's budget in any tangible way, its passage would likely result in increased investigation and/or prosecution of medical professionals, which could substantially tax the system given that New Mexico is considered a sanctuary state for abortions. An increase in prosecutions may have a fiscal impact, albeit attenuated. Similarly, an increase in prosecutions may have a fiscal impact on the Law Offices of the Public Defender's budget if representation of health care providers *or witnesses/recently pregnant women* becomes necessary.

It should also be noted that if the State suffers from a reduction in the overall number of health care providers due to a general unwillingness to practice medicine in the state as a result of the risk of prosecution, as discussed further below, the usual response to that is an increase in

provider salaries, which could also have a fiscal impact, again, albeit attenuated.

The proposed legislation may impact the budgets of the Department of Health and CYFD as it pertains to the creation of a task force and the mandatory reporting.

## **SIGNIFICANT ISSUES**

As noted last year, the proposed legislation does not define the term “overt act,” and it is unclear whether it could encompass failing to provide medical attention to the born alive infant as referenced elsewhere in the legislation.

The proposed legislation also presents a **potential conflict** with NMSA 1978, § 24-7A-6.1 (2015), which generally provides that a parent of a minor may make the minor’s healthcare decisions, including the decision to withhold or withdraw life-sustaining treatment.

The proposed legislation is in **apparent conflict** with the Reproductive and Gender-Affirming Health Care Freedom Act (the Freedom Act), NMSA 1978, §§ 24-34-1 to -5 (2023), which includes within the definition of reproductive health care, services related to abortions.

Specifically, Section 24-34-3(B) states that no public body may “deny, restrict or interfere with a person's ability to access or provide reproductive health care or gender-affirming health care within the medical standard of care,” and Section 24-34-3(C) states that no public body may “deprive, through prosecution, punishment or other means, a person's ability to act or refrain from acting during the person's pregnancy based on the potential, actual or perceived effect on the pregnancy.” The additional requirements and threats of prosecution imposed on health care providers performing abortions contained within the proposed legislation may conflict with the existing law’s prohibitions. Similarly, Section 24-34-3(D) states that no public body may “impose or continue in effect any law, ordinance, policy or regulation that violates or conflicts with the provisions of the Reproductive and Gender-Affirming Health Care Freedom Act.” Again, the proposed legislation may constitute a law that violates and/or conflicts with the provisions of the Freedom Act.

It should be noted that the proposed legislation imposes criminal liability on “whoever” intentionally performs or attempts to perform an overt act that kills a born alive infant, which is not limited to health care providers and may include the woman seeking an abortion. Prosecution of such a woman for violation of the proposed legislation would also be in apparent conflict with the Freedom Act.

The proposed legislation is also in **apparent conflict** with the related Reproductive and Gender-Affirming Health Care Protection Act (the Protection Act), NMSA 1978, §§ 24-35-1 to -8 (2023), which includes within the definition of protected health care activity, providing reproductive health care including abortions.

The Protection Act is aimed at protecting individuals from the dissemination of information related to a protected health care activity. The proposed legislation criminalizes certain acts related to abortion, and also includes mandatory reporting of violations, forms a task force to monitor related activity, and ongoing monitoring and reporting of related activity. The criminalization of abortions may result in an inherent and logical conflict. The mandatory reporting, task force, and ongoing monitoring likewise presents an inherent and logical conflict. Additionally, assuming any prosecution of a health care provider or a previously pregnant woman under the proposed legislation would require some litigation, it is likely that the

Protection Act would otherwise be in conflict with the proposed legislation.

As for any **potential public policy concerns**, the action initiated by the Attorney General in January 2023 in the New Mexico Supreme Court related to such protection seeks a ruling from the Court that abortions are protected by New Mexico statutory and constitutional law. Although the action specifically attacks a local government’s ability or authority to enact and/or enforce ordinances infringing upon such a right as violative of New Mexico statutes (through field preemption of medical licensing and with HB7 directly) and the constitution (both due to the authority granted by the constitution to local governments to enact laws and due to identified substantive rights), it also addresses and may result in an opinion from our High Court that abortions are, in fact, protected by the New Mexico Constitution under the equal rights clause, the due process clause, and/or as a fundamental privacy right. It is presently unclear whether any such ruling would extend to actions taken after an abortion by either a health care provider or a previously pregnant woman that may implicate the proposed legislation.

The **intended consequence** of the proposed legislation appears to be to effectively change the outcome of an abortion—i.e., rather than a successful abortion, after the fetus is extracted, there must be an attempt to save the life of the extracted fetus. Although the *expected* consequence may be an increase in saved lives of aborted fetuses, an **unintended consequence** of the passage of the proposed legislation is not only that there would likely be an increase in health care providers and women seeking abortions being prosecuted and potentially imprisoned for providing health care services that are considered to be within the medical standard of care or for seeking abortions, but that there will be an exodus of health care providers from the state for fear of criminal prosecution or civil liability. Given that our State already struggles with having enough health care providers, this consequence could have dire effects. Another **unintended consequence** would be a notable reduction in trust between reproductive health care providers and their patients, as the intended result of a woman’s chosen abortion procedure would be necessarily undermined, not to mention the potential risk of prosecution on both sides of the relationship. Yet another **unintended consequence** would be, if a pregnant person seeks an abortion from an *unlicensed non-health care provider*, there would not be any violation of the proposed legislation by the health care provider.

Finally, as noted in prior years in related legislation, the proposed legislation fails to define what is meant by “abortion” or “health care provider.” The proposed legislation also does not define or provide any indication of the scope of the signs of life: “breathing,” “a heartbeat,” “umbilical cord pulsation,” or “definite movement of voluntary muscles.” These omitted definitions will likely result in ambiguity, vagueness, or overbreadth challenges and could place law enforcement in a difficult position if they were to attempt to enforce this statute. In addition, the failure to define “abortion” is particularly problematic given that a woman seeking an abortion could be criminally prosecuted under the proposed legislation.

## **PERFORMANCE IMPLICATIONS**

None

## **ADMINISTRATIVE IMPLICATIONS**

None

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

As discussed above, the proposed legislation presents an apparent conflict with Section 24-7A-6.1, the Freedom Act, and the Protection Act.

The proposed legislation relates to HB110 – Limit Certain Abortions.

### **TECHNICAL ISSUES**

None

### **OTHER SUBSTANTIVE ISSUES**

As noted in 2023 regarding HB441 and HB468, in 2002, President George W. Bush signed into federal law the Born-Alive Infants Protection Act, 1 U.S.C.A. § 8, which provides that a fetus that survives an abortion is a human being and must be cared for accordingly by medical professionals. The definitional section of “born alive” in the federal law mirrors the language of HB 441. As such, HB 167 is duplicative of the federal Born Alive Infants Protection Act.

Also as noted in 2023 regarding HB441 and HB468, New Mexico criminal statutes Section 30-2-1(A) and (B) already provide criminal penalties for first degree and second-degree murder. In both sections, and for all lesser included offenses, murder involves causing “the death of a human being” and has been applied to criminalize the death of an infant following birth. *See, e.g., State v. Gutierrez*, 1975-NMCA-121, ¶¶ 14-15, 88 N.M. 448 (concluding that the defendant, charged with first-degree murder for killing his infant son, was not entitled to a jury instruction for involuntary manslaughter).

### **ALTERNATIVES**

None

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo.

### **AMENDMENTS**

None