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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Odioso and Williams

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SUMMARY

- Permits an elective abortion to be performed or induced only if a physician meets with the woman at least 24 hours before the abortion to provide specified information and document the woman's informed consent, except in the case of a medical emergency.
- Prohibits payment from being required for any elective abortion-related service until the bill's informed consent requirements are met.
- Authorizes civil liability, including damages and attorney's fees, and professional discipline against a physician who fails to satisfy the bill's abortion informed consent requirements.
- Specifies that a civil action authorized by the bill must be commenced within one year of the abortion or one year after the reasonable discovery of harm incurred as a result of a breach of duties under the bill.
- Authorizes an immediate interlocutory appeal of a court's order denying a motion under continuing law for a woman who underwent an abortion or attempted abortion to keep her identity confidential in any civil action related to any injury, death, or loss to person or property suffered due to an abortion or attempted abortion.
- Includes a severability clause and specifies that if the bill's informed consent provisions conflict with existing informed consent provisions, the bill's provisions prevail.
- Permits the State Medical Board to adopt rules specifying adverse physical or psychological conditions arising from abortion that a physician must disclose as possible complications when meeting with the pregnant woman as part of the informed consent process the bill establishes.

- Names the bill the “Share the Health and Empower with Informed Notices (SHE WINS) Act.”

DETAILED ANALYSIS

The bill, named the “Share the Health and Empower with Informed Notices (SHE WINS) Act,” requires that three conditions be met before an elective abortion is performed or induced: (1) a meeting between the physician and the pregnant woman, (2) disclosure of specified information to the pregnant woman, and (3) the woman provides written informed consent. If those conditions are satisfied, consent to an abortion must be presumed valid and effective.¹

It defines an “elective abortion” as the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known or believed to be pregnant for purposes other than a medical emergency. “Elective abortion” does not include any medical procedure used to address or resolve a miscarriage, ectopic pregnancy, or medical emergency.² (See “**Medical emergency exception**,” below.) Some of the bill’s requirements are similar to those in current law governing informed consent. (See “**Note on enjoined existing law**,” below.)

Abortion informed consent

Meeting with physician

At least 24 hours before an elective abortion, a physician must meet with the pregnant woman, in person, by telephone, or by virtual meeting, in a manner that does the following:

- Protects her privacy and the confidentiality of her decision;
- Ensures the provided information focuses on her individual circumstances and her ability to understand the provided information;
- Gives her an adequate opportunity to ask questions about the abortion procedure; and
- Provides her with complete, accurate, and satisfactory answers to her questions.³

At this meeting, the physician must inform the pregnant woman of, and document, (1) the name of the physician who is scheduled to perform or induce the abortion, and (2) medically accurate information that a reasonable patient would consider material to the decision of whether to undergo the abortion, including the following:

- The nature and purpose of the particular abortion procedure to be used;
- The immediate and long-term medical risks associated with that procedure, including all possible complications;

¹ R.C. 2317.58(B) and (D).

² R.C. 2317.58(A)(3); Section 3.

³ R.C. 2317.58(B)(1).

- The medical risks associated with carrying the pregnancy to term;
- Alternatives to abortion, including adoption and parenting;
- For a pregnant woman who is Rh negative, the need for anti-Rh immune globulin therapy, the likely consequences of refusing the therapy, and the cost of the therapy.

The bill defines “complication” as any adverse physical or psychological condition arising from an abortion that the State Medical Board may specify in rules the bill authorizes the Board to adopt. Such conditions include the following: uterine perforation; cervical perforation; infection; bleeding; hemorrhage; blood clots; failure to actually terminate the pregnancy; incomplete abortion (retained tissue); pelvic inflammatory disease; endometritis; missed ectopic pregnancy; cardiac arrest; respiratory arrest; renal failure; metabolic disorder; shock; embolism; coma; placenta previa in subsequent pregnancies; preterm birth in subsequent pregnancies; free fluid in the abdomen; adverse reactions to anesthesia and other drugs; any psychological or emotional complications, such as depression, anxiety, suicidal ideation, post-traumatic stress disorder, and sleeping disorders; and any other adverse event as defined under the Federal Food, Drug, and Cosmetic Act.⁴

Disclosure of specified information

At least 24 hours before the abortion, the physician or the physician’s qualified agent must do each of the following verbally, in person, by telephone, or by virtual meeting, and in writing, by certified mail, return receipt requested, by regular mail evidenced by a certificate of mailing, or by electronic mail to the pregnant woman’s correct electronic mail address, and in a manner she understands, based on her ability to understand according to her own individual circumstances:

- Inform her of any medical assistance benefits that may be available for prenatal care, childbirth, and neonatal care;
- Except when the pregnancy results from rape or incest, inform her that the unborn child’s father has a child support obligation, even if the father has offered to pay for the elective abortion;
- Inform her that she is free to withhold or withdraw her consent to the abortion at any time without affecting her right to future care or treatment or the status of any state or federally funded benefits to which she is or may be entitled;
- For an abortion by abortion-inducing drugs, inform her that it may be possible to reverse the effects of the abortion-inducing drug if she changes her mind, but that time is of the essence.⁵

⁴ R.C. 2317.58(A)(2) and (J).

⁵ R.C. 2317.58(B)(2).

Written informed consent

Finally, before the abortion, the pregnant woman must sign, and the physician or the physician's agent must receive, a form providing her informed consent to the abortion that certifies both of the following:

- She has received the information described above, and her questions about the abortion have been answered in a complete, accurate, and satisfactory manner and in a manner that she understands.
- She consents to the abortion voluntarily, knowingly, intelligently, and without coercion by any person, and she is not under the influence of any drug of abuse or alcohol.⁶

Note on enjoined existing law

Current law also requires a physician to meet in person with the pregnant women in an individual, private setting at least 24 hours before an abortion can be performed or induced. The physician must inform the woman of information similar to the information required by the bill and provide copies of materials published by the Department of Health.⁷

The law is currently being challenged because the plaintiffs in the case allege that it conflicts with the Ohio constitutional provision that prohibits the State from, directly or indirectly, burdening, penalizing, prohibiting, interfering with, or discriminating against an individual, or person or entity that assists an individual in, exercising the right to make and carry out one's own reproductive decisions, unless the State can demonstrate that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care. The Franklin County Court of Common Pleas issued a preliminary injunction in the case on August 29, 2024, regarding the 24-hour waiting period, in person visit requirement, and the state-mandated information requirement in Ohio's existing informed consent statute.⁸ That case remains pending. The bill's mandatory 24-hour waiting period may likewise be subject to legal challenge. It is up to a court to determine whether a statute violates the Ohio Constitution.

Medical emergency exception

The bill's informed consent requirements do not apply if a pregnant woman is experiencing a medical emergency. If a medical emergency requires an abortion, the physician must inform her of the medical indications supporting the physician's judgment that an immediate abortion is necessary. This must be done prior to the abortion, if possible. The physician must enter the reason for that conclusion in her medical record.

"Medical emergency" is defined as a condition which, based on the physician's reasonable medical judgment, so complicates the pregnant woman's medical condition as to necessitate the

⁶ R.C. 2317.58(B)(3) and (4); 21 Code of Federal Regulations 251.2.

⁷ R.C. 2317.56(B) and (C), not in the bill.

⁸ *Preterm-Cleveland vs. Yost*, No. 24CV2634, Franklin C.C.P. (August 23, 2024); Ohio Constitution, Article I, Section 22.

immediate separation of the mother and her unborn child 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.

“Serious risk of the substantial and irreversible impairment of a major bodily function” means any 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. A medically diagnosed condition that constitutes a “serious risk of the substantial and irreversible impairment of a major bodily function” includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include diabetes and multiple sclerosis, and does not include a condition related to the woman’s mental health.

“Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the pregnant woman’s case and the treatment possibilities for her medical condition.⁹

Payment

The bill prohibits payment from being required for any service provided in relation to an elective abortion until the bill’s informed consent requirements are met.¹⁰

Civil and professional liability

A physician who fails to satisfy the bill’s requirements before an abortion may be subject to civil liability and professional discipline by the State Medical Board.¹¹

A physician who performs or induces an abortion (1) with actual knowledge that the bill’s informed consent requirements have not been satisfied or with a heedless indifference as to whether those conditions have been satisfied, or (2) who causes any person to sustain injury, death, or loss to person or property as a result of negligent, reckless, or intentional conduct is liable to an interested party in a civil action for statutory, compensatory, and exemplary damages; court costs; and attorney’s fees.¹² The interested party must bring the civil action within one year after the abortion is performed or induced or attempted to be performed or induced or within one year after the reasonable discovery by the harmed party of the harm incurred, whichever is later.¹³

Under the bill, an “interested party” is any of the following:

- A woman on whom an elective abortion was performed or induced;

⁹ R.C. 2317.58(A)(6), (10), and (11), (B), and (C); R.C. 2919.16, not in the bill.

¹⁰ R.C. 2317.58(F).

¹¹ R.C. 2317.58(E).

¹² R.C. 2317.58(G)(1).

¹³ R.C. 2305.11.

- In the case of the woman's death, the deceased woman's estate; the deceased woman's spouse or, if she was unmarried, the unborn child's biological father; or the deceased woman's parent, custodian, or legal guardian;
- If the woman has been determined by a court to be an incapacitated person, her court-appointed guardian.

In the case of the woman's death, a person cannot be considered an interested party if that individual has been convicted of or pleaded guilty to certain crimes and the victim of the crime was the deceased woman. The crimes are aggravated murder, murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, negligent homicide, aggravated vehicular homicide, vehicular homicide, vehicular manslaughter, aggravated vehicular assault, vehicular assault, felonious assault, aggravated assault, assault, negligent assault, strangulation, aggravated menacing, menacing by stalking, illegal use of a tracking device or application, menacing, kidnapping, abduction, unlawful restraint, extortion, sexual extortion, coercion, trafficking in persons, telecommunications harassment, endangering children, domestic violence, corrupting another with drugs, any violation of Ohio criminal law governing sex offenses, or any existing or former U.S., state, or municipal law that is substantially similar to the aforementioned offenses.¹⁴

Damages

If the claimant prevails in the civil action, the court must award the following:

- Statutory damages of at least \$100,000 for each claim;
- Compensatory damages that apply to tort actions which, under continuing law, generally:
 - For the plaintiff's economic loss, are not limited;
 - For the plaintiff's noneconomic loss, cannot exceed the greater of \$250,000 or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact (a jury or a judge in a nonjury trial), to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence that forms the basis of the action.
- Punitive or exemplary damages that apply to tort actions which, under continuing law, generally cannot exceed two times the amount of the compensatory damages awarded to the plaintiff or 10% of a small employer's or individual's net worth when the tort was committed, to a maximum of \$350,000;
- Court costs and attorney's fees.

Additionally, the court may enter any injunctive or other equitable relief that it considers appropriate. It is prohibited from awarding costs or attorney's fees to a defendant in the action.¹⁵

¹⁴ R.C. 2317.58(A)(5).

¹⁵ R.C. 2317.58(G)(2); R.C. 2317.18 and 2315.21, not in the bill.

Affirmative defenses

The following are affirmative defenses in a civil action brought under the bill:

- The physician performed or induced the abortion due to a medical emergency.
- The physician made an objectively reasonable and good faith effort to satisfy the bill's abortion informed consent requirements.
- For an action brought in relation to a drug-induced abortion in which informed consent requirements were not met, the defendant reasonably believed, after conducting a reasonable investigation, that the drug was intended for lawful, on-label use rather than for the purpose of inducing an abortion.

The following are not affirmative defenses:

- Ignorance or mistake of the law;
- A defendant's belief that the abortion informed consent requirements are or were unconstitutional;
- A defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;
- Nonmutual issue preclusion or nonmutual claim preclusion;
- If the informed consent requirements have not been met, the voluntary consent of the unborn child's mother to the abortion;
- Any claim that the bill's enforcement or the imposition of civil liability against the defendant violates a third party's constitutional rights.¹⁶

Pregnant woman not liable, confidentiality

The pregnant woman who underwent the abortion or attempted abortion is not liable in any civil action under the bill.¹⁷

Under continuing law, in any civil action based on or related to any injury, death, or loss to person or property suffered due to an abortion or attempted abortion, the pregnant woman who underwent the abortion or attempted abortion may file a motion with the court requesting that her identity only be revealed to the defendant and to the court. Under the bill, a court order denying the motion is the basis for immediate interlocutory appeal. Current law provides that the court's decision on the motion is final and not subject to appeal.¹⁸

Preclusion and construction

The bill states that it does not preclude an interested party from either of the following:

¹⁶ R.C. 2317.58(C)(3) and (4).

¹⁷ R.C. 2317.58(G)(7).

¹⁸ R.C. 2307.46(A).

- Bringing any additional civil action or claim arising out of the circumstances that are the basis for an action under the bill;
- Being awarded statutory damages pursuant to additional civil actions or claims.

Nothing in the bill can be construed to impose liability on any speech or conduct protected by the First Amendment to the U.S. Constitution, as made applicable to the states through interpretation of the Fourteenth Amendment to the U.S. Constitution by the U.S. Supreme Court or by the Ohio Constitution.¹⁹

The bill also states that the performance or inducement of an abortion without satisfying the bill's informed consent requirements does not constitute and is not to be construed as constituting a violation of the prohibition against unlawful abortion in existing law.²⁰

Impact on existing law

Under the bill, to the extent that the provisions in existing law governing abortion informed consent conflict with the bill's provisions, the bill's provisions supersede existing law.²¹ It is up to a court to determine how and if statutes conflict.

Severability

The bill states that any of its provisions that a court holds to be invalid or unenforceable by its terms, or as applied to any person or circumstance held invalid or unenforceable by its terms, must be construed to give it the maximum effect permitted by law. If the holding wholly invalidates or renders the provision unenforceable, the provision is severable and does not affect the remainder of the provisions or how the remainder of the bill's provisions apply to any other person not similarly situated or to other, dissimilar circumstances.²²

Other definitions

The bill defines the following terms:

"Abortion-inducing drug" is a drug or regimen of drugs that causes the termination of a clinically diagnosable pregnancy. It includes any drug prescribed or dispensed for off-label use to terminate a pregnancy that is prescribed without a diagnosed pregnancy for the purpose of terminating a pregnancy on a future date. "Abortion-inducing drug" does not include any drug that may be known to have the effect of terminating a pregnancy, but that is prescribed for the purpose of treating a medical condition and not for terminating a pregnancy, so long as the medical indication is clearly specified on the prescription.

"Unborn child" is an individual organism of the species *Homo sapiens* from fertilization until live birth.

¹⁹ R.C. 2317.58(G)(5) and (6).

²⁰ R.C. 2317.58(E); R.C. 2919.12, not in the bill.

²¹ R.C. 2317.58(I); R.C. 2317.56, not in the bill.

²² R.C. 2317.58(H). *See also* R.C. 1.50, which applies generally to the entire Revised Code.

“Pregnant” is the human female reproductive condition, that commences with fertilization, of having a developing fetus.²³

HISTORY

Action	Date
Introduced	06-11-25

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²³ R.C. 2317.58(A)(1), (7), (8), and (9); R.C. 2305.113, 2919.124, and 2919.16, not in the bill. An LSC corrective amendment is required to remove the definition for “fertilization,” which is not a term used in the bill, in R.C. 2317.58(A)(4) and to correct a grammar error in R.C. 2317.58(B)(1).