

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 352 (Bauer-Kahan)
Version: May 18, 2023
Hearing Date: June 27, 2023
Fiscal: Yes
Urgency: No
AM

SUBJECT

Health information

DIGEST

This bill seeks to enact protections for certain sensitive medical information by requiring businesses that store or maintain that information to develop specified capabilities, policies, and procedures to enable safeguards regarding accessing the information by July 1, 2024. The bill also prohibits a provider of health care, a health care service plan, contractor, or employer from cooperating with any inquiry or investigation by, or from providing medical information to, an individual, agency, or department from another state or, to the extent permitted by federal law, to a federal law enforcement agency that would identify an individual or that is related to an individual seeking or obtaining an abortion or abortion-related services that are lawful under the laws of this state, unless the request for medical information is authorized in accordance with specified existing provisions of law.

EXECUTIVE SUMMARY

Since the 1973 holding in *Roe v. Wade*, the U.S. Supreme Court has continuously held that it is a constitutional right to access abortion before fetal viability. However, on June 24, 2022 the Court voted 6-3 to overturn the holding in *Roe* and found that there is no federal constitutional right to an abortion. As a result of the *Dobbs* decision, people in roughly half the country may lose access to abortion services or have them severely restricted. Some states have even begun criminalizing abortion care. In addition, a growing number of states have been passing laws putting residents who seek essential gender-affirming care at risk of being prosecuted. States are attempting to classify the provision and seeking of gender-affirming health care as a crime warranting prison time and are threatening parents with criminal penalties if they attempt to travel to another state in order to secure life-saving gender-affirming care for their child. This bill seeks to provide additional safeguards by requiring specified protections and procedures for information regarding sensitive medical services that is electronically stored or maintained, including abortion care and gender affirming care, as provided.

The bill is sponsored by American College of Obstetricians and Gynecologists District IX and Planned Parenthood Affiliates of California and is supported by various reproductive rights organizations, medical associations, and other organizations. Should this bill pass out of this Committee, it will next be heard in the Senate Health Committee.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Establishes the Health Insurance Portability and Accountability Act (HIPAA), which provides privacy protections for patients' protected health information and generally prohibits a covered entity, as defined (health plan, health care provider, and health care clearing house), from using or disclosing protected health information except as specified or as authorized by the patient in writing. (45 C.F.R. § 164.500 et seq.)
- 2) Provides that if HIPAA's provisions conflict with a provision of state law, the provision that is the most protective of patient privacy prevails. (45 C.F.R. § 164.500 et seq.)

Existing state law:

- 1) Provides, pursuant to the California Constitution, that all people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. (Cal. Const., art. I, § 1.)
- 2) Holds that the state constitution's express right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.)
- 3) Prohibits the state from denying or interfering with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. Specifies that this provision is intended to further the constitutional right to privacy guaranteed by Section 1 of Article I of the California Constitution, and the constitutional right to not be denied equal protection guaranteed by Section 7 of Article I of the California Constitution, and that nothing herein narrows or limits the right to privacy or equal protection. (Cal. Const., art. I, § 1.1.)
- 4) Establishes the Reproductive Privacy Act, which provides that the Legislature finds and declares that every individual possesses a fundamental right of privacy

with respect to personal reproductive decisions and, therefore, it is the public policy of the State of California that:

- a) every individual has the fundamental right to choose or refuse birth control; and
 - b) every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion, with specified limited exceptions
- 5) Establishes the Confidentiality of Medical Information Act (CMIA), which establishes protections for the use of medical information. (Civ. Code § 56 et seq.)
 - 6) Prohibits providers of health care, health care service plans, or contractors, as defined, from sharing medical information without the patient's written authorization, subject to certain exceptions. (Civ. Code § 56.10.)
 - 7) Provides that every provider of health care, health care service plan, pharmaceutical company, or contractor who creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall do so in a manner that preserves the confidentiality of the information contained therein. Any provider of health care, health care service plan, pharmaceutical company, or contractor who negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information shall be subject to remedies and penalties, as specified. (Civ. Code § 56.101.)
 - 8) Defines "patient," for purposes of CMIA, to mean any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical information pertains. (Civ. Code § 56.05(k).)
 - 9) Defines "medical information," for purposes of CMIA, to mean any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental or physical condition, or treatment. "Individually identifiable" means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity. (Civ. Code § 56.05(j).)
 - 10) Defines "health care service plan" to mean any entity regulated pursuant to the Knox-Keene Health Care Service Plan Act of 1975. (Civ. Code § 56.05(g).)
 - 11) Defines a "licensed health care professional," for purposes of CMIA, to mean any person licensed or certified pursuant to the Business and Professions Code, the

Osteopathic Initiative Act or the Chiropractic Initiative Act, or the Health and Safety Code, as specified. (Civ. Code § 56.05(h).)

- 12) Defines “provider of health care,” for purposes of CMIA, to mean any person licensed or certified pursuant to the Business and Professions Code, as specified; the Osteopathic Initiative Act or the Chiropractic Initiative Act; the Health and Safety Code, as specified; or any licensed clinic, health dispensary, or health facility, as specified. The term does not include insurance institutions, as defined. (Civ. Code § 56.05(m).)
- 13) Defines “sensitive services” to mean all health care services related to mental or behavioral health, sexual and reproductive health, sexually transmitted infections, substance use disorder, gender affirming care, and intimate partner violence. (Civ. Code § 56.05(p).)
- 14) Provides that any business organized for the purpose of maintaining medical information in order to make the information available to an individual or to a provider of health care at the request of the individual or the provider of health care, for purposes of allowing the individual to manage their information, or for the diagnosis and treatment of the individual, is deemed a provider of health care subject to the requirements of CMIA. (Civ. Code § 56.06(a).)
- 15) Provides that any business that offers software or hardware to consumers, including a mobile application or other related device that is designed to maintain medical information in order to make the information available to an individual or a provider of health care at the request of the individual or a provider of health care, for purposes of allowing the individual to manage their information, or for the diagnosis, treatment, or management of a medical condition of the individual, shall be deemed to be a provider of health care subject to the requirements of CMIA. (Civ. Code § 56.06(b).)
- 16) Provides that any business described in the preceding two paragraphs must maintain the same standards of confidentiality required of a provider of health care with respect to medical information disclosed to the business. Such businesses are subject to the penalties for improper use and disclosure of medical information prescribed in CMIA. (Civ. Code § 56.06(d)-(e).)
- 17) Provides that any provider of health care, a health care service plan, pharmaceutical company, or contractor who negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of written or electronic medical records shall be subject to damages in a civil action or an administrative fine, as specified. (Civ. Code § 56.36.)

This bill:

- 1) Requires a business, as described in Section 56.06 of the Civil Code, that electronically stores or maintains medical information on the provision of sensitive services, including, but not limited to, on an electronic health record (EHR) system or electronic medical record system, as specified, to develop capabilities, policies, and procedures, on or before July 1, 2024, to enable all of the following:
 - a) Limit user access privileges to information systems that contain medical information related to sensitive services only to those persons who are authorized to access specified medical information.
 - b) Prevent the disclosure, access, transfer, transmission, or processing of medical information related to sensitive services to persons and entities outside of this state.
 - c) Segregate medical information related to sensitive services from the rest of the patient's record.
 - d) Provide the ability to automatically disable access to segregated medical information related to sensitive services by individuals and entities in another state.
- 2) Requires any fees charged to health care providers, health care service plans, pharmaceutical companies, contractors, employers, or patients to comply with this bill to be consistent with existing federal law.
- 3) Exempts an existing EHR system that is substantially customized to fit the individual needs of a health care provider or health care service plan from the requirement specified in 1) above, except that if a substantially customized EHR system is modified, other than for basic maintenance, then 1) above applies.
- 4) Defines "substantially customized" to mean that significant changes were made to existing off-the-shelf technology, or that a system was entirely custom built by a vendor according to a client's specifications.
- 5) Prohibits a provider of health care, health care service plan, contractor, or employer from cooperating with any inquiry or investigation by, or provide medical information to, any individual, agency, or department from another state or, to the extent permitted by federal law, to a federal law enforcement agency that would identify an individual and that is related to an individual seeking or obtaining an abortion or abortion-related services that are lawful under the laws of this state, unless the request for medical information is authorized under 7), below.
- 6) Specifies that the above provisions do not prohibit compliance with the investigation of activity that is punishable as a crime under the laws of this state.

- 7) Prohibits a provider of health care, health care service plan, pharmaceutical company, contractor, or employer from knowingly disclosing, transmitting, transferring, sharing, or granting access to medical information in an electronic health records system or through a health information exchange that would identify an individual and that is related to an individual seeking, obtaining, providing, supporting, or aiding in the performance of an abortion that is lawful under the laws of this state to any individual or entity from another state, unless the disclosure, transmittal, transfer, sharing, or granting of access is authorized under any of the following conditions:
 - a) In accordance with a valid, written authorization that clearly states that medical information on abortion or abortion-related services may be disclosed, and only to the extent and for the purposes expressly stated in the authorization, as provided.
 - b) To the extent necessary to allow responsibility for payment to be determined and payment to be made or to the extent that it is not further disclosed by the recipient in a way that would violate the CMIA, as provided.
 - c) For the purpose of accreditation, in reviewing the competence or qualifications of health care professionals, or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges, as provided.
 - d) For the purpose of bona fide research. Institutional Review Boards shall consider the potential harm to the patient and the patient's privacy when the research uses data that contains information related to abortion or abortion-related services and the research is performed out of state, as provided.

- 8) Requires the content of the health records containing medical information described in 7), above, to be disclosed to any of the following:
 - a) A patient, or their personal representative, consistent with the Patient Access to Health Records Act.
 - b) In response to an order of a California or federal court, but only to the extent clearly stated in the order and consistent with Section 1543 of the Penal Code, if applicable, and only if all information about the patient's identity and records are protected from public scrutiny through mechanisms, including, but not limited to, a sealed proceeding or court record.
 - c) When expressly required by federal law that preempts California law, but only to the extent expressly required.

COMMENTS

1. Stated need for the bill

The author writes:

In a medical setting, people should never fear that their information will be used against them. Patients who live in states with abortion bans are traveling to access needed care, but those patients risk their safety when they return to their home state. AB 352 prevents the automatic sharing of sensitive medical information so that anyone coming to California for care is protected.

2. Protections for medical information

HIPAA, enacted in 1996, guarantees privacy protection for individuals with regards to specific health information. (Pub.L. 104–191, 110 Stat. 1936.) Generally, protected health information is any information held by a covered entity which concerns health status, provision of healthcare, or payment for healthcare that can be connected to an individual. HIPAA privacy regulations require healthcare providers and organizations to develop and follow procedures that ensure the confidentiality and security of personal health information when it is transferred, received, handled, or shared. HIPAA further requires reasonable efforts when using, disclosing, or requesting protected health information, and to limit disclosure of that information to the minimum amount necessary to accomplish the intended purpose.

CMIA (Civ. Code § 56 et seq.) allows adult patients in California to keep their personal health information confidential and decide whether and when to share that information. These provisions are guided to protect every Californians' fundamental right to privacy. (Cal. Const., art. I, § 1.) CMIA protects "medical information," and generally regulates what providers of health care, and health care service plans, can do with such information.

Health Information Exchanges (HIE) are digital services that operate across health organizations to share health care information. HIEs store and exchange information about health conditions, medications, and allergies. It can also include procedures, notes and lab results.¹ Once an organization is part of an exchange, or a member of a health information network, they have access to the information in the exchange based on the policy of the HIE. Information that cannot be exchanged, due to federal regulations, includes substance abuse treatment, which requires written authorization from a patient. (42 U.S.C. 290dd; 82 Fed. Regs. 6115.)

¹ See Health Information Exchange, UCLA, available at <https://www.uclahealth.org/patient-resources/support-information/medical-records/health-information-exchange>.

3. Reproductive rights

Roe v. Wade was the landmark U.S. Supreme Court decision that held the implied constitutional right to privacy extended to a person's decision whether to terminate a pregnancy, while allowing that some state regulation of abortion access could be permissible. ((1973) 410 U.S. 113; overruled by *Dobbs v. Jackson Women's Health* (2022) 142 S. Ct. 2228.) *Roe* has been one of the most debated U.S. Supreme Court decisions and its application and validity have been challenged numerous times, but its fundamental holding had continuously been upheld by the Court until June 2022. On June 24, 2022 the Court published its official opinion in *Dobbs* and voted 6-3 to overturn the holding in *Roe*.² The case involved a Mississippi law enacted in 2018 that banned most abortions after the first 15 weeks of pregnancy, which is before what is generally accepted as the period of viability. (see Miss. Code Ann. §41-41-191.) The majority opinion upholds the Mississippi law finding that, contrary to almost 50 years of precedent, there is no fundamental constitutional right to have an abortion. The opinion further provides that states should be allowed to decide how to regulate abortion and that a strong presumption of validity should be afforded to those state laws.³

a. Out-of-state statutes denying or chilling access to reproductive health care

Texas perniciously enacted a law with an enforcement scheme that was designed to avoid judicial scrutiny of the law's clearly unconstitutional, at the time of enactment, provisions under the holding of *Roe* and *Casey*.⁴ Texas abortion providers filed a case in an attempt to stop the law before it took effect seeking pre-enforcement review of the law and an injunction barring its enforcement. On certiorari from the Fifth Circuit, the U.S. Supreme Court held that a pre-enforcement challenge to the law under the U.S. Constitution may only proceed against certain defendants but not others.⁵ The court did not address whether the law was constitutionally sound. However, the court's ruling essentially insulated the private enforcement of the law from challenge, allowing the law to remain in effect. The inability to challenge the law pre-enforcement allows it to stand as an ominous threat to all persons seeking or performing an abortion. This Texas law may very well be found to be constitutional under the holding of *Dobbs*.

The Texas law prohibits a physician from knowingly performing or inducing an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn

² *Dobbs v. Jackson Women's Health* (2022) 597 U.S. _ (142 S. Ct. 2228) at p. 5, available at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

³ *Id.* at 77.

⁴ See *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, at 543 (conc. opn. Roberts, C.J., Breyer, Sotomayor, & Kagan) that states Texas has passed a law that is contrary to *Roe* and *Casey* because it has "the effect of denying the exercise of what we have held is a right protected under the Federal Constitution" and was "designed to shield its unconstitutional law from judicial review." (footnote omitted).

⁵ *Whole Woman's Health v. Jackson* (2021) 142 S. Ct. 522, 530.

child, as specified, or failed to perform a test to detect a fetal heartbeat. (Tex. Health & Safety Code § 171.201 et seq. (enacted through Texas Senate Bill 8).) This law essentially places a near-categorical ban on abortions beginning six weeks after a person's last menstrual period, which is before many people even realize they are pregnant and occurs months before fetal viability.⁶ The Texas law has far reaching implications, not only for the person receiving an abortion or performing abortion services. This is evidenced in the provisions that prohibit anyone from "aiding and abetting" a person in obtaining an abortion, which could implicate and impose significant civil liability upon a person providing transportation to or from an abortion clinic, a person donating to a fund to assist individuals receiving an abortion, or even a person who simply discusses getting an abortion with someone. (Tex. Health & Safety Code § 171.208.) The Texas law provides that any person, other than an officer or employee of a state or local governmental entity in Texas, may bring a civil action to enforce its provisions, which includes liability of \$10,000 plus costs and fees if a plaintiff prevails while a defendant is prohibited from recovering their own costs and fees if they prevail. (*Id.* at § 171.201(b) & (i).) Other states have already followed suit.

Additionally, many abortion bans attach criminal and administrative penalties in addition to civil liability. For example, in Texas it is a felony to perform an abortion, unless it is needed to save the life of the patient, and provides for civil liability and licensure revocation. (Tex. Health & Safety Code § 171.201 et. seq.) In six states with abortion bans – Arkansas, Georgia, Idaho, Missouri, North Dakota, and Tennessee – prosecutors can criminally prosecute health care professionals for performing abortions and providers are only allowed to offer evidence that the procedure was necessary to save the patient until after they are charged.⁷ Oklahoma made performing an abortion a felony, with a punishment of up to 10 years in prison and a fine of up to \$100,000 in August of 2022.⁸ This year, the Governor of Idaho signed a bill into law that makes it illegal for an adult to help a minor get an abortion without parental consent. The law essentially bans adults from obtaining abortion pills for a minor or "recruiting, harboring or transporting the pregnant minor" without parental consent.⁹ If convicted, a person could face two to five years in prison and may be sued by the minor's parent.

⁶ See *Whole Woman's Health v. Jackson* (2021) 141 S. Ct. 2494, at 2498 (dis. opn. Sotomayor, Breyer, & Kagan).

⁷ Christine Vestal, *Some Abortion Bans Put Patients, Doctors at Risk in Emergencies*, Pew Trusts (Sept. 1, 2022), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/09/01/some-abortion-bans-put-patients-doctors-at-risk-in-emergencies>.

⁸ Associated Press, *Oklahoma governor signs bill making it felony to perform an abortion*, NBC News (Apr. 12, 2022), available at <https://www.nbcnews.com/news/us-news/oklahoma-governor-signs-bill-making-felony-perform-abortion-rcna24071>.

⁹ Associated Press, *Idaho governor signs law banning adults from helping minors get abortions*, The Guardian (April 6, 2023), available at <https://www.theguardian.com/us-news/2023/apr/06/idaho-abortion-trafficking-law-governor>.

b. California is a Reproductive Freedom State

The California Supreme Court held in 1969 that the state constitution's implied right to privacy extends to an individual's decision about whether or not to have an abortion. (*People v. Belous* (1969) 71 Cal.2d 954.) This was the first time an individual's right to abortion was upheld in a court. In 1972 the California voters passed a constitutional amendment that explicitly provided for the right to privacy in the state constitution. (Prop. 11, Nov. 7, 1972 gen. elec.) California statutory law provides, under the Reproductive Privacy Act, that the Legislature finds and declares every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy; therefore, it is the public policy of the State of California that every individual has the fundamental right to choose or refuse birth control, and every individual has the fundamental right to choose to bear a child or to choose to obtain an abortion. (Health & Saf. Code § 123462.) In 2019 Governor Newsom issued a proclamation reaffirming California's commitment to making reproductive freedom a fundamental right in response to the numerous attacks on reproductive rights across the nation.¹⁰ In September 2021, more than 40 organizations came together to form the California Future Abortion Council (CA FAB) to identify barriers to accessing abortion services and to recommend policy proposals to support equitable and affordable access for not only Californians but all who seek care in the state.

In response to the *Dobbs* decision, California enacted a comprehensive package of legislation expanding, protecting, and strengthening access to reproductive health care, including abortions, for all Californians and people seeking such care in our state.¹¹ One such law, AB 1666 (Bauer-Kahan, Ch. 42, Stats. 2022) provided that a law of another state that authorizes a person to bring a civil action against a person or entity who receives, seeks, performs, or induces an abortion, or knowingly engages in conduct that aids or abets the performance or inducement of an abortion, or attempts or intends to engage in such conduct, is contrary to the public policy of this state (Gov. Code § 123467.5.) Additionally, the voters overwhelmingly approved Proposition 1 (Nov. 8, 2022 gen. elec.), and enacted an express constitutional right in the state constitution that prohibits the state from interfering with an individual's reproductive freedom in their most intimate decisions.

4. Out of state bans on gender-affirming care and California policies to protect patients receiving such care

As California and other states have implemented policies to ensure that transgender individuals are not discriminated against and can obtain gender-affirming care, other

¹⁰ California Proclamation on Reproductive Freedom (May 31, 2019) available at <https://www.gov.ca.gov/wp-content/uploads/2019/05/Proclamation-on-Reproductive-Freedom.pdf>.

¹¹ Kristen Hwang, *Newsom signs abortion protections into law*, CalMatters (Sept. 27, 2022), available at <https://calmatters.org/health/2022/09/california-abortion-bills/>.

states have targeted transgender individuals and providers of gender affirming care. According to Human Rights Watch, as of March 2022, legislatures nationwide had introduced over 300 anti-LGBTQ+ bills, over 130 of which specifically targeted transgender people.¹² Many states have been enacting statutes that potentially impose civil and criminal liability for providing to a minor, or helping a minor obtain, gender-affirming care. For example, Alabama recently enacted a bill that makes it a felony to provide, or help to provide, certain types of gender-affirming care.¹³ Arkansas prohibits a physician or other healthcare provider from providing or referring certain types of gender-affirming care for a minor; a violation or “threatened violation” can be punished through a professional board or a civil action.¹⁴ SB 107 (Wiener, 2022; Ch. 810, Stats. 2022), among other things, prohibits the sharing of medical records regarding the receipt of gender-affirming care, the enforcement of out-of-state subpoenas seeking information regarding the receipt of gender-affirming medical care in California, and the enforcement of laws of another state that authorize the removal of a child from their parent or guardian and enforcement of out-of-state criminal laws related to gender-affirming health care. On September 29, 2022, Governor Newsom issued a signing statement for SB 107 that said “[i]n California we believe in equality and acceptance. We believe that no one should be prosecuted or persecuted for getting care they need – including gender-affirming care.”¹⁵

5. This bill seeks to provide additional protections to information regarding sensitive services under the CMIA

In response to the assault on reproductive rights and legislation targeting transgender people, this bill seeks to provide increased protections to electronically stored or maintained medical information. The author and sponsors of the bill note that, though California has enacted extensive protections for abortion within the state, there are still major gaps when people come to California for care. Critically, they state that physicians in states that ban abortion can easily see all details of abortion care through health information HIEs – even if it is unrelated to the patient’s care. This creates the risk that out-of-state providers will report patients to authorities and endanger patients and providers. This bill seeks to enact similar provisions to the federal regulations that prohibit the sharing of patient information for substance use disorders. (42 U.S.C. 290dd; 82 Fed. Regs. 6115)

¹² Human Rights Watch, Press Release, ICYMI: As Lawmakers Escalate Attacks on Transgender Youth Across the Country, Some GOP Leaders Stand Up for Transgender Youth (Mar. 24, 2022), <https://www.hrc.org/press-releases/icymi-as-lawmakers-escalate-attacks-on-transgender-youth-across-the-country-some-gop-leaders-stand-up-for-transgender-youth> (all links current as of August 29, 2022).

¹³ See Al. Code, § 26-26-4.

¹⁴ Ark. Stats. §§ 20-9-1502 & 20-9-1504.

¹⁵ Governor’s signing statement on Sen. Bill 107 (2021-22 Reg. Sess.), available at <https://www.gov.ca.gov/wp-content/uploads/2022/09/SB-107-SIGNING.pdf?emrc=1a80c5>.

This bill requires any business subject to the CMIA that electronically stores or maintains medical information on the provision of sensitive services to develop capabilities, policies, and procedures, by July 1, 2024 that do all of the following:

- limit user access privileges to information systems that contain such information only to those persons who are authorized to access the information;
- prevent the disclosure, access, transfer, transmission, or processing of such information to persons and entities outside of this state;
- segregate medical information related to sensitive services from the rest of the patient's record; and
- provide the ability to automatically disable access to segregated medical information related to sensitive services by individuals and entities in another state.

Sensitive services is defined under the CMIA as all health care services related to mental or behavioral health, sexual and reproductive health, sexually transmitted infections, substance use disorder, gender affirming care, and intimate partner violence. (Civ. Code § 56.05(p).)

The bill provides an exception to the above provisions for an existing electronic health records system that is substantially customized to fit the individual needs of a provider of health care or health care service plan. A system is substantially customized if significant changes were made to existing off-the-shelf technology, or that a system was entirely custom built by a vendor according to a client's specifications. The bill specifies that any fees charged to providers of health care, health care service plans, pharmaceutical company, contractors, employers, or patients to comply with these provisions must be consistent with federal regulations governing fees for accessing, exchanging, or using electronic health information pursuant to Section 171.302 of Title 45 of the Code of Federal Regulations.

6. This bill seeks to provide additional protections to information regarding abortion or abortion-related services

The bill also prohibits a provider of health care, health care service plan, contractor, or employer from cooperating with any inquiry or investigation by, or provide medical information to, any individual, agency, or department from another state or, to the extent permitted by federal law, to a federal law enforcement agency that would identify an individual and that is related to an individual seeking or obtaining an abortion or abortion-related services that are lawful under the laws of this state, unless the request for medical information is authorized. The bill specifies that these provisions do not prohibit compliance with the investigation of activity that is punishable as a crime under the laws of this state.

The bill also prohibits a provider of health care, health care service plan, contractor, or employer from knowingly disclosing, transmitting, transferring, sharing, or granting access to medical information in an electronic health records system or through a health information exchange that would identify an individual and that is related to an individual seeking or obtaining an abortion or abortion-related services that are lawful under the laws of this state, unless the request for medical information is authorized in accordance with specified existing provisions of law. These provisions include granting of access under any of the following conditions:

- In accordance with a valid, written authorization pursuant to Section 56.11 of the Civil Code that clearly states that medical information on abortion or abortion-related services may be disclosed, and only to the extent and for the purposes expressly stated in the authorization.
- To the extent necessary to allow responsibility for payment to be determined and payment to be made or to the extent that it is not further disclosed by the recipient in a way that would violate the CMIA, in accordance with paragraphs (2) and (3) of subdivision (c) of Section 56.10 of the Civil Code.
- For the purpose of accreditation, in reviewing the competence or qualifications of health care professionals, or in reviewing health care services with respect to medical necessity, level of care, quality of care, or justification of charges, in accordance with paragraphs (4) and (5) of subdivision (c) of Section 56.10 of the Civil Code.
- For the purpose of bona fide research, in accordance with paragraph (7) of subdivision (c) of Section 56.10 of the Civil Code. Institutional Review Boards must consider the potential harm to the patient and the patient's privacy when the research uses data that contains information related to abortion or abortion-related services and the research is performed out of state.

7. Statements in support

The American College of OB/GYN's District IX, one of the sponsors of the bill, writes in support:

Given the federal climate, anyone supporting someone in obtaining an abortion could face arrest and extradition under other states' current law. The fear of arrest can create a chilling effect, with providers forced to deny care because of the legal peril they face and patients afraid to seek abortion care in California. Critically, physicians in anti-choice states can easily see all details of abortion care through health information exchanges (HIEs) – even if it is unrelated to the patient's care. This creates the risk that out-of-state providers will report patients to authorities and endanger patients and providers.

AB 352 addresses this problem head-on by preventing information on sexual health abortion, and other sensitive services in health information exchanges from being

automatically shared, especially outside of California. Parties must be appropriately authorized to view medical information related to sensitive services.

SUPPORT

American College of Obstetricians and Gynecologists District IX (sponsor)

Planned Parenthood Affiliates of California (sponsor)

Attorney General Rob Bonta

California Nurse Midwives Association (CNMA)

California Pan - Ethnic Health Network

Electronic Frontier Foundation

Lieutenant Governor Eleni Kounalakis

NARAL Pro-Choice California

Oakland Privacy

Planned Parenthood Affiliates of California

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

AB 254 (Bauer-Kahan, 2023) includes “reproductive or sexual health application information” in the definition of “medical information” and the businesses that offer reproductive or sexual health digital services to consumers in the definition of a provider of health care for purposes of the Confidentiality of Medical Information Act (CMIA). This bill is currently pending in the Senate Appropriations Committee.

AB 793 (Bonta, 2023) prohibits a government entity from seeking or obtaining information from a reverse-location demand or a reverse-keyword demand, and prohibits any person or government entity from complying with a reverse-location demand or a reverse-keyword demand. That bill is currently pending before the Senate Public Safety Committee.

AB 1194 (Carrillo, 2023) provides stronger privacy protections pursuant to the California Consumer Privacy Act where the consumer information relates to specified reproductive health services. This bill is currently pending in the Senate Appropriations Committee.

Prior Legislation:

SR 9 (Skinner, 2023) urges the President of the U.S. and the U.S. Congress to enact federal legislation that guarantees the right to reproductive freedom, including abortion and contraception.

SB 107 (Wiener, Ch. 810, Stats. 2022) enacted various safeguards against the enforcement of other states' laws that purport to penalize individuals from obtaining gender-affirming care that is legal in California.

AB 1666 (Bauer-Kahan, Ch. 42, Stats. 2022) prohibited the enforcement in this state of out-of-state laws authorizing a civil action against a person or entity that receives or seeks, performs or induces, or aids or abets the performance of an abortion, or who attempts or intends to engage in those actions and declares those out-of-state laws to be contrary to the public policy of this state.

AB 2091 (Mia Bonta, Ch. 628, Stats. 2022), among other things, prohibited compelling a person to identify or provide information that would identify an individual who has sought or obtained an abortion in a state, county, city, or other local criminal, administrative, legislative, or other proceeding if the information is being requested based on another state's laws that interfere with a person's right to choose or obtain an abortion or a foreign penal civil action.

AB 2223 (Wicks, Ch. 629, Stats. 2022), among other things, provides that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

PRIOR VOTES

Assembly Floor (Ayes 64, Noes 12)

Assembly Appropriations Committee (Ayes 11, Noes 4)

Assembly Privacy and Consumer Protection Committee (Ayes 8, Noes 2)

Assembly Health Committee (Ayes 11, Noes 3)
