



H.B. 228

126th General Assembly
(As Introduced)

Reps. Brinkman, Hood, Buehrer, Bubp, Faber, Fessler, Gilb, Hoops, Kearns, Raussen, Reidelbach, Schaffer, Schneider, Seaver, Taylor, Uecker, Wagner, Widowfield

BILL SUMMARY

- Prohibits the performance of abortions.
- Creates the offense of facilitating an abortion.
- Increases penalties for performance of unlawful abortions, unlawful distribution of an abortion-inducing drug, and abortion trafficking.
- Prohibits the use of state funds to pay for health insurance plans that cover abortion.
- Prohibits the use of state or local public funds to subsidize an abortion.
- Eliminates the Public Health Council's authority to adopt rules relating to abortions.
- Authorizes the Ohio State Medical Board to take disciplinary action against physicians who violate an abortion-related law.

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CONTENT AND OPERATION

Prohibition of abortion

(R.C. 2919.12; 2919.121 and 2919.122 (repealed))

The bill prohibits any person from performing or inducing an abortion. It eliminates provisions of current law governing informed consent, how an unemancipated minor may obtain an abortion, and all affirmative defenses for physicians who perform abortions.¹ (See "**COMMENT 1**" below.)

The bill's prohibitions do not apply to a person who provides medical treatment to a pregnant woman to prevent the death of the woman and who, as a proximate result of the provision of medical treatment but without the intent to do so, causes the termination of the woman's pregnancy.

Facilitating an abortion

(R.C. 2919.12(A)(2))

The bill creates the offense of facilitating an abortion. The bill prohibits a person from transporting another person, or causing another person to be transported, across the boundary of the state or of any county in the state in order to facilitate the other person having an abortion.

¹ The bill provides that the prohibition on abortion goes into effect October 29, 2005 or the earliest date permitted by law.

Elimination of informed consent provisions

(R.C. 2151.85 and 2505.073 (repealed); 2919.12)

Under current law, a physician² is prohibited from performing an abortion without the informed consent of the woman. If the woman is an unemancipated minor, she must either notify one of her parents prior to obtaining an abortion or obtain an exemption from this requirement from the court.

The bill eliminates provisions regarding informed consent, including the provisions specifying how a minor may obtain a waiver of the parental notification requirements from the juvenile court and how a minor may appeal a decision of the juvenile court.

Prohibition on the administration of abortion-inducing drugs

(R.C. 2919.123)

Current law permits a physician to administer an abortion-inducing drug, such as mifepristone (RU-486), provided the physician complies with certain requirements, such as a requirement that the physician follow all federal guidelines on the use of the drug. A person who is not a physician may not give, sell, dispense, administer, provide, or prescribe an abortion-inducing drug unless the person falls in one of the following categories:

- (1) The person is a pregnant woman who obtains or possesses the drug for the purpose of inducing an abortion to terminate her own pregnancy;
- (2) The person is legally transporting and delivering the drug to a recipient;
- (3) The person is a legal manufacturer or distributor of the drug and makes a good faith effort to comply with any applicable requirements of federal law regarding the distribution, provision, or sale of the drug.

The bill prohibits any person, including a physician, from knowingly giving, selling, dispensing, administering, providing, or prescribing an abortion-inducing drug to another person for the purpose of inducing an abortion or enabling the person to induce an abortion. The bill eliminates exceptions to this prohibition.

² Under current law, only an individual authorized by the State Medical Board to practice medicine and surgery or osteopathic medicine and surgery may perform an abortion.

Abortion manslaughter

(R.C. 2919.13)

Current law prohibits an individual from purposely taking the life of a child born by attempted abortion who is alive when removed from the uterus of a pregnant woman. The law also requires the person performing the abortion to take necessary measures required by the exercise of medical judgment to preserve the life of a child born under such circumstances.

The bill adds that prior to the bill's effective date, no person who administers an abortion-inducing drug shall fail to take necessary measures to preserve the life of the child.

Prohibition on partial birth abortion

(R.C. 2919.151 (repealed))

Under current law, a physician may not perform a partial birth procedure³ on a pregnant woman unless the procedure is necessary to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function.

³ Current law defines a "partial birth procedure" as the medical procedure that includes all of the following elements in sequence (R.C. 2919.151):

(a) *Intentional dilation of the cervix of a pregnant woman, usually over a sequence of days;*

(b) *In a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother;*

(c) *Intentional partial evacuation of the intracranial contents of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, intentional compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of another intentional act that the person performing the procedure knows will cause the death of the fetus;*

(d) *Completion of the vaginal delivery of the fetus.*

The bill eliminates this provision as part of its general prohibition on all abortion procedures.

Elimination of post-viability provisions

(R.C. 2919.16, 2919.17, and 2919.18 (repealed))

Current law prohibits a physician from performing an abortion on a pregnant woman if the unborn human is viable⁴ unless the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. If the pregnant woman is 22 weeks pregnant or more, the physician may not perform the abortion unless the physician performs medical tests on the fetus and determines that the fetus is not viable.

The bill eliminates this provision as part of its general prohibition on all abortion procedures.

Right of health care professionals to refuse to perform an abortion

(R.C. 4731.91)

Under current law, no hospital or individual may be required to perform an abortion. Refusal to permit or perform an abortion is not grounds for civil liability nor a basis for disciplinary or other recriminatory action. Any person or entity that takes civil or other action against a person for refusing to perform an abortion is liable in civil damages to the person who refused to perform an abortion.

The bill provides that no hospital or person may permit or perform an abortion. The bill retains the provision that refusal to permit or perform an abortion is not grounds for civil liability nor a basis for disciplinary or other recriminatory action.

The bill provides that a person who permits or performs an abortion or takes civil or other action against a person for refusing to perform an abortion is liable in civil damages to the following individuals:

⁴ "Viable" means the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support (R.C. 2919.16).

- (1) The pregnant woman;
- (2) The person who was the father of the fetus or embryo;
- (3) The pregnant woman's parents, guardians, or custodians if she was a minor at the time of the abortion.

Penalties for performing an abortion or facilitating an abortion

(R.C. 2919.12)

Under current law, if a physician fails to obtain informed consent from a woman prior to performing an abortion, the physician is guilty of unlawful abortion, a misdemeanor of the first degree on the first offense and a felony of the fourth degree on each subsequent offense. The physician may also be civilly liable to the woman and her parents, if applicable (*see* "**Civil actions for abortion-related acts**" below).

Under the bill, a physician who performs an abortion is guilty of unlawful abortion. The offenses of unlawful abortion and facilitating an abortion (*see above*) are both felonies of the second degree on the first offense. If the offender has previously been convicted of unlawful abortion, facilitating an abortion, or other abortion-related offenses,⁵ the offense is a felony of the first degree.

Penalty for administering an abortion-inducing drug

(R.C. 2919.123)

Under current law, a person who violates the law governing the use of abortion-inducing drugs is guilty of unlawful distribution of abortion-inducing drugs, a felony of the fourth degree on the first offense and a felony of the third degree if the offender has previously been convicted of or pleaded guilty to an abortion-related offense.

The bill provides that unlawful distribution of an abortion-inducing drug is a felony of the second degree on the first offense and a felony of the first degree if the offender has previously been convicted of or pleaded guilty to an abortion-related offense.

⁵ For purposes of this analysis, an "abortion-related offense" includes a violation of an abortion-related offense under current law or an abortion-related offense as the offense existed prior to the bill's effective date, where applicable.

Penalty for abortion trafficking

(R.C. 2919.14)

Under current law, a person who experiments upon or sells the product of human conception following an abortion is guilty of abortion trafficking, a misdemeanor of the first degree.

The bill makes the crime a felony of the first degree.

Definition of the term "person" for purposes of the Criminal Code

(R.C. 2901.01 and 2903.09)

Under current law, the term "person" must not be construed in the Criminal Code so that an offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an otherwise lawful abortion.

The bill eliminates this rule of construction.

Pre-abortion procedures

(R.C. 2317.56)

Under current law governing informed consent for abortion procedures, a physician must meet several requirements prior to performing an abortion. These include observing a 24-hour waiting period, providing information on abortion to the woman seeking the abortion, and obtaining a signature from the woman, verifying that the physician has performed these tasks.⁶ The bill eliminates these requirements.

Current law also provides that in the event of a medical emergency that compels the performance of an abortion, the physician must note the medical emergency or necessity in the woman's medical record. It is an affirmative

⁶ *The meeting must be in an individual, private setting and the woman must be afforded an opportunity to ask questions about the abortion procedure. The physician must inform the woman of the type of abortion to be performed and the risks associated with the procedure, the probable gestational age of the embryo or fetus, and the medical risks associated with carrying a pregnancy to term. Current law also requires the physician performing the abortion, or the physician's agent, to contact the pregnant woman and inform her of the name of the physician scheduled to perform the abortion, give the woman certain informational materials about abortion and family planning, and inform the woman that the informational materials are provided by the state. The bill does not alter the Department of Health's duty to print the information materials. (R.C. 2317.56.)*

defense against liability if the physician performs an abortion without holding the required meeting and distributing the required literature if the abortion is performed because of a medical emergency or necessity. The bill eliminates these provisions.⁷

The bill retains the following provisions of the informed consent law:

(1) Requiring the Department of Health to publish informational materials regarding family planning;

(2) Requiring the Department of Job and Family Services to prepare and conduct a public information program to inform women about governmental programs and agencies that provide services or assistance for family planning, prenatal care, child care, or alternatives to abortion.

Civil actions for abortion-related acts

(R.C. 2305.11, 2317.56, and 2919.12)

Current law provides that a civil action for certain abortion-related acts,⁸ including performing an unlawful abortion, must be commenced within one year after the performance or inducement of the abortion or other relevant conduct.

The bill applies this statute of limitations to a civil action for facilitating an abortion (*see* "**Facilitating an abortion**" above). The bill also provides that the one-year statute of limitations applies to abortion-related acts committed before the bill's effective date.

⁷ Current law also provides that it is an affirmative defense that the physician made a good faith effort to satisfy the informed consent requirements or was unable to satisfy the literature requirement because the physician was unable to obtain copies of the literature from the Department of Health. The bill eliminates these affirmative defenses. (R.C. 2317.56.)

⁸ The bill applies the statute of limitations to the following acts: unlawful abortion; facilitating an abortion; failing to comply with the prescribed waiting period before an abortion and informed consent as that law existed prior to the bill's effective date (R.C. 2317.56); partial-birth abortion (R.C. 2307.53 and 2919.151); terminating or attempting to terminate a pregnancy after viability as that law existed prior to the bill's effective date (R.C. 2307.52); requiring an individual to perform or participate in an abortion (R.C. 4731.91); using public funds to perform an abortion or forcing someone to submit to an abortion (R.C. 5101.55).

Current law also provides that a physician who performs an abortion is liable to the woman receiving the abortion if the physician fails to obtain informed consent from the woman (*see* "**Pre-abortion procedures**" above). The bill amends this provision so that, regardless of whether the physician obtained informed consent, a physician who performs an abortion is liable to the pregnant woman, the father of the fetus or embryo, and the parents of the woman if the woman is a minor.

Current law excludes the employer of a physician from liability if the physician fails to comply with the informed consent requirements, with certain exceptions. The bill retains provisions of current law that exclude the employer from liability, but instead the exclusion applies if a physician performs an abortion, not just if the physician fails to comply with the informed consent requirements.

Use of public funds for insurance coverage of non-therapeutic abortions

(R.C. 124.85)

Current law provides that the funds of the state may not be expended directly or indirectly to pay the costs, premiums, or charges associated with a health insurance policy, contract, or plan that provides coverage, benefits or services related to a non-therapeutic abortion.⁹ This provision applies notwithstanding any other provision of Ohio law, and expressly prevails over conflicting provisions of any collective bargaining agreement between employee organizations and public employers. Current law does not preclude the state from expending funds to pay for a policy, contract, charges associated with a policy, or a plan that includes a rider under which an individual employee may obtain coverage for a non-therapeutic abortion. However, the individual covered must pay for all of the costs, premiums, or charges associated with the rider, including administrative expenses.

The bill prohibits the use of state funds to pay for health insurance policies, contracts, or plans that provide coverage, benefits, or services related to any type of abortion. The bill eliminates the provision of current law that allows individuals to obtain a rider under which the individual can obtain coverage for a non-therapeutic abortion. The bill retains the provision specifying that the prohibition on state funds paying for health insurance coverage of abortions prevails over collective bargaining agreements.

⁹ "Non-therapeutic abortion" means an abortion that is performed or induced when the life of the mother would not be endangered if the fetus were carried to term or when the pregnancy was not the result of rape or incest reported to a law enforcement agency.

Coverage of abortion under the Medicaid program or other publicly funded programs

(R.C. 5101.55)

Current law provides that state or local public funds may not be used to subsidize an abortion unless the abortion is necessary to preserve the life or physical or mental health of the pregnant woman. Also, no person may be ordered by a public agency or other individual to submit to an abortion.

Under the bill, state or local public funds may not be used to subsidize an abortion. Further, a public agency or individual that orders a pregnant woman to obtain an abortion is liable for civil compensatory and exemplary damages to the pregnant woman, the father of the fetus or embryo, and the pregnant woman's parents, guardians, or custodians if the pregnant woman was a minor at the time of the abortion. (See "**COMMENT 2**" below.)

Public Health Council rulemaking and enforcement

(R.C. 3701.341)

Current law requires the Public Health Council to adopt rules relating to abortions, including the following:

- (1) Post abortion procedures;
- (2) Reporting forms;
- (3) Pathological reports;
- (4) Humane disposition of the product of human conception;
- (5) Counseling.

The Director of Health is authorized to apply to the court of common pleas for a temporary or permanent injunction restraining a violation or threatened violation of the rules.

The bill eliminates the Council's rulemaking authority regarding abortion. The bill authorizes the Director to apply for an injunction if a person commits, or threatens to commit, any of the following offenses:

- (1) Unlawful abortion;
- (2) Unlawful distribution of an abortion-inducing drug;

- (3) Abortion manslaughter;
- (4) Abortion trafficking.

State Medical Board disciplinary actions

(R.C. 4731.22)

Under current law, the State Medical Board may take disciplinary action against physicians for any of the following reasons:

- (1) Violation of an abortion rule adopted by the Public Health Council (*see above*);
- (2) Failure to obtain informed consent from a pregnant woman prior to performing an abortion on the woman;
- (3) Performance or inducement of an abortion on a woman with actual knowledge that the physician has not complied with the informed consent conditions, such as providing educational materials, or with a heedless indifference as to whether those conditions have been satisfied.

The bill retains the Board's authority to act based on the listed conditions until the bill's effective date. The bill also authorizes the Board to take action if a physician violates an abortion-related law, such as performing an unlawful abortion, after the bill's effective date.

Ohio Civil Rights Commission--sex discrimination

(R.C. 4112.01)

Current law prohibits employers from discriminating against applicants or employees on the basis of sex, among other categories (R.C. 4112.02, not in the bill). For the purposes of civil rights law, "because of sex" and "on the basis of sex" include because of or on the basis of pregnancy, childbirth, or related medical conditions; women who are affected by these conditions must be treated the same for employment-related purposes. This provision must not be construed to mean that an employer has to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from the abortion. This provision also does not bar an employer from providing abortion benefits.

The bill retains the basic meaning of "because of sex" or "on the basis of sex," but removes the provisions regarding abortion benefits.

References to current law

The bill modifies several sections of current law to reflect that sections authorizing, regulating, or otherwise pertaining to the performance of abortions will no longer have legal effect. The substantive provisions of these sections are not new law, but are affected by other portions of the bill. In some cases, the provisions will be relevant only until the bill's effective date. With these changes, the bill does the following:

(1) Retains the law regarding records held by the State Medical Board regarding the provision of RU-486 prior to the bill's effective date (R.C. 2919.123(C)(1));

(2) Retains the requirement that physicians follow federal guidelines for the use of RU-486 and file the appropriate reports to the State Medical Board regarding the provision of RU-486 prior to the bill's effective date (R.C. 2919.123(B) and (C)(2));

(3) Provides that records pertaining to the former crime of unlawful performance of an abortion on a minor are not public records for the purpose of Ohio's public records law (R.C. 149.43);

(4) Provides that, for the purpose of the child abuse reporting requirements, attorney-client or physician-patient privilege is deemed to have been waived if, among other things, the relationship does not arise out of the client's or patient's attempt to have an abortion without notifying her parents, prior to the bill's effective date (R.C. 2151.421);

(5) Provides that a woman may request that a court reveal her identity only to the defendant and the court in a civil action related to any injury, death, or loss to person or property suffered as a result of the performance or attempted performance of an abortion prior to, on, or after the bill's effective date (R.C. 2307.46);

(6) Allows a woman to pursue a civil action against an individual who performed an abortion on the woman prior to the bill's effective date and failed to comply with the waiting period and informed consent requirements (R.C. 2307.52);

(7) Allows a woman, father of the child, or parent of a minor woman to pursue a civil action against an individual who performed an unlawful partial birth abortion prior to the bill's effective date (R.C. 2307.53);

(8) Provides that a court order determining the constitutionality of changes to R.C. 2919.16 (repealed by the bill) made by various acts of the General Assembly is a final order (R.C. 2505.02);

(9) Makes changes to cross references contained in R.C. 2919.24 and 2950.03.

COMMENT

1. Constitution

In 1973, the United States Supreme Court held that certain bans on abortion are unconstitutional (*Roe v. Wade*, (1973) 410 U.S. 113). The Court held that the right of personal privacy includes the right to terminate a pregnancy, subject to the state's interest in protecting the life and health of a pregnant woman and the developing embryo or fetus. The Court has upheld this general principle in subsequent cases (*Webster v. Reproductive Health Services*, (1989) 492 U.S. 49; *Planned Parenthood of Southeastern Pa. v. Casey*, (1992) 505 U.S. 833; *Stenberg v. Carhart*, (2000) 520 U.S. 914). Together, these cases have held the following:

(1) A prohibition on abortions performed must include an exception to preserve the life and health of the pregnant woman;

(2) A regulation or prohibition on abortion must not impose an "undue burden," or "a substantial obstacle in the path of a woman seeking an abortion," on a pregnant woman's right to obtain an abortion (*Casey*, 505 U.S. at 877).

2. Medicaid

Medicaid is a program funded by federal, state, and county governments that pays for medical services for individuals who meet certain eligibility criteria. As a condition of receiving federal Medicaid funds, Ohio must comply with any federal statutes or regulations regarding services covered by the Medicaid program. Under this federal law, the Medicaid program must fund abortions that are determined to be medically necessary. The scope of what is meant by "medically necessary abortions" is typically determined by an amendment to the Departments of Labor, Health and Human Services, and Education budget known as the Hyde Amendment, after its original sponsor, Representative Henry Hyde (see *Planned Parenthood Affiliates of Michigan v. Engler*, (6th Cir. 1996) 73 F.3d 634). For purposes of the Medicaid program for federal fiscal year 2006, an abortion is medically necessary and must be reimbursed by Medicaid if the pregnancy is the result of an act of rape or incest or the woman's life is at risk by continuing the pregnancy (H.R. 3010, Sec. 508, 109th Congress, 2005). The

federal government reimburses the state for nearly 60% of the cost of the state's Medicaid program.

3. The Privileges and Immunities Clause of the U.S. Constitution provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" (U.S. CONST. ART. IV, § 2). The U.S. Supreme Court has held that the citizen of one state is entitled to travel and "enjoy the 'Privileges and Immunities of Citizens in the several States' that [the citizen] visits" (*Saenz v. Roe*, 526 U.S. 489, 501 (1999)). The "right to travel" is "a right that has been firmly established and repeatedly recognized" (*United States v. Guest*, 383 U.S. 745, 757 (1966)).

The bill creates the offense of "facilitating an abortion," where a person (the transporter) is prohibited from transporting another person (the transportee), or causing another person to be transported, across state lines in order to facilitate the transportee obtaining an abortion (R.C. 2919.12(A)(2)). If the transporter takes the transportee to a state where abortion is legal, and the transporter is punished on returning to Ohio for "enjoying" the privileges and immunities enjoyed by citizens in the other state, such a law could be held to violate the federal Privileges and Immunities Clause by infringing on the transporter's right to travel.

HISTORY

ACTION	DATE
Introduced	04-28-05

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