



Ohio Legislative Service Commission

Bill Analysis

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H.B. 200

130th General Assembly
(As Introduced)

Reps. Hood, Beck, Young, Huffman, Becker, Terhar, Hill, Blessing, Roegner, Maag, Hottinger, Brenner, Burkley, Schuring, Buchy, Boose, Hayes, J. Adams, Butler, Lynch, Retherford, Stautberg, Thompson, Wachtmann, Blair, Hall, Henne, McClain, Rosenberger, Slaby, Sprague, Johnson, Smith, Scherer, Romanchuk

BILL SUMMARY

- Increases the mandatory waiting period before an abortion may be performed or induced from 24 hours to 48 hours.
- Repeals the medical necessity exception to the waiting period and notification requirements but retains a revised exception for medical emergencies.
- Requires that a physician inform the pregnant woman of specified medical risks associated with the abortion procedure, including the increased risk of breast cancer.
- Requires a physician to provide the pregnant woman with a conflict of interest disclaimer.
- Requires a physician to perform an ultrasound and describe all relevant features of the ultrasound, including any audible heartbeat.
- Permits the pregnant woman to refuse to listen to the fetal heart monitor or view the ultrasound images.
- Requires a physician to inform the pregnant woman whether she has a viable pregnancy.
- If the pregnancy is not viable, generally requires that the physician advise the pregnant woman that she will suffer a miscarriage with no further intervention.
- Requires the physician to provide the pregnant woman with a list of all known obstetric ultrasound providers within a specified radius.

- Requires the physician to describe the development of fetal nerve endings and the ability of the fetus to feel pain at each stage of development.
- Requires a physician to provide the pregnant woman with a statement that she is free to withdraw her consent at any time without affecting her right to future care and without the loss of any state or federal benefits.
- Requires that the physician scheduled to perform or induce the abortion provide, under oath and penalty of perjury, a signed statement that the physician has complied with the bill's requirements.
- Establishes new criminal penalties (a felony of the first degree and fine of up to \$1 million) for failure to satisfy the bill's waiting period and notification requirements.

CONTENT AND OPERATION

Informed consent generally

The bill makes a number of changes to the law governing informed consent for abortion procedures.

Ohio law prohibits a person from performing or inducing an abortion without the informed consent of the pregnant woman.¹ Whoever performs an abortion without obtaining informed consent is guilty of unlawful abortion, a misdemeanor of the first degree on a first offense, and a felony of the fourth degree on each subsequent offense, and is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.²

Before performing an abortion, a physician must satisfy several conditions, including meeting with the pregnant woman at least 24 hours before the procedure, providing informational materials published by the state, and receiving a signed statement from the woman consenting to the procedure. The criminal penalties for unlawful abortion (described above) do not apply to physicians who fail to satisfy these conditions, but they remain civilly liable and subject to disciplinary action by the State Medical Board.³ Current law includes exceptions to the waiting period and notification requirements in cases of medical emergency or medical necessity.

¹ R.C. 2919.12(A) (not in the bill).

² R.C. 2919.12(D) and (E) (not in the bill). Exemplary damages are often referred to as punitive damages.

³ R.C. 2317.56(H) and 4731.22.

Mandatory waiting period and conditions before abortion may be performed or induced

The bill increases from 24 to 48 hours the waiting period before an abortion may be performed or induced. It places additional conditions on a physician or physician's agent during this time period. Except where noted, the bill requires that the conditions described below be satisfied at least 48 hours before the abortion procedure.

In-person meeting

Under the bill, at least 48 hours before an abortion is performed, a physician must meet with the pregnant woman in an individual, private setting and give her an opportunity to ask questions about the procedure. Current law requires that the meeting take place at least 24 hours before the performance or inducement of an abortion. The meeting need not occur at the facility where the abortion is to be performed or induced, and the physician involved in the meeting need not be affiliated with that facility or with the physician who is scheduled to perform the abortion.⁴

At the meeting, current law requires that the physician inform the woman of the probable gestational age of the embryo or fetus, the nature and purpose of the particular abortion procedure to be used, and the medical risks associated with that procedure and carrying the pregnancy to term.⁵ While existing law requires that a physician inform the pregnant woman verbally, under the bill, the physician also must provide this information in writing. If a pregnant woman is hearing impaired, then the physician must inform the woman by other means of communication as well as in writing.

With respect to the medical risks associated with the abortion procedure, the bill specifically requires that a physician inform the pregnant woman of the following:

- (1) The risk of infection, hemorrhage, or cervical or uterine perforation;
- (2) The risk of infertility;
- (3) The risk to subsequent pregnancies;
- (4) The increased risk of breast cancer.

⁴ R.C. 2317.56(B)(1).

⁵ R.C. 2317.56(B)(1).



The bill also requires the physician to inform the pregnant woman of the probable anatomical and physiological characteristics of the embryo or fetus at that gestational age.

Mandatory ultrasound

The bill requires that at least one physician or physician's agent perform an obstetric ultrasound examination that portrays the entire body of the embryo or fetus.⁶ A physician or physician's agent also must provide the pregnant woman with all of the following:

(1) A verbal description of all relevant features of the ultrasound, including an audible heartbeat, if present. The bill does not specify which features of an ultrasound (other than the heartbeat) are relevant.

(2) Upon request and at no additional charge, a physical picture of the ultrasound image of the embryo or fetus of a quality consistent with current standard medical practice. Current law repealed by the bill requires that, if an ultrasound is performed prior to an abortion, the physician must give the pregnant woman the opportunity to view the active ultrasound image of the embryo or fetus and offer the pregnant woman a picture of the ultrasound image at no additional charge.⁷

(3) A written document and verbal description stating whether or not the pregnant woman has a viable pregnancy, the location of the fetal sac, and the presence or absence of cardiac activity within the fetal sac. The bill defines "viable pregnancy" as a pregnancy in which a fetal sac is located inside the pregnant woman's uterus and fetal cardiac activity is present within the fetal sac.⁸ The bill's definition of viable pregnancy applies only to the Revised Code section that relates to the mandatory 48-hour waiting period and notifications. It does not extend to restrictions on post-viability abortion, which define viability differently.⁹

(4) If the pregnancy is not a viable pregnancy, the physician (and not the physician's agent) must advise the pregnant woman that she will suffer a miscarriage with no further intervention unless the physician has evidence to the contrary.

⁶ R.C. 2317.56(B)(2)(e).

⁷ R.C. 2317.561 (repealed by the bill).

⁸ R.C. 2317.56(A)(4).

⁹ See R.C. 2919.16(M) (not in the bill).

(5) A list of all known obstetric ultrasound providers within a ten-mile radius of the physician who intends to perform or induce the abortion or, if there is no such provider within that ten-mile radius, a list of all known obstetric ultrasound providers within a 50-mile radius of the physician who intends to perform or induce the abortion.¹⁰

The bill requires that the foregoing information be provided to the pregnant woman in a private room with sufficient time for the pregnant woman to ask questions and receive answers. If the pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.¹¹

The bill further provides that a pregnant woman is not prohibited from refusing to listen to the sounds detected by a fetal heart monitor or refusing to view the images displayed by the obstetric ultrasound examination.¹²

Disclosure about fetal pain

The bill requires that a physician or physician's agent describe the development of nerve endings of the embryo or fetus and the ability of the embryo or fetus to feel pain at each stage of development.¹³ The description must be provided to the pregnant woman in a private room with sufficient time for questions and answers. If the pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.¹⁴

Conflict of interest disclaimer

Under the bill, a physician or physician's agent must provide the pregnant woman with a conflict of interest disclaimer.¹⁵ The bill defines "conflict of interest disclaimer" as a written statement divulging the following information:

(1) The previous year's gross income of a physician who performs or induces an abortion or of a facility where an abortion is performed or induced;

¹⁰ R.C. 2317.56(B)(2)(e).

¹¹ R.C. 2317.56(C).

¹² R.C. 2317.56(B)(3).

¹³ R.C. 2317.56(B)(2)(f).

¹⁴ R.C. 2317.56(C).

¹⁵ R.C. 2317.56(B)(2)(d).

(2) The percentage of that income that was obtained as fees for the performance of an abortion;

(3) The monetary loss to the physician or facility that would result from the woman's decision to carry the pregnancy to term.¹⁶

The bill requires that the disclaimer be provided in a private room and that the pregnant woman be allowed sufficient time to ask questions and receive answers that she can understand. If the pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.¹⁷

Other information and materials to be provided

Under the bill, at least 48 hours before the abortion is performed or induced, a physician or physician's agent must satisfy the following conditions that current law requires be satisfied at least 24 hours before the abortion procedure:

(1) Inform the woman of the name of the physician scheduled to perform the procedure;

(2) Give the woman informational materials published by the Department of Health (ODH) regarding pregnancy and family planning;

(3) Inform the woman that the informational materials are provided by the state and that the materials describe the embryo or fetus and list agencies that offer alternatives to abortion.

With respect to the materials published by ODH, under current law unchanged by the bill, the woman is not required to examine them. The physician or physician's agent may choose to be disassociated from the materials and may choose whether to comment on them.¹⁸

Under current law, the foregoing information must be given in person, by telephone, or by certified or registered mail. The bill also requires that the information be provided in a private room with sufficient time to ask questions and receive answers that the woman can understand. If the pregnant woman is unable to read materials

¹⁶ R.C. 2317.56(A)(3).

¹⁷ R.C. 2317.56(C).

¹⁸ R.C. 2317.56(B)(2).

provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.¹⁹

Impact on future care or benefits

Under the bill, a physician or physician's agent must provide the pregnant woman with a statement that she is free to withhold or withdraw her consent to the abortion at any time without affecting her right to care or treatment in the future and without the loss of any state or federal benefits to which she may otherwise be entitled. The statement must be provided to the pregnant woman in a private room with sufficient time for questions and answers. If the pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.²⁰

Other material information

The bill requires that a physician or physician's agent provide the pregnant woman with any other medical or other information that a reasonable person would consider material to the decision of whether or not to have an abortion.²¹ This information must be provided to the pregnant woman in a private room with sufficient time for questions and answers. If the pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.²² (See **Comment 3**.)

Pregnant woman's signed consent

The bill imposes an additional requirement concerning the consent form a pregnant woman must sign before the performance or inducement of an abortion. Under current law, before an abortion, the pregnant woman must certify on a consent form that she has received certain materials and information, that her questions have been answered in a satisfactory manner, and that she knowingly and voluntarily consents to the particular abortion. The physician who performs the abortion or the physician's agent must receive a copy of this form before performing the abortion.²³ The bill requires that consent be provided and received in a private room with sufficient time to ask questions and receive answers that the woman can understand. If the

¹⁹ R.C. 2317.56(C).

²⁰ R.C. 2317.56(C).

²¹ R.C. 2317.56(B)(2)(h).

²² R.C. 2317.56(C).

²³ R.C. 2317.56(B)(4).

pregnant woman is unable to read materials provided to her, they must be read to her and, if necessary, explained in a way that is understandable to her.²⁴

Physician's compliance statement

The bill directs that, before the abortion, the physician scheduled to perform or induce the abortion must provide (under oath and penalty of perjury) a signed statement that the physician has satisfied certain requirements, such as the mandatory ultrasound, fetal pain disclosure, conflict of interest disclaimer, and other required disclosures.²⁵ However, both the bill and current law allow for another physician or physician's agent to satisfy some of these requirements.

Photographs included on ODH web site

Under the bill, materials that ODH must make available on its web site that inform the pregnant woman of probable anatomical and physiological characteristics of the fetus at specific gestational increments must include color photographs.²⁶ ODH is required by existing law to make certain materials available on its web site, including materials that inform the pregnant women about:

- Family planning information;
- Public and private agencies and services available to assist her through the pregnancy, upon childbirth, and while the child is dependent, including adoption agencies;
- Fetal development.

The materials must be published in English, in a clearly legible typeface, and in an easily comprehensible format.

Prohibition on advance payment

The bill prohibits a physician from accepting payment or requiring payment before the 48-hour waiting period has expired and before the physician fulfills the bill's requirements.²⁷

²⁴ R.C. 2317.56(C).

²⁵ R.C. 2317.56(B)(6).

²⁶ R.C. 2317.56(D)(2).

²⁷ R.C. 2317.56(L).

Criminal penalties for violation of waiting period and notification requirements

The bill establishes criminal penalties for failing to comply with the waiting period and notification requirements. These penalties are distinct from the penalties retained under existing law that apply to an abortion performed without informed consent (a first degree misdemeanor on a first offense and a fourth degree felony on subsequent offenses).²⁸

Under the bill, a person who performs or induces an abortion in violation of the bill's waiting period and notification requirements is guilty of a felony of the first degree, punishable by a prison term of three to eleven years and a fine of up to \$1 million (rather than the standard fine for first degree felonies of not more than \$20,000).²⁹ Under continuing law, the failure of a physician to satisfy the notification conditions before performing or inducing an abortion may be the basis for a civil action for compensatory and exemplary damages as well as discipline by the State Medical Board.³⁰

Exceptions to the waiting period and notification requirements

The bill repeals the medical necessity exception to the waiting period and notification requirements. The bill also revises the existing definition of "medical emergency." Under current law, an abortion may be performed or induced only if certain conditions are satisfied during the waiting period, except in the case of a medical emergency or medical necessity.

Under the bill, an abortion may be performed or induced without satisfying the waiting period and notification requirements only in the event of a medical emergency. The bill defines "medical emergency" as a condition of a pregnant woman that, in the reasonable judgment of the physician who is attending the woman, so complicates the medical condition of the woman that the death of the woman would result from the failure to immediately terminate the pregnancy.³¹

In contrast, current law defines "medical emergency" as a condition of the pregnant woman that, in the reasonable judgment of the physician who is attending the woman, creates an immediate threat of serious risk to the life or physical health of the

²⁸ R.C. 2919.12(D) (not in bill).

²⁹ R.C. 2317.56(I).

³⁰ R.C. 2317.56(H).

³¹ R.C. 2317.56(A)(1).



woman from the continuation of the pregnancy necessitating the immediate performance or inducement of an abortion. Current law (repealed by the bill) defines "medical necessity" as a medical condition of a pregnant woman that, in the reasonable judgment of the physician who is attending the woman, so complicates the pregnancy that it necessitates the immediate performance or inducement of an abortion.³²

The bill's definition of "medical emergency" applies only to the Revised Code section that relates to the mandatory 48-hour waiting period and notifications. It does not extend to restrictions on post-viability abortion, which define medical emergency differently.³³

COMMENT

1. In the 1992 United States Supreme Court case *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld a woman's right to terminate her pregnancy, but concluded that truthful and nonmisleading informed consent was constitutionally permissible.³⁴ The Court concluded that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."³⁵ The Court recognized that mandated statements need not be restricted to information related to the medical procedure or carrying the fetus to term, but instead could include information regarding fetal development.³⁶

In 2007, the Supreme Court again addressed the issue of informed consent in the abortion context. In *Gonzales v. Carhart*, the Court upheld the federal Partial Birth Abortion Act of 2003.³⁷ Justice Kennedy, writing for the majority, stated that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman."³⁸ The Court discussed informed consent in the context of a medical preference not to disclose the details of the abortion procedure to women who are already in distress. The Court stated that the lack of information was of great

³² R.C. 2317.56(A).

³³ See R.C. 2919.16(F) (not in the bill).

³⁴ 505 U.S. 833 (1992).

³⁵ *Casey* at 877-878.

³⁶ *Casey* at 882-883.

³⁷ 550 U.S. 124 (2006).

³⁸ *Carhart* at 157.

concern to the state by noting that "[t]he state has an interest in ensuring so grave a choice is well informed."³⁹

Since *Gonzales*, a number of states have expanded existing statutes to require that physicians include specific speech, must perform ultrasounds, or make the fetal heartbeat audible. These enactments have resulted in extensive litigation to further clarify how informed consent applies in an abortion context, with various parties arguing that the new statutes require the distribution of false and misleading information to women and are an undue burden on a woman's right to choose, while others argue that the laws are necessary to protect fetal life and ensure that the women are fully aware of the risks associated with their decision, including psychological impact.⁴⁰

2. Compelled speech implicates a physician's First Amendment right not to speak, and the Supreme Court historically has taken a dim view of content-based speech compelled by the state, finding such requirements to be presumptively invalid.⁴¹ Some state statutes have been challenged on these grounds;⁴² however, in *Casey*, the Court found no violation of the physician's First Amendment rights when physicians merely were required to give truthful, nonmisleading information relevant to the patient's decision to have an abortion.⁴³

3. As noted above (see "**Other material information**"), the bill requires that a physician or physician's agent provide the pregnant woman with any other medical or other information that a reasonable person would consider material to the decision of whether or not to have an abortion; however, it does not specify what this information includes.⁴⁴ Some abortion statutes have been challenged on the grounds that the statute is unconstitutionally vague. The "void for vagueness" doctrine generally requires that a statute, particularly one that includes criminal penalties, define the prohibited conduct

³⁹ *Carhart* at 160.

⁴⁰ *Planned Parenthood Minn. v. Rounds*, 686 F.3d 889 (8th Cir. 2012); *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood of Ind. v. Comm'r of the Ind. State Dept. of Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011) (appealed on other grounds at 699 F.3d 962 (7th Cir. 2012), cert den. 2013 U.S. LEXIS 4013 (May 28, 2013)); *Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025 (Neb. 2010) (appealed on other grounds at 664 F.3d 716 (8th Cir. 2011), cert den. *Nebraskans United for Life v. Planned Parenthood*, 2012 U.S. LEXIS 7596 (October 1, 2012)).

⁴¹ *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007).

⁴² *Rounds*, at 893-898; *Lakey*, at 574-576; *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

⁴³ *Casey*, at 882.

⁴⁴ R.C. 2317.56(B)(2)(h).



with sufficient definiteness that ordinary people can understand what is prohibited and act accordingly.⁴⁵

HISTORY

ACTION	DATE
Introduced	06-11-13

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⁴⁵ See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Grayned v. City of Rockford* 408 U.S. 104 (1972); *Lahey*, at 580.

