

LFC Requester:	
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**AGENCY BILL ANALYSIS
2017 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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 **Amendment**
Correction **Substitute**

Date _____
Bill No: HB37

Sponsor: Rod Montoya
Short Title: Born Alive Infant Protection

Agency Code: 264
Person Writing: Gail MacQuesten
Phone: 466-0532 **Email:** gailmacquesten@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
0	0	0	n/a	n/a

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	unknown	unknown	unknown	unknown	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

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

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB37 creates new statutes that

- Define “born alive” or “live birth,” and “infant;
- Set out care requirements for infants, with special requirements applicable only to abortion providers;
- Require health care practitioners and employees to report any failure to comply with those requirements;
- Create a new “first degree felony resulting in the death of a child,” applicable to anyone who intentionally performs an overt act that kills a born alive infant;
- Create a new second degree felony for attempt to perform an overt act to kill a born alive infant;
- Create a civil remedy for a woman against persons who violate the care requirements during an abortion procedure; and
- Create a task force to create reporting guidelines, assign inspectors, and prepare a yearly report.

Section 1 defines “born alive” or “live birth” as the birth of an infant who, whether or not the umbilical cord has been cut or the placenta is attached, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section or induced abortion, shows any evidence of life, including breathing, a heartbeat, umbilical cord pulsation or definite movement of voluntary muscles. Section 1 defines “infant” as a child who has been completely expelled or extracted from the child’s mother, regardless of the state of gestational development.

Section 2 sets out the requirements and responsibilities that apply to live births. “A person” shall not deny or deprive an infant of nourishment with the intent to cause or allow the death of the infant.” “A person” shall not deprive an infant of medically appropriate and reasonable medical care and treatment or surgical care. Abortion providers have additional responsibilities in the case of a live birth. They are to provide immediate medical care to the infant, inform the mother of the live birth and request transfer of the infant to an on-duty resident or emergency care physician. If the abortion was provided outside a hospital, the abortion provider is to call 911 for an emergency transfer of the infant to a hospital. If the doctor is unable to undertake any of these duties because he or she is caring for the woman, another health care provider is to assume those duties. The requirements of Section 2 do not prevent a parent or guardian from refusing to give consent to medical treatment or surgical care that is not medically necessary or reasonable,

including care that will do no more than temporarily prolong the act of dying when death is imminent. Section 2 provides that any born alive infant shall be treated as a legal person, with birth and, if necessary, death certificates issued according to state law. No person may use any born alive infant for any type of scientific research or other kind of experimentation except as necessary to protect or preserve the life and health of the infant.

Section 4 sets out two new crimes. 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. Whoever intentionally attempts to perform an overt act to kill a born alive infant is guilty of a second degree felony.

Section 5 provides a civil remedy to the woman upon whom the abortion was performed against any person who violates the provisions of Section 2. Relief includes money damages for all injuries, psychological and physical, statutory damages equal to three times the cost of the abortion, and punitive damages and reasonable attorney fees.

Section 6 creates the “task force to monitor born alive births” made up of two members from the department of health and three members from the children, youth and families department. The task force is to create reporting guidelines for each born alive birth incident, including information on when the infant was given medical treatment or emergency medical care or when the 911 system was called. Children youth and families department caseworkers are to perform monthly inspections and conduct staff interviews at each facility in the state that offers elective abortions to determine whether appropriate measures and care are being given to born alive infants and if the reporting guidelines are being followed. The task force is to provide a yearly report of its findings to the governor and the legislature.

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.

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. The department of health and the children, youth and families department will have increased costs due to their participation in the task force. Children, youth and families department will also have costs association with performing monthly inspections and conducting staff interviews at all facilities in the state that offer elective abortions.

SIGNIFICANT ISSUES

1. HB37 provides that an infant shall be treated as a “legal person,” and discusses various legal processes as though infants are not already covered by existing laws. HB37’s new provisions addressing issues already covered by statute or case law can create duplication, confusion or conflict.

- HB37 provides that birth and, if necessary, death certificates shall be issued. The Vital Statistics Act, NMSA 1978, Section 24-14-1 through 24-14-31, already contains

comprehensive requirements covering birth and death certificates, as well as records of still birth, spontaneous fetal death, induced abortions, and other events.

- Section 2(G) of HB37 prohibits the use of a born alive infant for any type of scientific research or another kind of experimentation except as necessary to protect or preserve the life and health of the born alive infant. The Maternal Fetal and Infant Experimentation Act, NMSA 1978, Section 24-9A-1 *et seq.* already contains such a prohibition. See, in particular, NMSA 1978, Section 24-9A-4.
- HB37 creates a new “first degree felony resulting in the death of a child,” defined as intentionally performing an overt act that kills a born alive infant. Issues related to this new crime are discussed below. But it is important to remember that homicide statutes and other criminal statutes already apply to acts committed on infants.
- HB37 creates a new statute-based medical malpractice action for women upon whom an abortion was performed or attempted, who may sue for any violation of the standards of care set out in Section 2.

2. HB37’s criminal provisions raise issues of interpretation, technical issues, and constitutional issues.

- HB37 creates a new “first degree felony resulting in the death of a child,” which carries a basic sentence of life imprisonment. The crime applies to “[w]hoever intentionally performs an overt act that kills a born alive infant.” The criminal intent in the statute applies to the intent to perform an overt act-- the statute does not require an intent to kill. (If an intent to kill were present, existing murder statutes would apply.) The legislature may forbid the doing of an act and make committing that act criminal without regard to intent. However, a criminal statute must give a person of ordinary intelligence fair notice of the conduct that the state criminalizes or the statute will violate the Due Process Clause of the Fourteenth Amendment. HB37’s criminal provision is likely void for vagueness, because it gives no notice of the prohibited act. The prohibited act is defined by its consequence: the death of the infant. A medically risky procedure taken to save the life of the infant would subject the doctor to life imprisonment if the infant died. Because HB37 requires certain actions be taken, it is possible that a person could be sentenced to life imprisonment for taking an action required by the statute. For example, immediate transportation of a fragile born alive infant to a hospital might result in the infant’s death, and subject the doctor ordering the transport and the person transporting the infant to life imprisonment. This criminal provision could have the unintended consequence of discouraging doctors and other persons from taking any action to save an infant, because an “overt act” taken to save the infant that instead causes the infant’s death could result in life imprisonment. In contrast, failing to act may result in a violation of Section 2 and a possible malpractice action, but would not result in a criminal charge even if the failure to act directly causes the death of the infant.
- HB37 creates a new “attempt” crime related to the crime described above, providing that “[w]hoever intentionally attempts to perform an overt act to kill a born alive infant is guilty of a second degree felony...” Interestingly, the intent required in this crime appears to be an intent to perform an overt act to kill; in other words, it appears to require an intent to kill. New Mexico already has a statute governing attempt crimes, but it wouldn’t apply to the “first degree felony resulting in the death of a child” defined in HB37. New Mexico’s intent statute punishes “an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.” NMSA 1978,

Section 30-28-1. That is hard to apply to HB37's felony because of the intent issue: the intent is to commit an act, not an intent to kill. The act itself is not a crime, unless the act results in the death of the infant. But creating a new "attempt" crime in HB37 isn't necessary. If someone attempts to kill an infant, that is attempted murder. There is no need for a special intent statute.

3. HB37's intent to legislate specific care may create conflicts. HB37 contains general requirements, such as "medically appropriate and reasonable medical care and treatment or surgical care." But it also contains specific care provisions: "a person shall not deny or deprive an infant of nourishment with the intent to cause or allow the death of the infant for any reason," and in cases of live births occurring during an attempted abortion, HB37 requires "emergency transfer of the infant to a hospital..." At the same time, HB37 allows an infant's parent or guardian to refuse to give consent to medical treatment or surgical care that is not medically necessary or reasonable, including care or treatment that is not necessary to save the life of the infant, has a potential risk to the infant's life or health that outweighs the potential benefit to the infant of the treatment or care, or will do no more than temporarily prolong the act of dying when death is imminent. There is clear potential for conflict with the wishes of a parent or guardian, who may not want the transportation or feeding of an infant whose death is imminent. The specific care requirements in HB37 create a potential conflict with the doctor's obligation to provide medically appropriate and reasonable care. For example, the best course of action may be not to transport a fragile infant, but to provide care without transportation. As discussed above, a doctor or other person who provides the specific care required by HB37 may be subject to criminal penalties if the infant dies as a result of that statutorily required action. And failure to perform the general requirements or the specific care requirements set out in the statute may subject a person to civil penalties, if the violation occurred during an abortion procedure (but not when the violation occurs in any other context).

4. HB37's task force provision requires interpretation. Paragraph B(1) requires the task force to create reporting guidelines for each "born alive infant incident." That term is not defined. A plain reading of the provision would require guidelines for all births, not just births occurring during an attempted abortion. The reporting requirements listed in HB37 appear to apply only to live births occurring during attempted abortions, however. The provision requiring children, youth and families department caseworkers to perform monthly inspections and conduct staff interviews applies only to those facilities that offer elective abortions.

PERFORMANCE IMPLICATIONS

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.

The children, youth and families department will have to expend resources for inspecting abortion providers and conducting staff interviews at abortion providing facilities. Note that these requirements apply to all facilities that provide elective abortions, whether or not the

facility provides abortions of potentially viable fetuses.

ADMINISTRATIVE IMPLICATIONS

See performance implications, above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted with current proposed legislation.

TECHNICAL ISSUES

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?”

OTHER SUBSTANTIVE ISSUES

None.

ALTERNATIVES

None proposed.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

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.

AMENDMENTS

None proposed.