



Ohio Legislative Service Commission

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Fiscal Note & Local Impact Statement

Bill: S.B. 72 of the 129th G.A.

Date: March 23, 2011

Status: As Introduced

Sponsor: Sen. Lehner

Local Impact Statement Procedure Required: No

Contents: To revise the criminal laws governing post-viability abortions

State Fiscal Highlights

- **Ohio Department of Health (ODH).** The bill will increase costs for ODH related to promulgating rules, compiling abortion reports, and issuing annual reports. If the bill would require ODH to carry out any enforcement duties, then costs would increase for this as well.
- **State Medical Board of Ohio.** The Board would likely experience an increase in administrative and possible investigative costs relating to license suspension provisions. It is expected that the costs would be minimal since the number of violations is anticipated to be small.

Local Fiscal Highlights

- **Government-owned hospitals.** Administrative costs for government-owned hospitals could increase as a result of the bill. However, costs should be minimal since a small percentage of abortions are performed in hospitals and it is assumed that a majority of those performed are medical emergencies.
- **Local courts.** As a result of any violations, additional misdemeanor and felony criminal cases may be generated for county and municipal criminal justice systems to process, potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court would generally impose court costs and fines to be paid by violators to help offset some of these costs.

Detailed Fiscal Analysis

The bill makes changes to the criminal laws governing post-viability abortions. The provisions with a fiscal impact are discussed below.

Affirmative defense for post-viability abortions

The bill establishes an affirmative defense to its prohibition against purposely performing or inducing or attempting to perform or induce an abortion on a woman when the unborn child is viable.

Under the bill, it is an affirmative defense to the post-viability abortion prohibition that the abortion was performed or induced or attempted to be performed or induced by a physician and that the physician determined, in the physician's good faith medical judgment and based on the facts known to the physician at that time, that either: (1) the unborn child was not viable or (2) the abortion was necessary to prevent the death of the pregnant woman or there existed a "serious risk of the substantial and irreversible impairment of a major bodily function" of the woman. Under the bill, because these conditions are affirmative defenses to the above prohibition, a physician can be charged with a violation of the prohibition and then has the burden of going forward with evidence of an affirmative defense and the burden of proof, by a preponderance of the evidence, for the affirmative defense.

Unless a medical emergency exists that prevents compliance, the affirmative defense is applicable only if the physician complies with six conditions. The conditions are specified in the bill, and including things such as: requiring certifications in writing stating that 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, requiring the abortion to be performed where there is an appropriate neonatal service, and requiring the attendance of at least one other physician who is to provide, among other things, medical care for the unborn child.

Viability testing

The bill prohibits a physician, except in the case of a medical emergency that prevents compliance, from performing or inducing or attempting to perform or induce an abortion on a pregnant woman after the beginning of the 20th week of gestation unless the physician determines that in the physician's good faith medical judgment the unborn child is not viable. The physician must make the determination after performing a medical examination of the pregnant woman and after performing or causing to be performed tests that assess gestational age, weight, lung maturity, or other tests that a reasonable physician would use to determine viability. These determination results must be entered into the woman's medical record.

Background information on abortions

According to ODH's 2009 report on "Induced Abortions in Ohio," 28,721 abortions were performed in Ohio in 2009. Of these abortions, 26,959, or 93.9%, were performed on Ohio residents. The majority of abortions (27,832 or 96.9%) were performed at 19 weeks of gestation or under. Approximately 2.1%, or 613 abortions, were performed at 20 weeks or over of gestation. Currently, induced abortions must be reported to ODH by the physician who performed the abortion. The report form filled out by the doctor does not provide for a reason for the abortion (e.g., medical emergency, fetal abnormality, etc.). The report includes a question relating to the medical condition of the woman at the time of the abortion. The available options are: good, fair, and other, which includes a space for a very brief explanation.

According to the Guttmacher Institute, in 2008, there were 1,793 abortion providers in the United States. Of these providers, 34% were hospitals, 21% were clinics where over one-half of patient visits were for abortion, 26% were clinics where less than half of visits were for abortion, and 19% were private physicians' offices. However, 70% of all abortions were provided at abortion clinics and 24% were performed at other clinics. The remainder were performed at hospitals (4%) and private physicians' offices (1%).

Fiscal impact

A government-owned hospital is a hospital that is owned by the state or a county. There are currently 20 such hospitals in Ohio. Administrative and medical service costs for these hospitals could increase as a result of the viability testing requirements and the requirements concerning the conditions that must be followed for an affirmative defense. However, costs should be minimal since a small percentage of abortions are performed in hospitals and it is assumed that a majority of those performed are medical emergencies. Additionally, it is likely that if additional medical services or tests were performed as a result of the bill, some costs would be paid for by the woman and/or her insurance.

Report to the Ohio Department of Health

The bill requires a physician who performs or induces or attempts to perform or induce an abortion to submit a report to the Ohio Department of Health (ODH) containing the information the physician is required to certify in writing or determine. Under the bill, a physician is required to submit the report within 15 days of a woman being discharged. If a report is not filed for 30 days after the 15-day deadline, the physician is subject to a late fee of \$500 for each additional 30-day period or portion of a period the report is overdue. ODH is required to issue a report detailing the information compiled during the previous calendar year and to provide statistics for each fiscal year by September 30th of each year. ODH is also required to adopt rules relating to the above requirements within 90 days of the effective date of the bill.

Fiscal impact

The bill will increase costs for ODH related to promulgating rules, compiling abortion reports, and issuing annual reports. Physicians who perform abortions must currently fill out a "Confidential Abortion Report" form and return the form to ODH. The form includes a number of general information questions about the woman, her medical history, and the medical procedure performed. In addition, physicians who provide care for post abortion complications must fill out a "Post Abortion Care Report for Complications" form. This information is currently compiled by ODH and released in an annual report. If existing staff and resources could be used to perform additional reporting requirements established by the bill, then this may help to offset some costs. However, if ODH is required to carry out any enforcement duties related to the bill (i.e., collecting late fees and monitoring compliance), then the costs would be higher. The bill would allow for the collection of fine revenues for filing the reports late. The bill does not specify where these fines would be deposited.

Penalties

The bill has a number of criminal and civil penalties associated with violations. A violation of the prohibition against purposely performing or inducing or attempting to perform or induce an abortion on a pregnant woman when the unborn child is viable would be a felony of the fourth degree. In addition, a violation of this prohibition would be cause for the State Medical Board of Ohio to revoke a physician's license to practice. Lastly, if a physician performs or attempts to perform or induce an abortion with actual knowledge that the bill's affirmative defenses are inapplicable or with heedless indifference to the applicability of affirmative defenses, he or she would be civilly liable for compensatory and exemplary damages and reasonable attorney's fees. The court would be permitted to award any injunctive or other equitable relief it considers appropriate.

If a physician fails to perform viability testing, the State Medical Board would be required to suspend a physician's license for a period of not less than six months. Additionally, a violation would be a misdemeanor of the fourth degree.

Under the bill, if a physician fails to comply with the reporting requirements or fails to submit a complete report more than one year after the 15-day deadline, the physician may be directed by a court of competent jurisdiction to submit a complete report or be subject to contempt of court. Additionally, a physician may be subject to disciplinary action by the State Medical Board.

Under the bill, if a person falsifies a report, he or she could be charged with a misdemeanor of the first degree.

Fiscal impact

As a result of any violations, additional misdemeanor and felony criminal cases may be generated for county and municipal criminal justice systems to process,

potentially increasing the costs to investigate, prosecute, adjudicate, and sanction violators. However, the court would generally impose court costs and fines to be paid by violators to help offset some of these costs. The number of possible cases that could be generated annually would likely be small. Therefore, any related fiscal effect on local criminal justice systems would be minimal at most. Dependent upon the number of successful prosecutions, the state could realize a gain in court cost revenues generated annually to the credit of the Indigent Defense Support Fund (Fund 5DY0) and the Victims of Crime/Reparations Fund (Fund 4020).

The State Medical Board would likely experience an increase in administrative and possible investigative costs related to the bill. However, it is assumed that the number of violators would be small. Thus, any increase in costs would be minimal.

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