

LEGAL REVIEW NOTE

Bill No.: HB 555

LC#: LC 981, To Legal Review Copy, as
of February 7, 2025

Short Title: Generally revise laws related
to chemical abortion.

Attorney Reviewer: Todd Everts
Julie Johnson

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

HB 555, as drafted, in Section 2 provides:

A health care provider shall not knowingly provide or attempt to provide a chemical abortion if such provision or attempt is in or affects interstate commerce without:

- (a) physically examining the patient;
- (b) being physically present at the location of the chemical abortion;

- (c) scheduling a follow-up visit to assess the patient's physical condition that must occur not more than 7 days after the administration or use of the drug; and
- (d) providing a catch kit and medical waste bag, including instructions for the patient to bring the catch kit and medical waste bag to the health care provider for proper disposal.

A provider who violates this section is guilty of a felony, may be imprisoned up to 3 years, and may be assessed a fine of up to \$10,000.

Constitutional Initiative No. 128, which passed in the 2024 general election and is effective July 1, 2025, amends the Montana Constitution to provide:

- “a right to make and carry out decisions about one’s own pregnancy, including the right to abortion”;
- that the government may regulate abortion after fetal viability; and
- that the government may not “penalize, prosecute, or otherwise take adverse action against a person based on the person’s actual, potential, perceived, or alleged pregnancy outcomes” and may not take similar action against a person for aiding or assisting another person, with consent, in making or carrying out pregnancy decisions.

As drafted, HB 555 may conflict with CI-128, particularly pertaining to the regulation of pre-viability abortions. Also, HB 555 provides penalties against a provider for aiding or assisting another person, with consent, in making or carrying out pregnancy decisions, which conflicts with the language of Constitutional Initiative No. 128.

Therefore, HB 555 may raise a potential constitutional conformity question as to whether this legislation conflicts with the language of Constitutional Initiative No. 128.

In addition, HB 555 may raise potential constitutional conformity issues concerning Montana's unique constitutional guarantee of the right to privacy, Article II, section 10, which provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Montana's constitutional right to privacy provides broader protection of the right of privacy than is afforded under the United States Constitution. *See Armstrong v. St.*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364.

In *Armstrong v. St.*, the Montana Supreme Court struck down the "physician only" provisions of the Montana Abortion Control Act, Title 50, chapter 20, MCA, which prohibited physician assistants from performing abortions on pregnant women, noting that the legislation was an "attempt to make it as difficult, as inconvenient and as costly as possible for women to exercise their right to obtain, from the health care provider of their choice, a specific medical procedure" and holding that a woman's right to seek and obtain a pre-viability abortion from a health care provider of her choice was constitutionally protected. *Armstrong*, ¶ 65, ¶ 75.

HB 555, as drafted, may raise a constitutional conformity issue regarding the potential infringement of a woman's right to privacy, specifically a woman's right to seek and obtain a pre-viability abortion.

Requestor response:

The Montana Constitution states in Article II, Section 3:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

The Montana Constitution further states in Article IX, Section 1:

Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

Under Montana law, when two or more constitutional rights are potentially at issue, the Montana Supreme Court balances the competing interests contained in the different constitutional rights. See *Krakauer v. State*, 2016 MT'230, i-130, 384 Mont. 527,381 P.3d 524.

HB 555 protects every Montanan's right to clean and healthy environment by requiring medical personal to be present when an abortion is conducted and requiring a provider to provide disposal methods for chemical abortions. Chemical abortions have been demonstrated to result in tainted wastewater. This wastewater flows into the natural environment where in may impact the environment. HB 555 provides a reasonable method of ensuring these chemicals do not enter the environment. HB 555 does not prohibit abortion. Thus, when the various constitutional rights impacted by this bill are balanced against each other, it is the sponsor's position the bill is constitutional.