Ohio Legislative Service Commission

Bill Analysis

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H.B. 78

129th General Assembly
(As Passed by the House)

Reps. Uecker and Roegner, J. Adams, Snitchler, Henne, Brenner, Beck, Boose, McClain, Grossman, Thompson, Stautberg, Martin, Huffman, Kozlowski, Dovilla, Derickson, Hall, Combs, Slaby, Hottinger, Goodwin, Carey, Maag, Gardner, Bubp, Hayes, Mecklenborg, Blessing, Young, Sears, Hackett, Butler, Johnson, Amstutz, Wachtmann, Blair, Schuring, Buchy, Gonzales, Newbold, Rosenberger, McKenney, Burke, R. Adams, Balderson, Conditt, Driehaus, C. Hagan, Peterson, Sprague, Batchelder

BILL SUMMARY

Post viability abortions

- Generally reinstates with modifications provisions regulating post-viability abortions held unconstitutional by federal court.

- Prohibits purposely performing or inducing or attempting to perform or induce an abortion on a pregnant woman carrying a viable unborn child.

- Provides affirmative defenses to a charge that a physician terminated or attempted to terminate a human pregnancy after viability based on the nonviability of the unborn child and protecting the life and health of the pregnant woman.

- Conditions the applicability of the affirmative defense based on protecting the life or health of the pregnant woman on all of the following:

  --The physician certifies in writing the available methods or techniques considered and the reasons for choosing the method or technique employed.

  --The abortion is performed or induced or attempted in a facility with appropriate neonatal services for premature infants and generally in a manner that provides the best opportunity for the unborn child to survive.

  --An additional physician provides an additional determination as to the necessity of the post-viability abortion, and that physician is not

professionally related to the physician who intends to perform or induce the abortion.

- Provides that the physician's good faith medical judgment used in making medical determinations pertaining to post-viability abortions must be based on the facts known to the physician at that time.

- Requires the Medical Board to revoke a physician's license to practice medicine if the physician violates the provisions governing post-viability abortions.

- Imposes civil liability on a physician who performs or induces or attempts to perform or induce a post-viability abortion, conditioned on the physician having actual knowledge that the applicable affirmative defenses are not applicable or with heedless indifference as to whether the defenses are applicable and permits courts in such actions to award injunctive or other appropriate equitable relief.

Viability testing requirements

- Prohibits, except in a medical emergency, an abortion after the 20th week of gestation unless the physician determines, in the physician's good faith medical judgment, that the unborn child is not viable after performing required tests to determine the unborn child's viability.

- Requires the physician to enter the determination and tests described in the prior dot point in the pregnant woman's medical record.

- Requires the Medical Board to suspend for a period of not less than six months a physician's license to practice medicine if the physician violates the provisions governing viability testing.

Abortion reporting requirements

- Requires a physician who performs or induces or attempts to perform or induce an abortion to submit a report with certain specified information to the Department of Health within 15 days after the woman is discharged and provides for certain penalties if the physician fails to submit a report within a certain period of time or in accordance with a court order.

- Provides that if a physician fails to comply with the reporting requirements described in the previous dot point the physician is subject to disciplinary action by the State Medical Board.

- Prohibits a person from falsifying any required report and provides that whoever violates this prohibition is guilty of abortion report falsification, a misdemeanor of the first degree.

- Requires the Department of Health to annually issue a public report that provides statistics from compiled reports for the previous calendar year that include all of the information a physician is required to certify in writing or determine under the bill.

- Requires that the annual report issued by the Department of Health provide the statistics for each previous calendar year in which a report was filed, adjusted to reflect any additional information that a physician provides to the Department.

- Requires that the Department of Health ensure that none of the information included in the annual report could reasonably lead to the identification of any pregnant woman upon whom an abortion is performed.

- Requires the Department of Health to adopt rules to assist in compliance with the bill's reporting requirements within 90 days of the effective date of the bill.

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CONTENT AND OPERATION

Necessity of the repeal and reenactment of the statutes governing post-viability abortions

The statutes governing post-viability abortions and viability testing enacted by Sub. H.B. 135 of the 121st General Assembly were held to be unconstitutional in *Women's Medical Professional Corp. v. Voinovich* (1995), 911 F.Supp. 1051, *affirmed* (6th Cir. 1997) 130 F.3d 187, *cert. denied* (1998) 523 U.S. 1036. Statutes held unconstitutional by the courts "remain null and of no effect absent an affirmative act of the General Assembly." The bill's repeal and reenactment with modifications of the statutes appears

to be an affirmative act of the General Assembly to indicate the General Assembly's intent to revive the statutes with amendments. (See *Ohio v. Hodge* (2010), Slip opinion No. 2010-Ohio-6320.) The repeal of a statute, as done in the bill, is an affirmative act and supports a bill's reenactment of a statute previously found unconstitutional.

The bill repeals two sections enacted by H.B. 135 and enacts two substantially similar sections. There are some structural differences between the sections enacted and those repealed by the bill. There are also some substantive differences. Despite the differences between the sections enacted and those repealed by the bill, the repeal and reenactment of those sections could be interpreted as an affirmative action by the General Assembly that makes the statutes that were found to be unconstitutional once again effective.

The analysis first will review the differences between the statutes enacted and those repealed by the bill. This review will include a review of the bill's amendment to three related R.C. sections that have not been found to be unconstitutional (current law). The analysis then will review those provisions of the statutes enacted that are very similar to the post-viability abortion statutes held unconstitutional and repealed by the bill ("current version of the section") but that are not covered as part of the analysis's review of the differences between the statutes enacted by the bill and the current version of the section.

Affirmative defenses to criminal charge based on conducting a post-viability abortion

The bill establishes "affirmative defenses" to its prohibition against purposely performing or inducing or attempting to perform or induce an abortion on a pregnant woman when the "unborn child" is viable (the current version of the section uses the term "unborn human," which is a defined term: the bill changes the defined term "unborn human" to "unborn child," but it does not change the definition of the term). The prohibition in the bill is the same as in the current version of the section. A violation of the prohibition is the offense of "terminating or attempting to terminate a human pregnancy after viability," a felony of the fourth degree (the bill is the same as the current version of the section) (hereafter "post-viability abortion prohibition").[1]

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

[1] R.C. 2929.17(A), (B), and (F).

the death of the pregnant woman or there existed a "serious risk of the substantial and irreversible impairment of a major bodily function" (see definition below) of the woman.[2] The current version of the section provides that these two conditions are exceptions to the prohibition rather than affirmative defenses. Under the bill, because these conditions are affirmative defenses to the above prohibition, a physician can be charged with a violation of the above 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.[3] Under the current version of the section, since these conditions are exceptions to the prohibition, if a physician is charged with the prohibition, the prosecution has the burden of proof, by proof beyond a reasonable doubt, with respect to these conditions.

The bill's provision establishing affirmative defenses requires a physician to make the determination as to the applicability of the circumstances supporting either affirmative defense in "good faith medical judgment, based on the facts known to the physician at that time."[4] "Good faith medical judgment, based on the facts known to the physician at that time" is used three more times in the bill's conditions for establishing the affirmative defense based on protecting the woman's health and is used in the definition of "medical emergency."[5] "Good faith medical judgment" is also used in the bill in connection with viability testing and in establishing the affirmative defense based on the unborn child not being viable.[6] The current version of the section requires the physician to make the determinations as to whether performing or inducing an abortion would fall within the exceptions to the prohibition in "good faith and in the exercise of reasonable medical judgment."[7] The current version of the section does not refer to "facts known to the physician at that time."

Conditions applicable to the affirmative defense based on woman's health

Unless a medical emergency exists that prevents compliance, the affirmative defense available to a physician based on a post-viability abortion being necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function ("to protect the health of the

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[2] R.C. 2919.17(B).

[3] R.C. 2901.05(A).

[4] R.C. 2919.17(B)(1).

[5] R.C. 2919.17(D)(1), (2), and (4) and 2919.16(F).

[6] R.C. 2919.17(C) and 2919.18(A).

[7] Current R.C. 2919.17(A).

pregnant woman") is applicable only if the physician complies with six specified conditions (see "**Provisions of the current version of sections generally reinstated by the bill**" below).

The six conditions generally are those that must be satisfied under the current version of the section to avoid prosecution under a second prohibition in the current version of the section that prohibits a post-viability abortion when there is a medical emergency unless each of five conditions are complied with. However, the bill provides in the second of those conditions that the physician who provides the additional medical determination of the necessity of a post-viability abortion that is required under the bill must not be professionally related to the physician who intends to perform or induce the abortion. The current version of the section does not speak to the physician's professional relationship to the concurring physician. The bill also requires in the fifth of those conditions a physician who intends to perform or induce a post-viability abortion to certify in writing the available methods or techniques considered and the reasons for choosing the method or technique employed. This certification is not required under the current version of the section.[8]

Mental health as a consideration

The bill provides that a post-viability abortion cannot be considered necessary to protect the health of the pregnant woman, for purposes of establishing an affirmative defense, on the basis of a claim or diagnosis that a woman will engage in conduct that would result in the woman's death or a substantial and irreversible impairment of a major bodily function or based on any reason related to the woman's mental health.[9] The current version of the section dealing with post-viability abortions does not refer to the pregnant woman's mental health.

The bill defines "serious risk of the substantial and irreversible impairment of a major bodily function" as a medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function (current law). Under the bill, a medically diagnosed condition that constitutes such a serious risk includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes and may include, but is not limited to, diabetes and multiple sclerosis but does not include a condition related to the woman's mental health. Conditions related to a woman's mental health was not specifically excluded from the definition under the current law. The definition otherwise refers to the same medical conditions as the definition in

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[8] R.C. 2919.17(D)(2) and (5).

[9] R.C. 2919.17(B)(2).

current law, except, with reference to diabetes and multiple sclerosis that *may* be included, in contrast to the current law that expressly includes these two conditions.[10]

Viability testing requirements

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 prior to the procedure 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 those tests for assessing gestational age, weight, lung maturity, or other tests that a reasonable physician would perform or cause to be performed in determining whether the unborn child is viable. The bill also prohibits the 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* without first entering the results of the determination of viability and the associated medical findings of the medical examination and tests in the woman's medical record. A violation of either of these prohibitions is the offense of "failure to perform viability testing," a misdemeanor of the fourth degree, which are the same as in the current version of the section. The provisions on viability testing are substantively the same as the current version of the section, but the current version of the section uses "*pregnancy*" rather than *gestation* in connection with the requirements. The bill defines "gestation" to have the same meaning as "gestational age" under current law and defines "pregnancy" as the condition of being pregnant.[11]

Revocation or suspension of physician's license

The bill requires the Medical Board to revoke a physician's license to practice medicine in Ohio if a physician commits the offense of terminating or attempting to terminate a human pregnancy after viability. It requires the Board to suspend a physician's license to practice medicine in Ohio for a period of not less than six months if the physician commits the offense of failure to perform viability testing.[12] The current version of the section does not discuss the revocation or suspension of the physician's license for the commission of either of these offenses.

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[10] R.C. 2919.16(K).

[11] R.C. 2919.18 and 2919.16(B) and (I).

[12] R.C. 2919.17(G) and 2919.18(D).

Civil liability

The bill provides that any physician who performs or attempts to perform or induce an abortion with actual knowledge that the bill's affirmative defenses (see above, "**Affirmative defenses to criminal charge based on conducting a post-viability abortion**") are inapplicable, or with heedless indifference to whether the affirmative defenses are applicable, is liable in a civil action for compensatory and exemplary damages and reasonable attorney's fees to any person, or the representative of the person's estate, who sustains injury, death, or loss to person or property as a result of the physician's actions. In the action, the court also may award any injunctive or other equitable relief that the court considers appropriate.[13]

The current version of the section does not contain a similar civil liability provision in the post-viability abortion laws, but current law does contain similar provisions in the law governing civil actions. The law provides that a woman upon whom an abortion is purposely performed or induced or attempted to be performed or induced in violation of the current version of the section on post-viability abortion has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized, and court costs and reasonable attorney's fees against the person who purposely performed or induced or attempted to perform or induce the abortion in violation of the law on post-viability abortions. Since there are two prohibitions under the current version of the section, there are two civil action provisions in current law. The bill repeals one of the provisions and retains one that refers to the prohibition in the bill.[14]

Provisions of the current version of sections generally reinstated by the bill

The bill contains additional provisions, not discussed previously in this analysis, that are substantively the same as or very similar to current law.

The bill specifies that except when a medical emergency exists that prevents compliance with the bill's viability testing requirements (see "**Viability testing requirements**" above) the affirmative defense based on protecting the health of the pregnant woman does not apply unless the physician who performs or induces or attempts to perform or induce the abortion complies with all of the following (five of the six are the same conditions required for a physician under the current version of the section to perform or induce a post-viability abortion):[15]

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[13] R.C. 2919.17(H).

[14] R.C. 2307.52(B).

[15] R.C. 2929.17(D)(1), (2), (3), (4), (5), and (6).

(1) The physician who performs or induces or attempts to perform or induce the abortion must certify in writing that in the physician's "good faith medical judgment, based on the facts known to the physician at that time," 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.

(2) Another physician who is not professionally related to the physician who intends to perform or induce the abortion certifies in writing that, in the physician's "good faith medical judgment, based on the facts known to that physician at the time" 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. Current law requires this physician to make this determination in good faith, in the exercise of reasonable medical judgment and following a review of the available medical records and any available tests results pertaining to the pregnant woman.

(3) The physician must perform or induce or attempt to perform or induce the abortion in a hospital or other health care facility that has appropriate neonatal services for premature infants.

(4) The physician who performs or induces or attempts to perform or induce the abortion must terminate or attempt to terminate the pregnancy in the manner that provides the best opportunity for the unborn child to survive, unless that physician determines, in the physician's "good faith medical judgment based on the facts known to the physician at that time," that the termination of the pregnancy in that manner poses a greater risk of the death of the pregnant woman or a greater risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman than would other available methods of abortion.

(5) The physician certifies in writing the available method or techniques considered and the reasons for choosing the method or technique employed (no similar provision in the current version of the section).

(6) The physician who performs or induces or attempts to perform or induce the abortion must arrange for the attendance in the same room in which the abortion is to be performed or induced or attempted to be performed or induced of at least one other physician who is to take control of, provide immediate medical care for, and take all reasonable steps necessary to preserve the life and health of the unborn child immediately upon the child's complete expulsion or extraction from the pregnant woman.

The bill states that for purposes of the R.C. section dealing with post-viability abortions that there is a rebuttable presumption that an unborn child of at least 24 weeks of gestational age is viable. (This provision is the same as the current version of the section.)[16]

"Viable" is defined in current law and not changed by the bill as the state of development of a human fetus in which in the determination of the physician, based on the facts of the 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 maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.[17]

The bill provides that a pregnant woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of the prohibition on post-viability abortions is not guilty of violating the prohibition or of attempting to commit, conspiring to commit, or complicity in committing a violation of that prohibition. This provision is the same as the current version of the R.C. section dealing with post-viability abortions.[18]

The bill defines "medical emergency" as a condition that in the physician's good faith medical judgment, *based on the facts known to the physician* at that time, so complicates the woman's pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.[19]

Report to Department of Health

The bill requires a physician who performs or induces or attempts to perform or induce an abortion on a pregnant woman to submit a report to the Department of Health in accordance with the forms, rules, and regulations adopted by the Department that includes all of the information the physician is required to certify in writing or determine under R.C. 2919.17 and 2919.18 (see "**Viability testing requirements**" and

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[16] R.C. 2919.17(E).

[17] R.C. 2919.16(M).

[18] R.C. 2929.17(I).

[19] R.C. 2919.16(F).

"**Provisions of the current version of sections generally reinstated by the bill**," above).[20]

The physician must submit that report to the Department within 15 days after the woman is discharged. If the physician fails to submit the report more than 30 days after that 15-day deadline, the physician is subject to a late fee of $500 for each additional 30-day period or portion of a 30-day period the report is overdue. A physician who is required to submit a report to the Department and who has failed to submit a report or has submitted an incomplete report more than one year following the 15-day deadline may, in an action brought by the Department, be directed by a court of competent jurisdiction to submit a complete report to the Department within a period of time stated or a court order or be subject to contempt of court.[21] If a physician fails to comply with these requirements, other than filing a late report with the Department, or fails to submit a complete report to the Department in accordance with a court order, the physician is subject to disciplinary action by the State Medical Board.[22]

Existing law requires the State Medical Board, by an affirmative vote of not fewer than six members, to the extent permitted by law, to limit, revoke, or suspend an individual's certificate to practice, refuse to register an individual, refuse to reinstate a certificate, or reprimand or place on probation the holder of a certificate for certain specified reasons. The bill includes as one of these reasons the individual's failure to comply with the requirements described above or failure to submit to the Department in accordance with a court order a complete report as described above.[23]

Under the bill a person is prohibited from falsifying any required report. Whoever violates this prohibition is guilty of abortion report falsification, a misdemeanor of the first degree.[24]

Public report issued by the Department of Health

The bill requires that, by September 30 of each year, the Department of Health issue a public report that provides statistics for the previous calendar year compiled from all of the reports covering that calendar year that include all of the information the physician is required to certify in writing or determine, as described above in "**Viability**

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[20] R.C. 2919.171(A).

[21] R.C. 2919.171(C)(1).

[22] R.C. 2919.171(C)(2).

[23] R.C. 4731.22(B)(41).

[24] R.C. 2919.171(C)(3).

testing requirements" and "**Provisions of the current version of sections generally reinstated by the bill**." The report must also provide the statistics for each previous calendar year in which a report was filed with the Department, adjusted to reflect any additional information that a physician provides to the Department in a late or corrected report. The Department must ensure that none of the information included in the report could reasonably lead to the identification of any pregnant woman upon whom an abortion is performed.[25]

Adoption of rules by the Department of Health

The bill requires the Department of Health to adopt rules pursuant to R.C. 111.15 to assist in compliance with the requirements described above within 90 days of the effective date of the provisions described above.[26]

HISTORY

ACTION	DATE
Introduced	02-01-11
Reported, H. Health & Aging	03-17-11
Passed House (65-33)	06-28-11

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[25] R.C. 2919.171(B).

[26] R.C. 2919.171(D).