

A person is guilty of fraudulent assisted reproduction when;

- the person knowingly uses human reproductive material from a donor whom the patient did not give written consent to receive it from; or
- intentionally uses his or her human reproductive material without the patient's knowledge or written consent.

The following people shall have a civil cause of action against any health care provider, the health care provider's employer, or both, for fraudulent assisted reproduction:

- the patient who undergoes an assisted reproduction procedure in violation of the above;
- the patient's surviving spouse or partner listed on the child's birth certificate;
- the child conceived through assisted reproduction as a result of fraudulent assisted reproduction; or
- a donor whose human reproductive material is used without the donor's consent or in a manner inconsistent with the donor's consent.

A civil action is not dependent on a criminal charged or a criminal convicted. Liability shall include liquidated damages of \$10,000 plus the costs of the fertility treatment and reasonable attorney's fees; or compensatory and punitive damages including the costs of the fertility treatment plus the costs of the action and reasonable attorney's fees.

An action shall commence no later than five years after the eighteenth birthday of the child conceived through the fraudulent assisted reproduction or the earliest of the following dates:

- the person first discovers evidence against the defendant through DNA analysis;
- the person first becomes aware of the existence of a record that provides evidence against the defendant; or
- the defendant confesses to the offense.

Fraudulent assisted reproduction will be punishable as a Class D felony. Additionally, fraudulent assisted reproduction will be grounds for denial, probation, suspension, or revocation of licenses by the Kentucky Board of Medical Licensure.

The impact regarding fraudulent assisted reproduction is indeterminable, yet expected to be minimal. The Kentucky Board of Medical Licensure (KBML) and the Federation of State Medical Boards (FSMB) were contacted for input. The KBML is only aware of one licensee against whom such allegations were made and that was for conduct occurring in the 1970's. The criminal aspect regarding this is a new area as states slowly move towards criminalization and stronger penalties and there simply is not significant data available. An internet search showed that doctors, if convicted, faced lesser charges akin to obstruction of justice, false advertising, and immoral conduct; a number of them continuing to practice medicine. The FSMB has not responded as of the posting of this mandate. If a response is received, the mandate will be updated accordingly.

Whereas HB 402 provides for punishment as a Class D felony, there may be an impact on local jails. When a court denies bail to a Class D felony defendant, the local government

is responsible for incarcerating the defendant until disposition of the case in one of Kentucky's 74 full service jails or three life safety jails. While the expense of housing inmates varies by jail, each additional inmate increases facility costs by an average cost to incarcerate of \$35.43 per day, which includes the \$31.34 per diem and medical expenses that the Department of Corrections pays jails to house felony offenders. Upon sentencing, a Class D felon is housed in one of Kentucky's full service jails for the duration of his or her sentence. The Department of Corrections pays a jail \$31.34 per day to house a Class D felon. The per diem may be less than, equal to, or greater than the actual housing cost.

Indirect fiscal impact as a result of legal action against a local government arising from criminal conviction of, or action by the State Board of Medical Licensure against, a local government health care provider for fraudulent assisted reproduction could be substantial.

It is expected that violations of HB 402 by a health care provider employed by a local government would be few. In fact, based on best information, there are no cities that currently employ a health care provider licensed pursuant to KRS 311 or 314. However, there are county or regional health facilities that employ such health care providers. Each incidence of violation of HB 402 would give rise to costs to the local jail.

A local government may be shielded from liability for the criminal conduct of its employees by sovereign immunity or other defense. However, in the event of a successful lawsuit against a local government for the fraudulent assisted reproduction activity of its employee(s), the local government would incur costs of litigation and would be liable for payment of a judgment for damages awarded to the victim. According to Kentucky League of Cities, most cities, especially smaller ones, retain a city attorney on contract and pay on an hourly basis. In FY 2020, the average hourly rate was \$107 (data on the hourly rate paid by counties for legal services is unavailable at this time). Because of many variables related to the difference in hourly rates, lack of complete data, complexity of lawsuits, final dispositions, and appeals, the costs of defending a lawsuit seeking damages for fraudulent assisted reproduction are unknown. A money judgment in favor of the victim against a local government found liable in a case of fraudulent assisted reproduction would likely be substantial, and could increase liability insurance premiums.

Part III: Differences to Local Government Mandate Statement from Prior Versions

Part II refers to HB 402 GA version. HB 402 GA version is the same as the bill introduced. The bill passed its chamber of origin without any amendments or substitutes.

Data Source(s): LRC Staff, Kentucky Board of Medical Licensure; KY League of Cities; KY Department of Corrections

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